

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

UC-NRLF
B 4 287 878

Digitized by Google

Author and Title

The American decisions.

Call Number	KF 133 A34	Vol. 69	Copy

THIS BOOK DOES NOT CIRCULATE OUTSIDE THE BUILDING

Name	Location

The American decisions.

Vol. 69

KF
133
A34

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

THE

AMERICAN DECISIONS

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO THE YEAR 1869.

COMPILED AND ANNOTATED BY

A. C. FREEMAN,

COUNSELOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS," "CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

EXTRA ANNOTATED

BY THE EDITORIAL DEPARTMENT OF THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY.

Vol. LXIX.

BANCROFT-WHITNEY CO. SAN FRANCISCO, CAL.

THE LAWYERS CO-OP. PUB. CO. ROCHESTER, N. Y.

1911

Digitized by Google

Entered according to Act of Congress, in the year 1883,
By A. L. BANCROFT & COMPANY,
In the Office of the Librarian of Congress, at Washington.

Copyright, 1911, by
BANCROFT-WHITNEY COMPANY,
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY.

Digitized by Google

AMERICAN DECISIONS.

VOL. LXIX.

The cases re-reported in this Volume will be found originally reported in the following State Reports:

MAINE REPORTS. - - - - - - - -	- Vols. 43, 44.	1857, 1858.
MARYLAND REPORTS. - - - - - -	- Vols. 10, 11.	1857.
GRAY'S MASSACHUSETTS REPORTS. - -	- Vols. 8, 9, 10	1857.
MICHIGAN REPORTS. - - - - - - -	- Vol. 4.	1857.
MINNESOTA REPORTS. - - - - - -	- Vol. 1.	1857.
MISSISSIPPI REPORTS. - - - - - -	- Vols. 33, 34.	1857, 1858.
MISSOURI REPORTS. - - - - - - -	- Vols. 24, 25, 26.	1857.
NEW HAMPSHIRE REPORTS. - - - -	- Vols. 34, 35.	1857.
DUTCHER'S NEW JERSEY LAW REPORTS.	- Vol. 2.	1857.
STOCKTON'S NEW JERSEY CH. REPORTS.	- Vol. 3.	1857.
NEW YORK REPORTS. - - - - - -	- Vols. 15, 16.	1857, 1858.
JONES'S N. CAROLINA EQUITY REPORTS.	- Vol. 3.	1857.
JONES'S N. CAROLINA LAW REPORTS. -	- Vols. 4, 5.	1857.

Digitized by Google

Digitized by Google

SCHEDULE

OF

REPORTS FROM WHICH CASES HAVE BEEN SELECTED

FOR THE

AMERICAN DECISIONS.

State Reports are in parentheses, and the number of the American Decisions in which they are re-reported is in heavy-faced letter.

ALABAMA—(1 Miner) **12**; (1 Stew.) **18**; (2 Stew.) **19, 20**; (3 Stew.) **20, 21**; (1 Stew. & P.) **21**; (1, 2, 3 Stew. & P.) **23**; (4, 5 Stew. & P.) **24**; (5 Stew. & P., and 1 Porter) **26**; (1, 2 Porter) **27**; (3, 4 Porter) **29**; (4, 5, 6 Porter) **30**; (6, 7 Porter) **31**; (8, 9 Porter) **33**; (1) **34, 35**; (2, 3) **36**; (3, 4) **37**; (4, 5) **39**; (6, 7) **41**; (7, 8) **42**; (9, 10) **44**; (11, 12) **46**; (13, 14, 15) **48**; (15, 16) **50**; (17, 18) **52**; (18, 19) **54**; (20, 21) **56**; (22, 23) **58**; (24, 25) **60**; (26, 27) **62**; (15, 16) **63**; (28, 29) **65**; (29, 30, 31) **68**.

ARKANSAS—(1, 2) **33**; (2) **35**; (3) **36**; (4) **37, 38**; (5) **39, 41**; (6) **42**; (7, 8) **44, 46**; (8, 9) **47**; (9, 10) **50**; (10, 11) **52**; (11, 12) **54**; (12, 13) **56**; (13, 14) **58**; (14, 15) **60**; (17, 18) **65**; (18, 19) **68**.

CALIFORNIA—(1) **52, 54**; (2) **56**; (3) **58**; (4) **60**; (5) **63**; (6) **65**; (7, 8) **68**.

CONNECTICUT—(Kirby, and 1, 2 Root) **1**; (1, 2 Day) **2**; (3 Day) **3**; (4 Day) **4**; (5 Day) **5**; (1) **6, 7**; (2) **7**; (3) **8**; (4) **10**; (5) **13**; (6) **16**; (7) **18**; (8) **20**; (9) **21**; (10) **25, 26, 27**; (11) **27, 29**; (12) **30, 31**; (13) **33**; (13, 14) **35**; (14) **36**; (15) **38, 39**; (16) **41**; (17, 18) **44**; (18) **46**; (19) **48**; (19, 20) **50**; (20) **52**; (21) **54**; (21, 22) **56**; (22) **58**; (23) **60**; (23, 24) **63**; (25) **65**; (25, 26) **68**.

DELAWARE—(1 Harr.) **23, 25, 26, 27**; (2 Harr.) **29, 30, 31, 33**; (4 Harr.) **42, 44**; (5 Harr.) **48, 60**; (1 Houst.) **63, 68**.

FLORIDA—(1) **44, 46**; (2) **48, 50**; (3) **52**; (4) **54, 56**; (5) **58**; (6) **63, 65**; (7) **68**.

GEORGIA—(1 T. U. P. Charlton) **4**; (1) **44**; (2, 3) **46**; (4, 5) **48**; (6, 7) **50**; (8, 9) **52**; (9, 10) **54**; (11, 12) **56**; (12, 13, 14) **58**; (15, 16) **60**; (17, 18, 19) **63**; (19, 20) **65**; (21, 22, 23) **68**.

ILLINOIS—(Breese) **2**; (1 Scam.) **25, 26, 27, 28, 29, 30, 32, 33**; (2 Scam.) **33, 35**; (3 Scam.) **36**; (3, 4 Scam.) **38**; (4 Scam.) **39**; (1 Gilm.) **41**; (2 Gilm.) **43**; (3 Gilm.) **44**; (4 Gilm.) **46**; (5 Gilm.) **48, 50**; (11) **50**; (11, 12) **52**; (12, 13) **54**; (13, 14) **56**; (14, 15) **58**; (15) **60**; (16) **61**; (16, 17) **63**; (17, 18) **65**; (18, 19) **68**.

Digitized by Google

INDIANA—(1 Blackf.) 12; (2 Blackf.) 18, 20, 21; (3 Blackf.) 25, 26; (4 Blackf.) 28, 29, 30, 32; (5 Blackf.) 32, 33, 35, 36; (6 Blackf.) 36, 38, 39; (7 Blackf.) 39, 41, 43; (8 Blackf.) 44, 46; (1) 48, 50; (2) 52; (2, 3) 54; (3) 56; (4) 58; (5, 6) 61; (6, 7) 63; (7, 8) 65; (9, 10) 68.

IOWA—(Morris) 39, 41, 43; (1 G. Greene) 46, 48, 50; (2 G. Greene) 52; (3 G. Greene) 54, 56; (4 G. Greene) 61; (1, 2) 63; (2) 65; (3, 4) 66; (4, 5) 68.

KENTUCKY—(1 Sneed) 2; (Hardin) 3; (1 Bibb) 4; (2 Bibb) 4, 5; (3 Bibb) 6; (4 Bibb) 7; (1 A. K. Marsh.) 10; (2 A. K. Marsh., and Litt. Sel. Cas.) 12; (3 A. K. Marsh., and 1, 2 Litt.) 13; (3, 4 Litt.) 14; (1, 2 Mon., and 5 Litt.) 15; (3, 4 Mon.) 16; (5, 6 Mon.) 17; (7 Mon.) 18; (1, 2, 3 J. J. Marsh.) 19; (3, 4, 5 J. J. Marsh.) 20; (5, 6 J. J. Marsh.) 22; (7 J. J. Marsh.) 22, 23; (1 Dana) 25; (2 Dana) 26; (3 Dana) 28; (4 Dana) 29; (5 Dana) 30; (6, 7 Dana) 32; (8, 9 Dana) 33; (9 Dana, and 1 B. Mon.) 35; (1, 2 B. Mon.) 36; (2, 3 B. Mon.) 38; (3, 4 B. Mon.) 39; (4, 5 B. Mon.) 41; (5, 6 B. Mon.) 43; (6 B. Mon.) 44; (7 B. Mon.) 45; (7, 8 B. Mon.) 46; (8, 9 B. Mon.) 48; (9, 10 B. Mon.) 50; (10, 11 B. Mon.) 52; (12 B. Mon.) 54; (13 B. Mon.) 56; (14 B. Mon.) 58; (14, 15 B. Mon.) 61; (15, 16 B. Mon.) 63; (17 B. Mon.) 66; (18 B. Mon.) 68.

LOUISIANA—(1, 2, 3 Mart.) 5; (3, 4 Mart.) 6; (5, 6, 7 Mart.) 12; (8, 9, 10, 11, 12 Mart.) 13; (1, 2 Mart., N. S.) 14; (3 Mart., N. S.) 15; (4, 5 Mart., N. S.) 16; (6 Mart., N. S.) 17; (7 Mart., N. S.) 18; (8 Mart., N. S.) 19, 20; (1, 2) 20; (2, 3) 22; (3, 4) 23; (5, 6) 25; (6, 7) 26; (8) 28; (9, 10) 29; (11) 30; (12) 32; (13, 14) 33; (15, 16) 35; (17, 18, 19) 36; (1 Rob.) 36; (1, 2, 3 Rob.) 38; (4, 5, 6 Rob.) 39; (6, 7, 8, 9 Rob.) 41; (10, 11, 12 Rob.) 43; (1 Ann.) 45; (2 Ann.) 46; (3 Ann.) 48; (4 Ann.) 50; (5 Ann.) 52; (6 Ann.) 54; (7 Ann.) 56; (8 Ann.) 58; (9 Ann.) 61; (10 Ann.) 63; (11 Ann.) 66; (12 Ann.) 68.

MAINE—(1 Greenl.) 10; (2 Greenl.) 11; (3 Greenl.) 14; (4 Greenl.) 16; (5 Greenl.) 17; (6 Greenl.) 19; (6, 7 Greenl.) 20; (7, 8 Greenl.) 22; (8, 9 Greenl.) 23; (10 Me.) 25; (11) 25, 26; (12) 28; (13) 29; (14) 30, 31; (15) 32; (15, 16) 33; (17) 35; (18, 19) 36; (20) 37; (21, 22) 38; (22, 23) 39; (23, 24) 41; (25) 43; (26) 45; (26, 27) 46; (28, 29) 48; (29, 30, 31) 50; (31, 32) 52; (32, 33) 54; (34, 35) 56; (35, 36, 37) 58; (37) 59; (38) 61; (39, 40) 63; (41, 42) 66; (43, 44) 69.

MARYLAND—(1, 2, 3, 4 H. & M.) 1; (1 H. & J.) 2; (2 H. & J.) 3; (3 H. & J.) 5, 6; (4 H. & J.) 7; (5 H. & J.) 9; (6 H. & J.) 14; (7 H. & J.) 16; (1 Bl. Ch.) 17, 18; (1 H. & G.) 18; (1, 2 Gill & J.) 19; (2 Bl. Ch., and 2, 3 G. & J.) 20; (3 Bl. Ch., and 3 G. & J.) 22; (4, 5 G. & J.) 23; (5, 6 G. & J.) 25; (6, 7 G. & J.) 26; (7 G. & J.) 28; (8 G. & J.) 29; (9 G. & J.) 31; (10 G. & J.) 32; (11 G. & J.) 33, 35, 37; (12 G. & J.) 38; (1 Gill) 39; (2 Gill) 41; (3 Gill) 43; (4 Gill) 45; (5, 6 Gill) 46; (6, 7 Gill) 48; (8 Gill) 50; (9 Gill) 52; (1) 54; (2, 3) 56; (4, 5) 59; (5, 6, 7) 61; (8) 63; (9) 66; (10, 11) 69.

MASSACHUSETTS—(Quincy) 1; (1) 2; (2, 3, 4) 3; (5, 6) 4; (7, 8) 5; (9, 10, 11) 6; (12, 13, 14) 7; (15, 16) 8; (17) 9; (1 Pick.) 11; (2 Pick.) 13; (3 Pick.) 15; (4, 5 Pick.) 16; (6 Pick.) 17; (7, 8, 9 Pick.) 19; (9, 10 Pick.) 20; (11, 12 Pick.) 22; (12, 13 Pick.) 24; (13, 14, 15 Pick.) 25; (15, 16 Pick.) 26; (16, 17 Pick.) 28; (18 Pick.) 29; (19 Pick.) 31; (20 Pick.) 32; (22 Pick.) 33; (23 Pick.) 34; (24 Pick., and 1, 2 Met.) 35; (2, 3 Met.) 37; (3, 4, 5 Met.) 38; (5, 6, 7 Met. 39; (7, 8 Met.) 41; (9, 10 Met.) 43; (11, 12 Met.)

Digitized by Google

45; (12, 13 Met.) **46**; (1, 2 Cush.) **48**; (3, 4 Cush.) **50**; (5 Cush.) **51**; (5, 6 Cush.) **52**; (6 Cush.) **53**; (7, 8 Cush.) **54**; (9 Cush.) **55, 57**; (10 Cush.) **57**; (11, 12 Cush.) **59**; (1, 2 Gray) **61**; (3 Gray) **63**; (4 Gray) **64**; (5, 6, 7 Gray) **66**; (8, 9, 10 Gray) **69**.

MICHIGAN—(1 Doug.) **40, 41**; (2 Doug.) **43, 45, 47**; (1) **48, 51, 53**; (2) **55, 57**; (2, 3) **59**; (3) **61**; (3) **64**; (4) **66**; (4) **69**.

MINNESOTA—(1) **55**; **61**; **66**; **69**.

MISSISSIPPI—(Walker) **12**; (1 How.) **26, 28, 29, 31**; (2 How.) **32**; (3, 4 How.) **34**; (4, 5 How.) **35**; (5 How.) **37**; (6 How.) **38**; (7 How., and 1 S. & M.) **40**; (2, 3 S. & M.) **41**; (4, 5 S. & M.) **43**; (5, 6, 7 S. & M.) **45**; (8, 9 S. & M.) **47**; (9, 10 S. & M.) **48**; (11 S. & M.) **49**; (12, 13 S. & M.) **51**; (13, 14 S. & M.) **53**; (23) **55, 57**; (24, 25) **57**; (25, 26) **59**; (27, 28) **61**; (28, 29, 30) **64**; (31, 32) **66**; (33, 34) **69**.

MISSOURI—(1) **13, 14**; (2) **22**; (3) **22, 23, 25, 26**; (4) **28, 29, 31**; (5) **31, 32**; (6) **34, 35**; (7) **37, 38**; (8) **40, 41**; (9) **43**; (9, 10) **45**; (10, 11) **47**; (11, 12) **49**; (12) **51**; (13) **53**; (14, 15) **55**; (15, 16, 17) **57**; (17, 18, 19) **59**; (19, 20) **61**; (20, 21, 22) **64**; (22, 23, 24) **66**; (24, 25, 26) **69**.

NEW HAMPSHIRE—(1) **8**; (2) **9**; (3) **14**; (4) **17**; (5) **20, 22**; (6) **23, 25, 26**; (7) **26, 28**; (8) **28, 29, 31**; (9) **31, 32**; (10) **34**; (11) **35**; (12) **37**; (13) **38**; (13, 14) **40**; (15, 16) **41**; (16, 17) **43**; (18) **45, 47**; (19) **49**; (19, 20) **51**; (21, 22) **53**; (22, 23, 24) **55**; (24, 25, 26) **57**; (26, 27, 28) **59**; (28, 29) **61**; (30, 31, 32) **64**; (33, 34) **66**; (34, 35) **69**.

NEW JERSEY—(Coxe) **1**; (1 Pen.) **2**; (2 Pen.) **4**; (1 South.) **7**; (2 South.) **8**; (1 Halst.) **10**; (2 Halst.) **11**; (3 Halst.) **14**; (4 Halst.) **17**; (5 Halst.) **18**; (6 Halst.) **19, 20**; (1 Sax., 7 Halst.) **21**; (1 Gr., 1 Sax., 7 Halst.) **22**; (1 Sax., 1 Gr.) **23**; (1, 2 Gr.) **25**; (2 Gr.) **27**; (3 Gr.) **28, 29**; (2 Gr. Ch.) **29**; (1 Harr., 3 Gr. Ch.) **31**; (1 Harr., 1 Gr. Ch.) **32**; (2 Harr., 1 Gr. Ch.) **34**; (1 Gr. Ch., 2, 3 Harr.) **35**; (3 Harr.) **37**; (3 Gr. Ch., 1 Spencer, 3 & 4 Harr.) **38**; (1 Spencer, 3 Gr. Ch.) **40**; (3 Gr. Ch.) **41**; (1 Spencer, 3 Gr. Ch., 1 Halst. Ch.) **43**; (1 Spencer, 1 Halst. Ch.) **45**; (1 Zab., 2 Halst. Ch.) **47**; (2 Zab., 3 Halst. Ch.) **51**; (2, 3 Zab.) **53**; (3 Zab., 4 Halst. Ch.) **55**; (3 Zab., 1 Stock. Ch.) **57**; (4 Zab., 1 Stock. Ch.) **59**; (4 Zab.) **61**; (4 Zab., 1 Dutch., 1, 2, 3 Stock. Ch.) **64**; (2, 3 Stock. Ch.) **66**; (1 Dutch.) **67**; (2 Dutch., 3 Stock. Ch.) **69**.

NEW YORK—(1, 2 Johns. Cas.) **1**; (3 Johns. Cas., 1, 2 Cai. Cas., 1, 2, 3 Cai.) **2**; (1, 2, 3 Johns.) **3**; (4, 5 Johns.) **4**; (6, 7, 8 Johns.) **5**; (9, 10, 11 Johns.) **6**; (12, 13, 14 Johns., 1, 2 Johns. Ch.) **7**; (15, 16, 17 Johns., 3, 4 Johns. Ch.) **8**; (18 Johns., 5 Johns. Ch.) **9**; (19 Johns., 6 Johns. Ch.) **10**; (20 Johns., 7 Johns. Ch.) **11**; (1 Cow.) **13**; (Hop. Ch., and 2 Cow.) **14**; (3, 4, 5 Cow.) **15**; (6 Cow.) **16**; (7 Cow.) **17**; (8, 9 Cow.) **18**; (1 Pai., 1, 2 Wend.) **19**; (2, 3 Wend.) **20**; (2 Pai., 4, 5, 6 Wend.) **21**; (2, 3 Pai., 6, 7, 8 Wend.) **22**; (3 Pai.) **23, 24**; (8, 9, 10 Wend.) **24**; (4 Pai., 10, 11 Wend.) **25**; (4 Pai., 11, 12, 13 Wend.) **27**; (5 Pai., 13, 14 Wend.) **28**; (6 Pai.) **29**; (15, 16 Wend.) **30**; (6, 7 Pai., 17, 18 Wend.) **31**; (7 Pai., 19, 20 Wend.) **32**; (7, 8 Pai., 21, 22 Wend.) **34**; (23, 24, 25 Wend., 8 Pai.) **35**; (25, 26 Wend., 1, 2 Hill, 9 Pai.) **37**; (9 Pai., 2, 3 Hill) **38**; (10 Pai., 4, 5, 6 Hill) **40**; (6 Hill) **41**; (7 Hill, 10, 11 Pai.) **42**; (1, 2 Denio, 11 Pai., 1 Barb. Ch.) **43**; (1, 2 Barb. Ch., 3 Denio) **45**; (4, 5 Denio, 2 Barb. Ch.) **47**; (3 Barb. Ch., 5 Denio) **49**; (1, 2) **49**; (2, 3) **51**; (3, 4) **58**; (4, 5, 6) **55**; (6, 7) **57**; (7, 8, 9) **59**; (9, 10) **61**; (11, 12) **62**; (12, 13) **64**; (13, 14) **67**; (15, 16) **69**.

Digitized by Google

NORTH CAROLINA—(1 Mart., 1 Hayw., 1 Tayl.) **1**; (2 Hayw., 1 Conf.) **2**; (1 Murph.) **3, 4**; (2 Murph.) **5**; (1, 2 Law Rep.) **6**; (1 T. R.) **7**; (3 Murph., 1 Hawks) **9**; (2 Hawks) **11**; (3 Hawks) **14**; (4 Hawks) **15**; (1 Dev.) **17**; (2 Dev.) **18, 21**; (1 Dev. Eq.) **18**; (3 Dev., 2 Dev. Eq.) **22, 24**; (4 Dev., 2 Dev. Eq.) **25**; (4 Dev., 2 Dev. Eq., 1 D. & B., 1 D. & B. Eq.) **27**; (1, 2 D. & B., 1 D. & B. Eq.) **28, 30**; (1 D. & B. Eq., 2 D. & B.) **31**; (3, 4 D. & B., 2 D. & B. Eq.) **32**; (4 D. & B., 2 D. & B. Eq.) **34**; (1 Ired.) **35**; (1 Ired. Eq.) **36**; (2 Ired.) **37**; (2, 3 Ired., 2 Ired. Eq.) **38**; (3, 4 Ired.) **2, 3** Ired. Eq.) **40**; (4, 5 Ired., 3 Ired. Eq.) **42**; (5, 6 Ired., 3, 4 Ired. Eq.) **44**; (6, 7 Ired., 4 Ired. Ch.) **45**; (7, 8 Ired., 4, 5 Ired. Eq.) **47**; (8, 9 Ired., 5 Ired. Eq.) **49**; (9, 10, 11 Ired., 6 Ired. Eq.) **51**; (11 Ired., 7 Ired. Eq.) **53**; (12, 13 Ired., 8 Ired. Eq.) **55**; (13 Ired., 8 Ired. Eq., Busbee L., Busbee Eq.) **57**; (Busbee L., 1 Jones L., Busbee Eq., 1 Jones Eq.) **59**; (1, 2 Jones L., 1, 2 Jones Eq.) **62**; (2 Jones Eq., 2, 3 Jones L.) **64**; (3, 4 Jones L., 2, 3 Jones Eq.) **67**; (3 Jones Eq., 4, 5 Jones L.) **69**.

OHIO—(1) **13**; (2) **15**; (3) **17**; (4) **19, 20**; (5) **22, 24**; (6) **25, 27**; (7) **28, 30**; (8) **31, 32**; (9) **34**; (10) **36**; (11) **37, 38**; (12) **40**; (13) **42**; (14, 15) **45**; (16) **47**; (17) **49**; (18) **51**; (19) **53**; (20) **55**; (1, 2 Ohio St.) **59**; (3, 4 Ohio St.) **62**; (4, 5 Ohio St.) **64**; (5, 6 Ohio St.) **67**.

OREGON—(1) **62**.

PENNSYLVANIA—(1 Add., 1, 2, 3 Dall., 1, 2 Yeates) **1**; (1 Bin., 3, 4 Yeates) **2**; (2 Bin.) **4**; (3, 4 Bin.) **5**; (5, 6 Bin.) **6**; (1, 2 S. & R.) **7**; (3. 4 S. & R.) **8**; (5, 6 S. & R.) **9**; (7 S. & R.) **10**; (8, 9 S. & R.) **11**; (10 S. & R.) **13**; (11; 12 S. & R.) **14**; (13 S. & R.) **15**; (14, 15, 16 S. & R.) **16**; (17 S. & R.) **17**, (1 Rawle) **18**; (2 Rawle) **19**; (2 Rawle, 1, 2 P. & W.) **21**; (3 Rawle, 2, 3 P. & W.) **23, 24**; (4 Rawle, 1, 2 Watts) **26**; (4 Rawle, 2, 3 Watts) **27**; (5 Rawle, 4 Watts) **28**; (1 Whart.) **29**; (1, 2 Whart., 5 Watts) **30**; (6 Watts, 3 Whart.) **31**; (7 Watts) **32**; (4 Whart.) **33**; (8, 9 Watts, 4, 5 Whart.) **34**; (9, 10 Watts, 6 Whart.) **36**; (6 Whart., 1, 2, 3 W. & S.) **37**; (3 W. & S.) **38**; (3, 4, 5 W. & S.) **39**; (5, 6 W. & S.) **40**; (7, 8, 9 W. & S.) **42**; (1, 2 Pa. St.) **44**; (2, 3, 4, 5) **45**; (5, 6, 7) **47**; (7, 8, 9, 10) **49**; (10, 11, 12) **51**; (13, 14, 15) **53**; (16, 17, 18) **55**; (18, 19, 20) **57**; (20, 21) **59**; (22) **60**; (22, 23, 24) **62**; (24, 25) **64**; (26, 27) **67**.

RHODE ISLAND—(1) **19, 36, 51, 53**; (2) **55, 57, 60**; (3) **62**; (3, 4) **67**.

SOUTH CAROLINA—(1, 2 Bay, 1 Desau. Eq.) **1**; 2 Desau. Eq., 1 Brev.) **2**; (2 Brev.) **3**; (3 Desau. Eq., 2 Brev.) **4**; (3 Desau. Eq., 3 Brev.) **5**; (4 Desau. Eq., 3 Brev.) **6**; (1 N. & M.) **9**; (1 N. & M., 1 McC.) **10**; (1, 2 Mill) **12**; (2 McC.) **13**; (1 Harp. Eq.) **14**; (3 McC.) **15**; (1, 2 McC. Ch.) **16**; (4 McC.) **17**; (1 Harp.) **18**; (1 Bai.) **19**; (1, 2 Bai., 1 Bai. Eq.) **21**; (2 Bai., 1 Bai. Eq., 1 Rich. Eq.) **23**; (1 Rich. Eq.) **24**; (1 Hill, 1 Hill Ch.) **26**; (2 Hill, 1, 2 Hill Ch.) **27**; (2 Hill Ch.) **29**; (3 Hill, 1 Riley, 1 Riley Ch., 2 Hill Ch.) **30**; (Dudley) **31**; (Rice) **33**; (Cheves) **34**; (McM.) **36**; (1 McM. Eq., 2 McM.) **37**; (2 McM., 1 Spears Eq.) **39**; (1 Spears, 1 Spears Eq.) **40, 42**; (1 Rich. Eq., 1 Rich., 2 Spears) **42**; (1, 2 Rich., 1, 2 Rich. Eq.) **44**; (2, 3 Rich.) **45**; (2 Rich. Eq.) **46**; (1 Strob. Eq., 1, 2 Strob.) **47**, (2, 3 Strob., 2 Strob. Eq.) **49**; (3, 4 Strob., 3 Strob. Eq.) **51**; (4, 5 Strob., 4 Rich., 4 Strob. Eq.) **53**; (3, 4 Rich. Eq., 4, 5, 6 Rich.) **55**; (4 Rich. Eq., 5 Rich.) **57**; (5, 6 Rich. Eq., 6 Rich.) **60**; (6, 7 Rich. Eq., 7, 8 Rich.) **62**; (7, 8 Rich. Eq., 8, 9 Rich. L.) **64**; (9, 10 Rich. L.) **67**.

TENNESSEE—(1 Overt.) **3**; (1 Cooke, 2 Overt.) **5**; (3, 4, 5 Hay.) **9**; (Peck) **14**; (M. & Y.) **17**; (1, 2, 3 Yerg.) **24**; (4, 5 Yerg.) **26**; (6, 7 Yerg.) **27**; (8 Yerg.)

Digitized by Google

29; (9, 10 Yerg.) 30; (10 Yerg.) 31; (1 Meigs) 33; (1 Humph.) 34; (2 Humph.) 36, 37; (3 Humph.) 39; (4 Humph.) 40; (5 Humph.) 42; (6 Humph.) 44; (7 Humph.) 46; (8 Humph.) 47; (8, 9 Humph.) 49; (9, 10 Humph.) 51; (10, 11 Humph.) 53; (1 Swan) 55, 57; (2 Swan) 58; (1 Sneed) 60; (1, 2 Sneed) 62; (2 Sneed) 64; (3 Sneed) 65; (3, 4 Sneed) 67

TEXAS—(1) 46; (2) 47; (3) 49; (4, 5) 51; (5, 6) 55; (6) 56; (7, 8, 9) 58; (9, 10, 11) 60; (11, 12, 13) 62; (13, 14, 15) 65; (16, 17, 18) 67.

VERMONT—(1 N. Chip., 1 D. Chip.) 1; (1, 2 Tyler) 2; (1 D. Chip.) 6, 12; (1 Aik., 2 D. Chip.) 15; (2 Aik.) 16; (1) 18; (2) 19, 21; (3) 21, 23; (4) 23, 24; (5) 26; (6) 27; (7) 29; (8) 30; (9) 31; (10) 33; (11) 34; (12) 36; (13) 37; (14) 39; (15) 40; (16, 17) 42; (17, 18) 44; (18, 19) 46; (19) 47; (20) 49; (20, 21) 50; (21, 22) 52; (22, 23) 54; (23) 56; (24, 26) 58; (25, 26) 60; (26, 27) 62; (27, 28) 65; (28, 29) 67.

VIRGINIA—(1 Jeff., 1, 2 Wash., 1, 2 Call) 1; (3, 4, 5 Call) 2; (1, 2 H. & M., 6 Call) 3; (4 H. & M., 1 Munf.) 4; (1 Va. Cas., 2, 3 Munf.) 5; (4 Munf.) 6; (5 Munf.) 7; (6 Munf.) 8; (1 Gilm.) 9; (1 Rand.) 10; (2 Rand.) 14; (3, 4 Rand.) 15; (5 Rand.) 16; (6 Rand.) 18; (1 Leigh) 19; (2 Leigh) 21; (3 Leigh) 23; (3, 4 Leigh) 24; (4 Leigh) 26; (5 Leigh) 27; (6 Leigh) 29; (7 Leigh) 30; (8 Leigh) 31; (9 Leigh) 33; (10 Leigh) 34; (11 Leigh) 36; (11, 12 Leigh) 37; (1 Rob.) 39, 40; (2 Rob.) 40; (1 Gratt.) 42; (2 Gratt.) 44; (3 Gratt.) 46; (4 Gratt.) 47; (4, 5 Gratt.) 50; (5, 6 Gratt.) 52; (7 Gratt.) 54; (7, 8 Gratt.) 56; (9 Gratt.) 58; (9, 10 Gratt.) 60; (11 Gratt.) 62; (12 Gratt.) 65; (13 Gratt.) 67.

WISCONSIN—(1 Pin.) 39, 40, 42, 44; (2 Pin., 1 Chand.) 52; (2, 3 Pin., 2, 3 Chand.) 54; (3 Pin.) 56; (1, 2) 60; (3) 62; (4) 65; (5) 68.

Digitized by Google

Digitized by Google

AMERICAN DECISIONS.

VOL. LXIX.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Abbey v. Commercial Bank	*Fraud. conveyances.*	34 Mississippi	401
Alderman v. People	*Conspiracy*	4 Michigan	321
Appling ads. State	*Criminal law*	25 Missouri	469
Atwell v. Miller	*Com. carriers—Ins.*	11 Maryland	206
Austin v. Searing	*Unincorp'd societies.*	16 New York	665
Bagley v. Peddie	*Damages*	16 New York	713
Baker v. Haldeman	*Parent and child*	24 Missouri	430
Bent v. Cobb	*Auctions*	9 Gray	295
Berry v. Billings	*Deeds*	44 Maine	107
Berry v. Griffin	*Debtor and creditor.*	10 Maryland	123
Bodenhammer v. Newsom	*Pawns.*	5 Jones' Law	775
Bow v. Allenstown	*Corp'ns—Evidence.*	34 New Hampshire.	489
Boyd v. Eaton	*Sales*	44 Maine	83
Branch & Thomas v. Morrison	*Landlord and ten'nt.*	5 Jones' Law	770
Brewster v. Wakefield	*Interest.*	1 Minnesota	343
Brown v. Beatty	*Eminent domain*	34 Mississippi	389
Brown v. Howe	*Guardian and ward.*	9 Gray	276
Brown v. Stone	*Evidence—Ways*	10 Gray	303
Brown v. Tyler	*Mortgages*	8 Gray	239
Buckey v. Snouffer	*Landlord and tenant—Insolvency.*	10 Maryland	129
Bullitt v. Taylor	*Fraud. conveyances.*	34 Mississippi	412
Burgess ads. State	*Criminal law*	24 Missouri	433
Campbell v. Gardner	*Equity*	3 Stockton's Ch	598
Canefox v. Crenshaw	*Trespass—Fences.*	24 Missouri	427
Carron v. Martin	*Municipal corp'ns.*	2 Dutcher	584
Castles ads. Commonwealth	*Criminal law*	9 Gray	278
Cayzer v. Taylor	*Master and servant.*	10 Gray	317
Chandler ads. State	*Assault*	24 Missouri	432
Chapin v. Marlborough	*Evidence*	9 Gray	281
Chasteen v. Phillips	*Judicial sales*	4 Jones' Law	760

Digitized by Google

NAME.	SUBJECT.	REPORT.	PAGE
Cheney v. Arnold	*Marriage*	15 New York	609
Childs v. Wyman	*Neg. instruments*	44 Maine	111
Commissioners v. Martin	*Municipal corp'ns*	4 Michigan	333
Commonwealth v. Castles	*Criminal law*	9 Gray	278
Commonwealth v. Fogerty	*Rape*	8 Gray	264
Commonwealth v. Hall	*Extradition—Criminal law.*	9 Gray	285
Commonwealth v. Sowle	*Criminal law*	9 Gray	289
Commonwealth v. Tivnon	*Criminal law*	8 Gray	248
Commonwealth v. Tolliver	*Assault*	8 Gray	252
Crocker v. Gullifer	*Bailments—Sales*	44 Maine	118
Daniels v. Brown	*Landlord and tenant—Co-tenancy.*	34 New Hampshire.	505
Davis v. Gorton	*Stat. of limitations*	16 New York	694
Dennis ads. People	*Suretyship*	4 Michigan	338
Draper v. Bryson	*Sheriffs' sales*	26 Missouri	483
Draper v. Shoot	*Adverse possession*	25 Missouri	462
Decker v. Gammon	*Animals*	44 Maine	99
Dumey v. Schœffler	*Wills*	24 Missouri	422
Dunlap v. Bartlett	*Bail*	10 Gray	320
Dunnica v. Coy	*Trusts and trustees*	24 Missouri	420
Dupree v. Dupree	*Waste—Vendor and vendee.*	4 Jones' Law	757
Durell v. Hayward	*Trespass*	9 Gray	284
Dwinel v. Veazle	*Riparian rights*	44 Maine	94
Eichelberger v. Murdock	*Factors—Pledge*	10 Maryland	140
Emanuel v. White	*Neg. Instruments*	34 Mississippi	385
Fagin v. Connoly	*Jury and jurors*	25 Missouri	450
Fairchild v. Ogdensburgh etc. Railroad Company.	*Corporations—Neg. instruments.*	15 New York	606
Farmers' and Mechanics' Bank v. Butchers' and Drovers' B'k.	*Banks and banking*	16 New York	678
Farr v. Farr	*Divorce—Adultery*	34 Mississippi	406
Fogerty ads. Commonwealth	*Rape*	8 Gray	264
Ford v. Tirrell	*Usage—Interest*	9 Gray	401
Fuhr v. Dean	*Trespass—Easem'ts.*	26 Missouri	484
Gaither v. Ballew	*Attachment*	4 Jones' Law	763
Garrett v. City of St. Louis	*Eminent domain—Taxation.*	25 Missouri	475
Garrison v. Savignac	*Ejectment*	25 Missouri	448
Gause v. Perkins	*Equity—Injunctions.*	3 Jones' Equity	728
General Insurance Co. v. United States Insurance Co.	*Registration—Mortgages.*	10 Maryland	174
Giles v. Palmer	*Trusts—Executions*	4 Jones' Law	756
Graves v. Shattuck	*Nuisance—Highw'ys.*	35 New Hampshire	536
Greenwood v. Murdock	*Mortgages*	9 Gray	272
Griffin v. Colver	*Damages*	16 New York	718
Gurney v. Howe	*Debtor and creditor—Evidence.*	9 Gray	294

Digitized by Google

NAME.	SUBJECT.	REPORT.	PAGE.
Hall ads. Commonwealth	*Extradition—Criminal law.*	9 Gray	285
Hamblen v. Hamblen	*Judicial sales*	33 Mississippi	358
Hamilton v. Scull's Adm'r	*Neg. instruments*	25 Missouri	460
Hamilton v. Whitridge	*Jurisdiction—Injunctions.*	11 Maryland	184
Harper v. Bibb	*Bona fide purch'ers.*	34 Mississippi	397
Hayden v. Snell	*Annuities*	9 Gray	294
Heebner v. Eagle Insurance Co.	*Insurance*	10 Gray	308
Herndon v. Harrisson	*Damages—Vendor and vendee*	34 Mississippi	399
Holland v. Mayor etc. Baltimore	*Estates—Injunct'ns.*	11 Maryland	195
Holly v. Boston Gaslight Co.	*Trespass*	8 Gray	233
Holt v. Westcott	*Common carriers*	43 Maine	74
Hubbard v. City of Concord	*Highw'ys—Evid'nce.*	35 New Hampshire.	520
Hunt v. Crane	*Master and servant.*	33 Mississippi	381
Inhab. of Orono v. Wedgewood	*Taxation*	44 Maine	81
Inhab. of Pelham v. Aldrich	*Fraud. conveyances.*	8 Gray	266
Inhab. of Warren v. Inhab. of Thomaston.	*Domicile*	43 Maine	69
Inloes v. American Exchange Bank.	*Assignments for benefit of creditors.*	11 Maryland	190
Inslee v. Flagg	*Arbitr'n and award.*	2 Dutcher	580
Isard v. Bodine	*Co-tenancy*	3 Stockton's Ch.	595
Jellison v. Goodwin	*Slander—Malice*	43 Maine	62
John ads. State	*Robbery*	5 Jones' Law	777
Johnson v. Atlantic etc. R. R. Co.	*Railr'ds—Damages.*	35 New Hampshire.	560
Jordan v. Thomas	*Detinue*	34 Mississippi	387
Keith v. Pinkham	*Common carriers*	43 Maine	80
Kellenbeck v. State	*Arson—Indictments.*	10 Maryland	166
Keller v. State	*Constitutional law*	11 Maryland	226
Kirkland v. Lowe	*Assignments*	33 Mississippi	355
Koechlept v. Hook's Lessee	*Judgments*	10 Maryland	133
Ladd v. Wiggin	*Executions*	35 New Hampshire.	551
Lakeman v. Pollard	*Master and servant.*	43 Maine	77
Lane v. Bryant	*Negligence*	9 Gray	282
Lewiston Falls Bank v. Leonard	*Neg. instruments*	43 Maine	49
Libby ads. State	*Adultery,*	44 Maine	115
Mack v. Parks	*Attachment*	8 Gray	267
Mann v. Taylor	*Grants*	4 Jones' Law	750
Marlborough Branch R. R. Co. v. Arnold.	*Corporations.*	9 Gray	279
Martin ads. Commissioners	*Municipal corp'ns.*	4 Michigan	333
McCann ads. People	*Statutes—Insanity*	16 New York	642
McDuffie ads. State	*Animals*	34 New Hampshire.	516
McGregor v. Watt	*Ways—Evidence*	10 Gray	305
McKyring v. Bull	*Payment*	16 New York	696
McLean v. Hardin	*Domicile*	3 Jones' Equity	740

Digitized by Google

NAME.	SUBJECT.	REPORT.	PAGE.
McO'Blenis ads. State	*Depositions*	24 Missouri	435
Miller v. State	*Wagers—Crim. law.*	33 Mississippi	351
Mizell v. Burnett	*Statute of frauds*	4 Jones' Law	744
Mount v. Brown	*Ex'rs and admin'rs.*	33 Mississippi	362
Nash v. Union Mutual Ins. Co.	*Debtor and creditor*	43 Maine	65
New England Car Spring Co. v. Baltimore etc. R. R. Co.	*Statutes—Mechanics' liens.*	11 Maryland	181
Nixon v. Porter	*Deeds—Boundaries.*	34 Mississippi	408
Nolton v. Western R. R. Corp.	*Common carriers*	15 New York	623
Norris v. Litchfield	*Neglig'ce—Highw'ys.*	35 New Hampshire	546
O'Donnell v. Leeman	*Statute of frauds*	43 Maine	54
Partridge v. Gilbert	*Party-walls*	15 New York	632
People v. Dennis	*Suretyship*	4 Michigan	338
People v. McCann	*Statutes—Insanity.*	16 New York	642
Perry ads. State	*Criminal law*	5 Jones' Law	768
Peterson v. Laik	*Infancy—Ejectment.*	24 Missouri	441
Pettigrew v. Barnum	*Innkeepers*	11 Maryland	212
Phillips v. Tudor	*Co-tenancy*	10 Gray	306
Phinney v. Watts	*Boundaries*	9 Gray	288
Pillsbury v. Moore	*Riparian rights*	44 Maine	91
Potter v. Greene	*Partnership*	9 Gray	290
Powell v. Bagg	*Easements*	8 Gray	262
Purvis v. Wilson	*Partition*	5 Jones' Law	773
Randall v. Thornton	*Sales—Warranty*	43 Maine	56
Rey v. Toney	*Animals*	24 Missouri	444
Rider v. Gray	*Specific performance.*	10 Maryland	135
Robertson v. American H. Ass'n.	*Building associat'ns.*	10 Maryland	145
Robinson v. Davis	*Judgm'ts—Injunc'ns.*	3 Stockton's Ch.	591
Robinson v. Robinson	*Mortgages*	9 Gray	301
Rogers v. Sample	*Usury*	33 Mississippi	349
Rose v. Bevan	*Receivers—Mort'ges.*	10 Maryland	170
Ross ads. State	*Trespass*	4 Jones' Law	751
Sasscer v. Whitely	*Neg. instruments*	10 Maryland	126
Shepherd v. Chamberlain	*Neg. instruments*	8 Gray	248
Shepherd v. Young	*Ex'rs and admin'rs.*	8 Gray	242
Shirley v. Fearne	*Judgments—Deeds.*	33 Mississippi	375
Sloss ads. State	*Pardons*	25 Missouri	467
Smalley v. Wight	*Neg. instruments*	44 Maine	112
Smith v. Philbrick	*Neg. instruments*	10 Gray	315
Smith v. Slocomb	*Boundaries*	9 Gray	274
Southard v. Hill	*Co-tenancy—Realty.*	44 Maine	85
Sowle ads. Commonwealth	*Criminal law*	9 Gray	289
Springer v. Toothaker	*Suretyship*	43 Maine	66
Starks v. Sikes	*Insurance*	8 Gray	270
State v. Appling	*Criminal law*	25 Missouri	469
State v. Burgess	*Criminal law*	24 Missouri	433
State v. Chandler	*Assault*	24 Missouri	432

Digitized by Google

NAME.	SUBJECT.	REPORT.	PAGE.
State v. John	*Robbery*	5 Jones' Law	777
State v. Libby	*Adultery*	44 Maine	115
State v. McDuffie	*Animals*	34 New Hampshire	516
State v. McO'Blenis	*Depositions*	24 Missouri	435
State v. Perry	*Criminal law*	5 Jones' Law	768
State v. Ross	*Trespass*	4 Jones' Law	751
State v. Sloss	*Pardons*	25 Missouri	467
State v. Weatherby	*Divorce—Adultery*	43 Maine	59
Storey v. Brennan	*Wagers*	15 New York	629
Swain v. Mixner	*Process*	8 Gray	244
Terry v. Chandler	*Boundaries*	16 New York	707
Thomas v. Hubbell	*Suretyship—Bonds*	15 New York	619
Thomas v. Wyatt	*Public lands*	25 Missouri	446
Tinsman v. Belvidere Delaware Railroad Company.	*Eminent domain—Corporations.*	2 Dutcher	565
Tivnon ads. Commonwealth	*Criminal law*	8 Gray	248
Tolliver ads. Commonwealth	*Assault.*	8 Gray	252
Uhl v. Dillon	*Receivers*	10 Maryland	172
Vass v. Freeman	*Wills*	3 Jones' Equity	734
Vaughn v. Tracy	*Bona fide purchasers*	25 Missouri	471
Warner v. Bacon	*Vendor and vendee*	8 Gray	253
Weatherby ads. State	*Divorce—Adultery*	43 Maine	59
Webber v. Davis	*Sales—Conversion*	44 Maine	87
Whitney v. Atlantic etc. R. R. Co.	*Railroads*	44 Maine	103
Whitney v. Bacon	*Boundaries*	9 Gray	281
Williams v. New York Central Railroad Company.	*Dedication—Highways.*	16 New York	651
Wright v. Morse	*Neg. instruments*	9 Gray	291

Digitized by Google

Digitized by Google

CASES CITED.

	PAGE
Abbot v. Chapman	701
Abbott v. Edgerton	202
Able v. Chandler	243
Abrahams v. Krautler	642
Academy of Music v. Hackett	725, 727
Adair v. State	342
Adams v. Adams	365, 407, 508, 756
Adams v. Barry	262
Adams v. Betz	455
Adams v. Field	269
Adams v. Haskell	768
Adams v. Hudson County Bank	595
Adams v. Inhabitants of Carlisle	236, 548
Adams v. McKesson	514
Adams v. McMillan	366, 367
Adams v. Michael	190
Adams v. Rivers	635
Adams v. Rockwell	709, 711, 712
Adams v. Saratoga & Washington R. R. Co	657
Adams v. Stanyan	496
Adams v. Wilson	293
Aday v. Echols	139
Adsit v. Lieb	204
Agate v. Sands	455
Agnew v. Johnson	121
Alabama Gold Life Ins. Co. v. Lott	199, 200, 203
Albany City National Bank v. Maher	201
Albany etc. Min. Co. v. Auditor-General	200
Albert v. Bleecker St. etc. R. R. Co	725
Alderman v. Finley	83
Alderson v. Ames	175
Aldrich v. Cheshire R. R. Co	395, 396, 562
Aldrich v. Pelham	523
Alexander v. Bennett	649
Alexander v. City of Milwaukee	580
Alexander v. Dennison	199
Alexander v. Ghilselin	130
Alexander v. McKenzie	687, 688
Alexander v. Vanderzee	457, 458
Alexandria Canal R. R. v. District of Columbia	198
Alice Packwood, Succession of	743
Allen v. Allen	743
Allen v. Bennett	747
Allen v. Dodd	632
Allen v. Farthing	735
Allen v. Hancock	548
Allen v. Kennedy	516
Allen v. Sowerly	212
Almy v. Winslow	609
Alna v. Plummer	365
Alston v. Clay	767
Altmann v. Benz	676
American Bank v. Inloes	454
American Co. v. Bradford	706
American Exchange Bank v. Inloes	191
American Fur Co. v. United States	232
Ames v. Palmer	772
Amiable Nancy	720
Anderson v. Baker	232
Anderson v. Foulke	370, 371
Anderson B. etc. Assoc. v. Thompson	155
Andrews v. Rumsey	204
Andrews v. Smith	556
Andrews v. Tedford	454
Angier v. Ash	554
Angus v. Radin	103
Anonymous	131, 697
Ansley v. Baker	559
Appleton v. Fullerton	304
Archer v. Commonwealth	341
Archer v. Harrison	164
Archer v. Terre Haute etc. R. R.	204
Archibald v. Davis	751
Argent v. Durrant	754
Armistead v. White	222
Armitage v. Walker	156
Armory v. Delamirie	771, 772
Armstrong v. Bicknell	514
Armstrong v. Mudd	411
Armstrong v. Vroman	365
Armstrong v. City of St. Paul	201
Armstrong v. Risteau	194
Arnold v. Stevens	263, 486
Arnold v. Town of Middleton	199, 201
Arthur v. Bokenham	573
Arthur v. Commercial etc. Bank	106
Ash v. Guie	678
Ashland v. Marlborough	282
Ashley v. Robinson	405
Askew v. Dupree	615

Digitized by Google

	PAGE
Astley v. Weldon	716
Attorney-general v. Sheffield Gas Consumer's Co	541
Attwood v. Munnings..687, 688,	689
Auffmordt v. Stevens	457
Austin v. Boyd	293
Babb v. Mackey	706
Babcock v. Middlesex etc. B. Assoc	156
Babcock v. Trice	705
Bacon v. Inhabitants of Charlton	282
Bacon v. Smith	759
Badger v. Hatch	122
Bagley v. Peddie	718
Bailey v. Atlantic etc. R. R.	201
Bailey v. Fillebrown.....507,	512
Bailey v. Kilburn	510
Bailey v. Mayor of N. Y....571,	677
Bailey v. Ogden	55
Bain v. Clark.....512,	513
Baird v. Baird	597
Baker v. Briggs	68
Baker v. Chicago etc. R. R. Co..	488
Baker v. Griffin	399
Baker v. Marshall	69
Baker v. Shepard	544
Baldwin v. Brown	711
Baldwin v. Mayor etc. of N. Y..	649
Baldwin v. Tucker	203
Baldwin v. U. S. T. Co. ...706, 724, 726,	727
Baldwin v. Western R. R.	255
Ball v. Deas	739
Baltimore Permanent B. etc. Soc. v. Taylor	162
Baltimore & Ohio R. R. Co. v. Green	126
Baltimore etc. R. R. v. Worthington	226
Bangor v. Warren.....267,	419
Bangs v. Strong	69
Bank v. Fordyce	69
Bank etc. of N. Y. v. Farmers' etc. Bank of Ohio	693
Bank of Alabama v. Comegys...	693
Bank of Auburn v. Putnam	693
Bank of Columbia v. Fitzhugh..	129
Bank of Commerce's Appeal..152,	157
Bank of Cooperstown v. Corlies..	707
Bank of Genesee v. Patchin Bank 680,	693
Bank of N. Y. v. Bank of Ohio..	692
Bank of Orleans v. Whittemore.	316
Bank of Pittsburgh v. Whitehead	181
Bank of Rochester v. Jones	212
Bank of Tennessee v. Patterson..	604
Bank of Utica v. City of Utica..	199
Baring v. Peirce	692
Barker v. Bigelow.....161,	163
Barker v. Commonwealth	471
Barker v. Havens.....75,	77
Barlow v. Lambert.....226,	488
Barnard v. Bartlett	247
Barnes v. City of Beloit	205
Barnes v. Hunt	702
Barnes v. Hyatt	763
Barnes v. Mayor of Mobile	455
Barnes v. Ontario Bank	691
Barnes v. Ward	550
Barnet v. Smith	126
Barney v. Patterson	360
Barrett v. Churchill	370
Barrett v. White	507
Barron v. People	355
Bartlett v. Campbell	621
Barwick v. Barwick....771,	772
Bassett v. Lederer	705
Baswell v. Bicknall	120
Bateman v. Phillips	747
Battel v. Smith	307
Battley v. Faulkner	255
Baxter v. Nurse	695
Beall v. Blake	384
Bean v. Atlantic & St. L. R. R. Co	106
Bean v. Parker	555
Beasley v. Reid	460
Beattie v. Butler	474
Beatty v. Lycoming Co. Ins. Co..	459
Beatty v. Gilmore	551
Beavan v. Delahay	515
Becket v. Uniontown B. & L. Assoc	151, 165
Beckett v. Lawrence	706
Beckford v. Clarke	697
Bechtold v. Brehm	162
Bedard v. Bonville.....459,	460
Beecher v. Buckingham	559
Beecher v. Parmele	755
Beekman v. Saratoga etc. R. R. Co.....480,	579
Beeler v. Bullitt	775
Beers v. Housatonic R. R. Co...	548
Beers v. St. John	516
Begg v. Forbes	457
Belfast Bank v. Harriman	455
Bell v. Layman	508
Bell v. Owen	365
Bell v. State	470
Bellefontaine R'y Co. v. Hunter.	284
Bellevillo etc. R. R. Co. v. Gregory	648
Bellinger v. Craigue	705
Bell's Appeal	374
Benfey v. Congdon	509
Bennet v. Hundred of Hertford.	215
Bennett v. Matthews	706
Bently v. Cowman	186
Benton v. Fay.....725,	727
Bergin v. People	440
Bergman v. St. Paul Mut. B. Assoc.....154,	159
Berkshire Woolen Works v. Proctor	222
Bernecker v. Miller	450
Bernstein v. Sweeny	226
Berri v. Patch	203

Digitized by Google

	PAGE
Berry v. Gillis	705
Berwick v. Horsfal	454
Bevans v. Briscoe....512, 514,	515
Beverly v. Burke	411
Beverson, Estate of	619
Bibb County L. Assoc. v. Richards....150,	161
Biddle v. Hoyt....735,	736
Bigelow v. Hartford Bridge Co..	190
Bigelow v. Kinney	557
Bigelow v. Rutland	548
Bigelow v. Topliff	559
Biggs v. Brown....513, 514,	515
Billings v. Sandom	737
Bird v. Boulter	297
Bird v. Holbrook	550
Bird v. Wilmington R. R. Co....396, 664,	733
Birely v. Staley	559
Birge v. Gardner	550
Birmingham v. Maryland Land etc. Assoc.	162
Birney v. New York etc. Telegraph Co	195
Bisbee v. Hall	366
Bisquay v. Jeunelot	642
Bissell v. Bissell	616
Bissell v. Michigan etc. R. R. Cos	628
Black v. Carrollton R. R....259,	262
Blackmer v. Phillips	757
Blackmore v. Barker...369, 370,	372
Blades v. Higgs	754
Blain v. Everitt	510
Blair v. Erie R'y Co	628
Blake v. Clark	109
Blake v. Rich	544
Blakeney v. Blakeney	650
Blanc v. Meyer....199,	204
Blanchard v. Baker	92
Blanchard v. Ely..720, 721, 722,	723
Bland v. Bowie	375
Blane v. Drummond....356,	357
Bledsoe v. Thompson	632
Blessing v. City of Galveston....201,	205
Blood v. Nashua & Lowell R. R....258,	580
Blood v. Wood	554
Bloodgood v. Mohawk & Hudson R. R. Co....396,	579
Blount v. Starkey	759
Blunt v. McCormick	256
Blythe v. Richards	559
Bode v. Smith	231
Bodine v. Glading	140
Bodwell v. Bragg	225
Bogey v. Shute	732
Bogges v. Meredith	307
Bolles v. Stearns	114
Bolt v. Burnell	555
Bonaparte v. Camden & Amboy R. R. Co	577
Bond v. City of Kenosha....200,	204
Bond v. Ward	268
Boniface v. Relyea	628
Bonine v. City of Richmond	455
Bonney v. Morrill	454
Booher v. Goldsborough	725
Bool v. Norcoms	443
Boomer v. Koon	707
Booth v. Barnum	535
Booth v. Farmers' etc. Bank..693,	694
Booth v. Spuyten Duyvil etc. Co.	727
Bord etc. Turnpike Co. v. Camden & Amboy R. R. Co	576
Border State Perpetual B. Assoc. v. McCarthy	164
Boring v. Lemmon	360
Borland v. Mercantile Ins. Co...	314
Boston v. Richardson....276,	289
Bott v. Burnell	554
Bouldin v. Mayor etc. of Baltimore....190,	201
Boulton v. Crowther....568, 570,	571
Bouton v. City of Brooklyn	205
Bowas v. Pioneer Tow Line	725
Bowes v. Shand....457, 458,	459
Bowker v. Mill River etc. Assoc.	155, 161
Bowler v. Eldredge	755
Bowlin v. Nash	89
Bowman v. Manter	559
Box v. State	355
Boyce v. Fitzpatrick	319
Boyd v. Plumb....685,	687
Bradley v. Boynton	87
Bradley v. Davis	50
Bradley v. Rice	289
Bradley v. Spofford	90
Bracken v. Preston	734
Brailey v. Inhabitants of Southborough	336
Brainard v. Clapp	276
Brancker v. Roberts	673
Brandirff v. Harrison Co....202,	205
Brandter v. Marshall	511
Brasher v. Cortlandt	370
Breckenridge v. Ormsby	559
Breninger v. Belvidere	589
Brenner v. Bigelow	511
Bretz v. Mayor etc. of N. Y	649
Brewer v. Boston etc. R. R. Co.	711
Brewer v. City of Springfield	199
Brewer v. Harris	705
Brewster v. Wakefield	348
Bridenbecker v. Hoard	678
Bridgeport City Bank v. Empire Stone Dressing Co	693
Bridgeport Ins. Co. v. Wilson	622
Brigance v. Erwin	763
Briggs v. Thompson	513
Brind v. Hampshire	143
Brine v. Board of Trade	672
Britt v. Aylett	405
Brittain v. McKay	513
Broadnax v. Groom	199
Broadwater v. Blot	445

Digitized by Google

PAGE

Brock v. Berry 756
Bromage v. Prosser 63
Brooklyn etc. R. R. Co. v. Brooklyn City R. R. Co 663
Brooks v. Curtis 642
Brooks v. Galster 514
Brooks v. Hart 544
Brooks v. Howland 201
Brooks v. Rooney 362
Brothers v. Hurdle 771
Brotherton v. People 651
Brown v. Bigg 737
Brown v. Butler 294
Brown v. Chadbourne 97
Brown v. Concord 199
Brown v. Coney 374
Brown v. Cram 755
Brown v. Davis 554
Brown v. Finley 461
Brown v. Hatton 454
Brown v. Hummel 580
Brown v. Johnson 692
Brown v. Manter 110
Brown v. Maxwell 320, 548
Brown v. McGran 451, 456
Brown v. State of Maryland 229, 230
Brown v. Thissell 109
Brown v. Windsor 637
Brownell v. McEwen 614
Browning v. City of Springfield 338, 535
Browning v. Wheeler 582
Brundige v. Morrison 372, 373
Bruce v. Levering 172
Brush v. Kohn 632
Bryant v. Crosby 58, 121
Bryant v. Moore 692, 742
Buchan v. Sumner 381
Buchanan v. Ocean Ins. Co 310
Bucknall v. Story 199
Bucknam v. Thompson 74
Budd v. Brooke 110
Buel v. Humphrey 90
Buffett v. Troy & B. R. R. Co 628
Buffkin v. Baird & Roper 749
Bufford v. Holliman 559
Building Assoc. v. Eshelbach 163
Building Assoc. v. George 161
Building Assoc. v. Kribs 152
Building Assoc. v. Neurath 161
Building Assoc. v. Reid 163
Building Assoc. v. Timmins 163
Building Assoc. v. Wall 163
Bull v. Sims 608
Bulwer v. Bulwer 513
Burbank v. Crooker 508
Burbidge v. Cotton 150, 161
Burden v. Thayer 261
Burdett v. Clay 555
Burgess v. Abbott 340
Burgess v. Clements 223
Burgess v. Commonwealth 434
Burgin v. Burgin 374
Burke v. Cruger 69

PAGE

Burke v. Lee 454
Burke v. Speer 200
Burlington etc. R. R. v. Clay County 201
Burlington etc. R. R. v. Comm'rs of Saline Co 200
Burlington etc. R. R. v. Comm'rs of Seward Co 199
Burlington etc. R. R. v. Comm'rs of York Co 203, 204
Burlington Mut. L. Assoc. v. Hieder 161, 162
Burnes v. Mayor etc. of Atchison. 199
Burnet v. Cincinnati 199
Burnley v. Cook 190, 664, 733
Burns v. Anderson 348
Burns v. Metropolitan B. Assoc. 153
Burr v. Hunt 201
Burrill v. Nahant Bank 693
Burroughs v. Housatonic R. R. Co. 570
Burrows v. Trieber 221
Burt v. Wadsworth 200
Burtis v. Burtis 611
Burton v. Conigland 739
Burton v. Holley 262
Burton v. State 228
Burton v. Wilkinson 247
Burwell v. Hobson 94
Busey v. McCurley 140
Buswell v. Bicknell 122
Butcher v. Butcher 754
Butler v. Kirby 696
Butterfield v. Forrester 236
Button v. McCauley 705, 706
Buttrick v. Gilman 706
Buxendin v. Sharp 101
Bybee v. Ashby 360
Byram v. City of Detroit 204
Byrket v. Monohon 65

Cabell v. Vaughan 340
Cahall v. Citizens' Mut. B. Assoc. 158, 165
Caldecott v. Smythies 515
Caldicott v. Griffiths 678
Caldwell v. Walters 705
Cal. S. N. Co. v. Wright 718
Calking v. Baldwin 395
Calkins v. Bloomfield etc. Gaslight Co 663, 664
Calvert v. Coxe 220
Calye's Case 222, 223, 224
Camden v. Belgrade 118
Cameron v. State 117
Camley v. Stanfield 411, 510
Campbell v. Mesier 633, 642
Campbell v. Wallace 87
Canada v. Canada 260
Candler v. Pettit 173
Cannon v. Folsom 725
Capital and Counties Bank v. Henty 460
Capitol Hill B. Assoc. v. Hilton. 152
Card v. Carr 152, 154

Digitized by Google

	PAGE
Carleton v. Woods	84
Carlin v. Hudson	205
Carlisle v. State	253
Carmouche v. Bouis	431
Carpenter v. State	232
Carr v. Clough	90
Carr v. Georgia R. R. Co.	394
Carrie v. Turnbull	618
Carroll v. Granite Mfg. Co.	220
Carroll v. Hussey	766
Carroll v. Staten Island R. R. Co.	628
Carroll v. Waring	138
Carrothers v. Board of Education.	199
Carroway v. Chancey	711
Carson v. Cent. R. R. Co.	663
Carter v. State	650
Cartland v. Morrison	88
Cary v. Daniels	94
Casamajor v. Strode	601
Cason v. Seldner	165
Cassidy v. LeFevre	725, 726
Cassilly v. Rhodes	514
Catherwood v. Caslon	618
Catlin v. Gunter	693
Catskill Bank v. Stall	685
Cattell v. Lowry	202
Caujolle v. Ferrié	619
Cazeaux v. Mali	694
Cazet v. Hubbell	368, 370, 371
Cecil v. Preuch	446
Cecil Bank v. Barry	455
Cedar Rapids etc. R. R. v. Carroll Co.	200
Center etc. Co. v. Black	200
Center Township v. Hunt	205
Cent. Pacific R. R. v. Corcoran.	199
Cent. etc. R. R. Co. v. Twenty-third St. R. R. Co.	649
Challiss v. Commissioners of Atchison Co.	200
Chamberlain v. Enfield	536
Chamberlain v. Lincoln	676
Chambers v. Chambers	508
Chambers v. Mathews	429
Champlain v. People	341
Chandelor v. Lopus	57
Chandler v. Sprague	212
Chanes v. Commissioners	705
Chapman v. Albany & Schenectady R. R. Co.	656
Chapman v. Callahan	462
Chapman v. Twitchell	281, 411
Chappell v. Daun	365
Charlotte v. Chouteau	455
Chemical Bank v. Mayor etc. of N. Y.	199
Cheney v. Jones	203
Chesapeake etc. Canal Co. v. Baltimore & Ohio R. R. Co.	183
Chicago & Mississippi R. R. Co. v. Patchin	106
Chicago B. Soc. v. Crowell	160
Chicago etc. R. R. v. Borough of Fort Howard	203
Chicago etc. R. R. v. Cole	202
Chicago etc. R. R. v. Frary	200
Chicago etc. R. R. v. Siders	200, 202
Chicago etc. R'y Co. v. Hoag	264
Chidsey v. Town of Canton	336
Chism v. Woods	121
Choteau v. Jones	411
Christianberry v. Christianberry.	407
Christian's Appeal	165
Christie v. Malden	200
Cincinnati German B. Assoc. v. Flach	164
Citizens' B. Assoc. v. Coriell	157
Citizens' etc. Co. v. Uhler	162
Citizens' Mut. L. etc. Assoc. v. Webster	161
City B. & L. Co. v. Fatty	161
City Council of Montgomery v. Sayre	199, 203
City L. & B. Assoc. v. Goodrich.	165
City Nat. Bank v. City of Paducah	203
City of Brooklyn v. Brooklyn etc. R. R. Co.	724
City of Buffalo v. Holloway	535
City of Chicago v. Larned	482
City of Delphi v. Bowen	200, 202
City of Georgetown v. Alexandria Canal Co.	188
City of Lafayette v. Fowler	204
City of Lawrence v. Killam	200, 204
City of Lexington v. McQuillan	482
City of Louisville v. Hyatt	589
City of Lowell v. Parker	622
City of Peoria v. Kidder	200, 204
City of St. Louis v. Gorman	467
City of St. Louis v. Speck	482
City of Tallahassee v. Fortune	535
Claflin v. Farmers' etc. Bank.	691, 692
Claghorn v. Lingo	454
Clagett v. Salmon	171
Claiborne v. Holmes	418
Clapp v. County of Cedar	380
Clapp v. Stoughton	558
Clark v. Baird	710
Clark v. Baker	290
Clark v. Barrington	535
Clark v. French	410
Clark v. Harvey	512, 515
Clark v. Keliher	755
Clark v. Munyan	411
Clark v. Spence	217, 219
Clark v. Wethey	710
Clark v. Whitaker	90
Clarke v. Ganz	203
Clarke v. Rannie	512, 514
Clarke Nat. Bank v. Bank of Albion	692
Clarkson v. Read	368, 369, 371, 372
Clarksville B. & L. Assoc. v. Stephens	161
Classman v. Lacoste	260
Clayton v. Lafargue	199
Clayton v. Wardell	613
Cleaveland v. Mayo	431

Digitized by Google

	PAGE
Cleaves v. Foss	55
Cleghorn v. Postlewaite	202
Clement v. Everest	204
Cline v. Prall	605
Clough v. Murray	706
Clute v. Wiggins	221, 224
Clymer v. Willis	768
Cocheco Bank v. Berry	454
Cock v. Fellows	114
Cockerell v. Aucompte	678
Cocks v. Brewer	340
Coffman v. Bank of Kentucky	386
Coffman v. Hampton	366
Cofran v. Sanbornton	536
Coggill v. New Haven R. R. Co.	121
Coggs v. Bernard	625, 626
Coggswell v. Baldwin	103
Cohen v. Carroll	422
Coker v. Birge	190
Colburn v. Mason	443, 593
Cole v. Hughes	642
Cole v. People	332
Cole v. Sprowl	256
Coleman v. Riches	689, 690
Coller v. Coller	496
Collier v. Whipple	600, 603
Collins v. Brannin	447
Collins v. Dorchester	523
Collins v. Hatch	589
Collins v. Jessott	618
Columbia B. L. Assoc. v. Bollinger	161
Columbus etc. R'y v. Commissioners of Grant Co	202
Colwell v. Foulks	718
Combs v. Jordan	515
Combs v. Little	582, 584
Comfort v. Duncan	515
Commissioners v. Franklin R. R.	232
Commissioners of Alleghany Co. v. Union Min. Co	200
Commissioners of Madison Co. v. Brown	200
Commonwealth v. Brigham	290
Commonwealth v. Burke	266
Commonwealth v. Call	62
Commonwealth v. Creed	253
Commonwealth v. Eastman	328, 331, 332
Commonwealth v. Erie etc. R. R. Co	662
Commonwealth v. Falvey	290
Commonwealth v. Haley	756
Commonwealth v. Heffron	253
Commonwealth v. Hunt	328, 332
Commonwealth v. Kimball	646
Commonwealth v. Knapp	323
Commonwealth v. Lavery	253
Commonwealth v. Murphy	266
Commonwealth v. Passmore	542
Commonwealth v. Pittsburgh etc. R. R. Co	106
Commonwealth v. Putnam	62
Commonwealth v. Rogers	646, 648, 650
Commonwealth v. Sharpless	471
Commonwealth v. Shedd	328, 331
Commonwealth v. Shouse	355
Commonwealth v. Smith	434
Commonwealth v. Stauffer	424, 427
Commonwealth v. Thompson	266
Commonwealth v. Tracy	287
Commonwealth v. Woelper	504
Commonwealth v. York	646, 648, 650, 651
Concordia Sav. and Aid Assoc. v. Read	154, 161
Congden v. Sanford	514
Conger v. Dean	384, 584
Conley v. Chedic	203
Conner v. New Albany	546
Connersville v. Wadleigh	705
Connitt v. Reformed etc. Church	676, 678
Connors v. City of Detroit	204
Consequa v. Willings	455
Continental B'k v. National B'k.	691
Conway v. Nolte	367
Conway v. Starkweather	509
Conway v. Township Board of Waverly	201, 203
Conway v. Younkin	200
Cook v. Field	705
Cook v. Gilman	557
Cook v. Kent	153
Cook v. Southwick	112, 294
Cook v. State	62, 117, 354, 691
Cook v. Stearns	486
Cook Co. v. Chicago etc. R. R	202
Cook, In the Matter of	68
Cooke v. Husbands	190
Coolidge v. Melvin	560
Coombs v. Jordan	370, 371
Coombs v. New Bedford Cordage Co	319
Cooper v. Sunderland	589
Cooper v. Young	725, 726
Copp v. Neal	544
Coppage v. Alexander	425, 427
Corning v. Lowerre	188
Cortelyou v. Van Brundt	546
Corwin v. Campbell	199
Cory v. Boylston Ins. Co	314
Costar v. Davies	90
Costigan v. Mohawk etc. R. R. Co.	384
Coulson v. City of Portland	201
Coulson v. Harris	199, 205
Coulter v. Herrod	370
Covas v. Bingham	58
Cowell v. Lippitt	374
Cowell v. Thayer	94
Coweta Falls Mfg. Co. v. Rogers	212, 725
Cowles v. Kidder	92, 98
Cox v. Freedley	454
Cox v. Hogg	735
Cox v. Louisville etc. R. R. Co.	662, 663
Cox v. O'Reilly	299

Digitized by Google

	PAGE
Craig v. Dale	514, 515
Craig v. Godfrey	297
Craig v. Miller	771, 772
Craig v. Rochester etc. R. R. Co.	663
Crammer v. Mathis	582
Crane v. City of Janesville	201
Crane v. Marshall	411, 504
Crawford v. Beall	195
Crawford v. Berry	124, 125
Crawford v. Williams	212
Crease v. Babcock	580
Creasinger v. Welch	443
Crevier v. Mayor etc. of N. Y.	199
Crippe v. Walcott	736
Criswell's Appeal	166
Crittenden v. Wilson	394, 574, 579
Croff v. Ballinger	488
Crook v. Cowan	749
Crosby v. Chase	555
Cross v. Sackett	694
Crowell v. Maughs	711
Cruikshank v. Luttrell	374
Crump v. Black	399
Cud v. Rutter	139
Culbertson v. City of Cincinnati	201
Cullen v. Duke of Queensbury	664
Cullum v. Emanuel	69
Cummings v. Coleman	705
Cummings v. Morris	705
Cummings v. Perham	518
Cunningham v. Hall	239
Curan v. Colbert	69
Curl v. Lowell	755
Curran v. Curran	705
Curtis v. Belknap	279
Curtis v. Blair	749
Curtis v. Galvin	755
Curtis v. Hubbard	247
Curtis v. Martz	458
Curtiss v. Rochester & Syracuse R. R.	259
Cutbill v. Kingdom	159, 161
Cutter v. Bomrey	221
Cutting v. Gilbert	199, 205
Daggett v. Shaw	281
Dakin v. Williams	717
Dalrymple v. Dalrymple	611, 612, 617, 618
Damon's Case	116
Dana v. Binney	555
Daniels v. Moses	374
Daniels v. People	342
Daniels v. Pond	515
Danley v. Rector	90
Dare v. Heathcote	503
Darling v. Gunn	202
Darling v. Westmoreland	536
Davenport v. Lamb	447
Davies v. Connop	514
Davies v. Penton	716
Davies v. Petit	341
Davies's Case	779, 780
Davis v. Brocklebank	512
Davis v. Burrell	754
Davis v. Eyton	513
Davis v. Garr	350
Davis v. Inscoe	749
Davis v. Lambertson	664
Davis v. Maynard	555
Davis v. Mayor etc. of N. Y.	662, 664
Davis v. Randall	294
Davis v. State	169, 228, 232, 648
Davis v. Thompson	512
Davis v. West Saratoga B. Union	158
Davis v. Winslow	98
Davis's Case	288
Davison v. Wilson	754
Dawes v. Boylston	558
Dawkins v. Antrobus	672, 677
Day v. Leal	555
Day v. Stickney	272
Dayton v. Vandoozer	513
Dean v. City of Madison	201
Dean v. Comstock	756
Dean v. Erskine	454
Dean v. Gleason	200
Dean v. Milford Township	336
Deane v. Todd	199
Dearborn v. Boston etc. R. R. Co.	562
Dearborn v. Brownson	243
Dearborn v. Turner	120
Deblois v. Ocean Ins. Co	313
Debow v. Colfax	513
Debow v. Titus	512
Decamp v. Hewitt	384
Decker v. McGowan	198, 199
De Cordova v. Smith	140
Deep River Gold Mining Co. v. Fox	731
Delafield v. State of Illinois	686
Delano v. Wild	161, 163
Delaplaine v. City of Madison	201
Delauney v. Strickland	678
Delaware & Maryland R. R. Co. v. Stump	188
Deming v. James	202
De Mott v. Hagerman	507
Den v. Hammell	586
Denmead v. Bank of Baltimore	182, 184
Denny v. West Philadelphia etc. B. Assoc.	162
Denver & Rio Grande R'y Co. v. Olsen	455
Derrett v. Alexander	341
Descharmes, Ex parte	131
Desloge v. Peace	488
De Tollenere v. Fuller	121
Detroit v. Blackeby	338
De Vancene, In re	649
Devin v. Dougherty	516
Devlin v. Mayor etc. of New York	725, 727
De Witt v. Chandler	678
De Witt v. Hays	199
De Wolf v. Johnson	558
Dey v. Dunham	177

Digitized by Google

	PAGE
Desell v. Odell	90
Dibble v. Brown	219
Dickerson v. Ripley Co.	69, 389
Dickerson v. Rogers	223
Dickinson v. Lott	455
Dickinson v. Lovell	555
Dickinson v. Williams	272
Dickinson v. Winchester	222
Diefenback v. Stark	454
Dikeman v. Parrish	504
Dilling v. Murray	93
Dinsmore v. Westcott	589
Dircks v. Brant	512, 513, 514, 515
Divoll v. Atwood	559
Dixon v. Parkes	258
Dobinson v. Hawks	151
Dodd v. City of Hartford	199, 201, 205
Dodge v. County Comm'r	562, 563
Dodson v. Mock	518, 519
Doe v. Heath	360
Doe v. Jones	508
Doe v. Murrell	514
Doe v. Phillips	302
Dolan v. Mayor and City Council of Baltimore	198
Dolph v. Ferris	101
Domett v. Beckford	77
Donnel v. United States	118
Doonan v. Board of Education	205
Dorrance v. Scott	705
Dorsey v. Dorsey	135
Doty v. Burdict	756
Doty v. Wilder	56, 297
Dougherty's Estate	594
Doughty v. Hope	588
Douglass v. Howland	620
Douglass v. Town of Harrisville	199
Dovaston v. Payne	429
Dowler v. Cushwa	132
Dows v. City of Chicago	199
Dows v. Griswold	267
Dozier v. Gregory	760
Drake v. Hudson R. R. R. Co	653
Drake v. Phillips	202
Draper v. Bryson	483, 484
Draper v. Glassop	697
Drew v. Drew	70, 71
Drew v. Towle	454
Drumright v. Philpot	692
Dubois v. Kelly	516
Dudley v. Lindsey	405
Duffield v. Scott	620
Duke v. Cahawba Nav. Co	504
Dumaresly v. Fisher	615
Dumesail v. Dupont	664
Dunbier v. Day	221
Duncan v. Dodd	603
Duncan v. Duncan	616, 617
Duncan v. Markley	256
Dundee Mortgage etc. Co. v. School District	201
Dunham v. Miller	202
Dunlap v. Snyder	518
Dunn v. Adams	115
Durham County etc. B. Soc., In re	158, 161
Durnford v. Degruys	366
Duryee v. Lester	706
Dusenbury v. Mayor etc. of Newark	199, 204
Dustin v. Cowdry	756
Dutton v. Weare	535
Dwinel v. Barnard	97
Dyer v. Brannock	615, 618
Dyer v. Clark	381
Dyer v. Lewis	58
Dyer v. Sanford	468
Earl v. Duras	201
Earle v. Hall	98
Earl of Lonsdale v. Nelson	428
Early's Appeal	163
Eastabrook v. Hapgood	555
Eates v. Antrobus	65
Eaton v. Delaware etc. R. R. Co.	692
Eaton v. Smith	458
Ebbinghousen v. Worth Club	672
Eckhardt v. Wilson	357
Economy B. Assoc. v. Hungerbuehler	163
Eddy v. Baldwin	421
Edelin v. Pascoe	165
Edelman v. Yeakel	459
Edgell v. Stanford	557
Edgerly v. Emerson	69
Edsall v. Merrill	598
Edson v. Munsell	264
Edwards v. Edwards	90
Edwards v. Kelly	749
Egyptian Levee Co. v. Hardin	482
Elcox v. Hill	224
Eldridge v. Rowe	384, 749
Elevated R. R. Co., Matter of	663
Elliot v. Sleeper	555
Elliott v. Horn	419
Elliott v. Newby	765
Elliott v. Paige	506
Ellis v. Paige	508
Ellison v. Daniels	558
Elmendorf v. Harris	584
Elsas v. Alford	672
Ely v. Bush	749
Elyton Land Co. v. Ayres	199
Emerick v. Tavener	510
Emerson v. Fisk	121
Emerson v. Patridge	386
Emery v. Fowler	440
Emery v. Owings	454
Emery v. San Francisco G. Co	482
Emmerson v. Heelis	55
Enfield T. B. Co. v. Hartford R. R. Co	396
Epps v. Hinds	223
Erie City v. Schwingle	336, 535
Erie's Case	556
Erle's Case	290
Essex Co. v. Edmands	294

Digitized by Google

	PAGE
Etnyre v. McDaniel	348
Etting v. Bank of United States	450
Evans v. Davis	360
Evans v. Gage	202
Evans v. Iglehart	512
Evans v. Roberts	514
Eve v. State	198
Everham v. Oriental S. & L. Assoc.	152
Everhart v. West Chester R. R.	154
Everett v. Neff	226
Ewing v. Batzner	203
Ewing v. Burnet	465
Ewing v. Thompson	431
Exchange Bank v. Hines	199
Exchange Bank v. Monteath	692
Fabri v. Bryan	756
Fairbanks v. Town of Antrim	336
Fairbanks v. Woodhouse	455
Fairfield v. Jeffreys	725
Fairfield Savings Bank v. Chase	181
Falconer v. Smith	705
Fall Brook Coal Co. v. Lynch	649
Falls v. McAffee	731
Farebrother v. Simmons	297
Farish v. Reigle	81
Farmer v. Smith	152, 104
Farmers' & Planters' Bank v. Martin	369
Farnsworth v. Packwood	223
Farnum v. Concord	548
Farrand v. Marshall	638
Farris v. Reynolds	204
Farris v. Starke	65
Farwel v. Boston & Worcester R. R. Co.	215, 318
Faulkner's Appeal	158
Fay v. Ames	622
Fellows v. Mayor etc. of N. Y.	649
Fenton v. Reed	613
Ferguson v. Shepperd	375
Fernald v. Chase	89
Fernander v. Dunn	401
Ferrer v. Beale	255, 259
Ferrin v. Symonds	507
Ferris v. Thaw	678
Fetrow v. Wiseman	707
Fetter v. Beal	259
Field v. Adames	269
Filson v. Himes	85
Finnegan v. City of Fernandina	200, 204
First Baptist Church in Ithaca v. Bigelow	55
First Nat. Bank v. Dana	459
First Nat. Bank v. Douglas Co.	201, 202, 203
First Nat. Bank v. Kimberlands	144
First Nat. Bank v. Leach	691
First Nat. Bank v. Meredith	199
First Nat. Bank v. Morgan	692
First Nat. Bank v. Ocean Nat. Bank	694
Fish v. Dodge	94
Fisher v. Keane	672, 677
Fisher v. Kelsey	224
Fisher v. Prince	187
Fits v. Freestone	698
Fitter v. Veal	259
Fitzhugh v. Croghan	504
Fitzpatrick v. Childs	509
Flack v. Charron	173
Flagg v. Mason	281
Flaherty v. Andrews	756
Fleischauer v. West Hoboken	589
Fleming v. Self	164
Fleming v. Townsend	419
Flemming v. Roberts	373
Flemyng v. Hector	678
Fletcher v. Auburn & Syracuse R. R. Co.	656
Fletcher v. Boston & Maine R. R.	239
Fletcher v. Howard	776
Florance v. Adams	692
Flower v. Allen	338
Floyd v. Gilbreath	199, 201
Flynn v. Hatton	724, 725
Fobes v. Shattuck	514, 515
Foland v. Johnson	705, 706
Foley v. McKeegan	262, 718
Folkerts v. Power	201, 203
Folsom v. Moore	508
Foote v. Linck	201
Foote v. Storrs	445
Forbes v. Smiley	510
Forbush v. Lombard	273
Ford v. Chicago etc. R. Co.	662
Ford v. Clough	82
Ford v. Potts	581, 582
Forest City etc. B. Assoc. v. Gallagher	153, 162
Forrest v. Elwes	139
Forsyth v. Hibernia B. Assoc.	160
Fort v. Groves	190
Foster v. City of Kenosha	201
Foster v. Pierce	332
Foster v. Robinson	515
Foster v. Scoffield	614
Foster v. Shattuck	114
Fouke v. Fleming	195
Fowle v. Bigelow	454
Fowle v. New Haven & N. Co.	262
Fowler v. Commonwealth	340
Fowler v. Stoneum	419
Fox v. Brissac	756
Fox v. Clifton	291
Francis v. Love	749
Franklin B. Assoc. v. Mather	154, 161
Freeland v. Hastings	199
Freeman v. Clute	723
Freer v. Cameron	239, 319, 550, 551
Fremont v. Boling	201
Fremont v. Mariposa Co.	204
French v. Braintree Mfg. Co.	92
French v. Brunswick	535, 548
Friedly v. Scheetz	367

Digitized by Google

	PAGE
Fritz v. Muck	672
Frost v. Brisbin	74
Frost v. Flick	199
Fryer v. Rockefeller	370
Fugure v. Mutual Soc. of St. Josephs	674
Fuhr v. Dean	755
Fuller v. Coats	225
Fuller v. Loring	69
Fuller v. Salem etc. Assoc	155
Furniss v. Hudson R. R. R. Co.	562
Fusting v. Sullivan	212
Gaffield v. Hapgood	515
Gage v. Evans	202
Gage v. Gannett	258
Gaither v. Myrick	631
Galbraith, State ex rel. v. People B. & L. Assoc	152
Gale v. Wells	630
Galena etc. R. R. Co. v. Fay	81
Galena etc. R. R. Co. v. Rae	726
Galena etc. R. R. Co. v. Yarwood	81, 551
Galloway v. Finley	447
Galloway v. McKeethen	381
Galpin v. Lamb	367, 369
Galsworthy v. Strutt	717
Galt v. Galloway	447
Gansevoort v. Williams	685, 687
Ganson v. Madigan	459, 460
Gant v. Hunsucker	411
Gardiner v. People	651
Gardner v. Com. of Dakota Co.	510
Garland v. Rives	559
Garrison v. Eborn	739
Gaskell v. Morris	366, 367
Gassaway v. Hall	360
Gates v. Barrett	202
Gates v. Briscoe	545
Gearhart v. Dixon	232
Geiger v. Eighth German B. Assoc	162
Geiger v. Green	137
George v. Dean	200, 201, 204
George v. Putney	510
George v. Thomas	711
Georgetown v. Alexandria Canal Co	93
Georgia Mut. Loan Assoc. v. McGowan	199
Germania B. Assoc. v. Neill	163
Germantown Union B. etc. Assoc. v. Sendmeyer	152
Gibbs v. Chase	89
Gibbs v. Gilead Ecc. Soc	459
Gibbs v. McKay	765
Gibson v. Minet	113
Gibson v. Vaughn	508
Gilbert v. Dennis	50
Gilbert v. Dickerson	87, 508
Gilderaleeve v. People	340, 341
Giles v. Fauntleroy	225
Giles v. Spaulding	718
Gillenwater v. Madison & I. R. R. Co	623
Gillet v. Mead	614
Gilliam v. Bird	510
Gillahannon v. Stony Brook R. R.	318
Gilman v. Eastern R. R. Co	320
Gilmore v. Fox	205
Gilmore v. Norton	205
Gilson v. Stevens Machine Co	294
Gingrich v. Foltz	757
Girard v. Taggart	363, 366
Givens v. Calder	749
Glacius v. Black	454
Glass v. Ellison	558
Glenn v. Black	365, 366
Glenn v. Blackford	372, 373
Glenn v. Smith	124
Glynn v. Home B. Assoc	164
Goddard v. Foster	457
Goerges v. Hufschmidt	450
Golder v. Ogden	90
Goodell v. Jackson	501
Goodloe v. Godley	692
Goodloe v. Rogers	725
Goodman v. Gay	101, 103
Goodman v. Pocock	260
Goodspeed v. East Haddam Bank.	579
Goodwin v. Clark	85
Goodwin v. Jones	558
Goodwin v. Simonson	369, 370, 372
Gordon v. Saunders	370
Gordon v. Winchester B. etc. Assoc	161
Gore v. Brazier	554
Gorham v. Blazo	554
Gorman v. Russell	677
Gorton v. Falkner	269
Goslin v. Corry	255, 257
Gould v. Mayor etc. of Atlanta	201
Gould v. Sterling	692, 694
Gould v. Venice	694
Governor v. Withers	515
Governor etc. v. Meredith	568, 571
Gower v. Carter	350, 718
Grace v. Webb	424
Graham v. Bleakie	369, 370, 371
Grant v. Austen	143
Grant v. Hunsucker	751
Grant v. Norway	689
Grant v. Wood	76, 77
Graves v. Weld	512
Gray v. Ayres	190
Gray v. Case	365, 367
Gray v. Holdship	515
Greedup v. Franklin County	201
Green v. Cole	760
Green v. Kellum	467
Green v. Mumford	199
Green v. North Carolina R. R. Co.	749
Green v. Trieber	192
Greene v. Jones	702
Greene v. Pacific Mutual Ins. Co.	314
Greenough v. Rolfe	556

Digitized by Google

	PAGE
Greenwalt v. McClure	374
Greenwood v. Spring	693
Greer v. Wright	267, 419
Gregory v. Thomas	555
Grier v. Youtz	365, 366
Griffin v. Chubb	90
Griffin v. Colver	727
Griffiths v. Puleston	515
Griggs v. Austin	210
Grimes v. Harrison	158
Grisham v. State	470
Griswold v. Haven	692
Griswold v. N. Y. Ins. Co	77, 504
Gross v. Pearcy	369, 370, 372, 373
Grosvenor v. United Society	672
Grove, Ex parte	131
Grubb v. Guilford	772
Guerrier v. Lambeth	431
Guimney v. Town of Stockbridge	203
Gulley v. Renney	350
Gundlach v. Germania etc. Ass'n	674
Gunn v. Howell	589
Gushee v. Leavitt	462
Guy v. Hermance	205, 469
Haddock's Case	496
Hafner v. Irwin	110
Hagaman v. Commissioners of Cloud Co	200, 204
Hagen v. Bowery Nat. Bank	691
Hagenbuch v. Howard	203
Hagerman v. Ohio B. & S. Assoc.	153, 157, 158, 159, 164, 165
Haines v. Pearce	126
Haigh v. U. S. B. etc. Assoc	155
Hairston v. Hairston	74
Hall v. Supreme Lodge	676
Hallenbeck v. Hahn	109, 200, 202, 204
Hallett v. Collins	617
Halpin v. Campbell	482
Hambleton v. Veere	256
Hamilton v. McPherson	725
Hamilton v. People	332
Hamilton v. Rogers	171
Hammeralough v. Kansas City B. etc. Assoc	161
Hampstead B. Assoc. v. King	164
Ham's Case	116
Hanchet v. Birge	293
Hancock v. Franklin Ins. Co	242
Hand v. Grant	365
Handley v. Farmer	164
Haney v. Caldwell	460
Hanham v. Sherman	508
Hanner v. Greensboro B. & L. Assoc	161
Hannewinkle v. Georgetown	199
Hansbury v. Pfeiffer	162
Hanson v. Eastman	455
Haralson v. George	374
Hardesty v. Taft	232
Hardin v. Cheek	763
Harding v. Harding	371
Harding v. Yarborough	371
Hardy v. Summers	186
Hare v. Carnall	201
Harker v. Dement	90
Harkness v. District of Columbia	199
Harman v. Commonwealth	265
Harmon v. James	411, 422, 443, 597
Harmon v. Salmon Falls etc. Co.	79
Harper v. Kean	459
Harris v. Alcock	171
Harris v. Carson	514, 515
Harris v. Frink	513
Harris v. Harris	179
Harris v. McRea	341
Harris v. Taylor	69
Harris v. Wilson	630
Harrison v. Crowder	248
Harrison v. Hoyle	676
Harrison v. Pike	386
Harrison v. Sterett	188
Harrison v. Vines	200, 204
Hart v. Hawkins	751
Hart v. Reed	705
Hart v. Skinner	90, 121
Hart v. Wall	460
Harter v. Crill	705
Hartfield v. Roper	239, 548
Hartford v. Co-operative Mut. Homestead Co.	154
Hartmann v. Commonwealth	328
Harward v. St. Clair etc. Drainage Co	205
Harwood v. Lowell	336
Harvey v. Brydges	754
Harvey v. Fish	366
Hastings v Lusk	65
Hatch v. Barnum	126
Hatch v. City of Buffalo	201
Hatch v. Dwight	92
Hatch v. Potter	65
Hathorn v. Stinson	109
Hauxhurst v. Lobree	509
Haven v. Low	558
Haven v. New Hampshire Asylum	504
Hawkeye Ben. & L. Assoc. v. Blackburn	161, 162
Hawkins v. Hoffman	90, 219
Hawkins v. Rut	301
Hawkins v. State	769
Hawley v. Smith	222, 225
Hayes v. Jackson	558
Hayes v. Stiger	604
Hayes v. Western R. R. Co	319
Haynes v. Brown	504
Hays v. Dorsey	145, 146
Haythorn v. Rushforth	90
Hayward v. Middleton	75, 77
Hayward v. Sedgley	512
Hazelton v. Putnam	488
Heath v. Barman	662, 664
Heath v. N. Y. Gold Exchange	673, 675
Heath v. Williams	92, 94
Hebbard v. Ricart	559

Digitized by Google

PAGE

Hebblethwaite v. Hepworth.615, 616
Hegeman v. Western R. R. Co.. 81
Heinemann v. Heard..... 725
Heirn v. McCaughan 262, 632
Heister v. Fortner 484
Hekelnkaemper v. German B. etc. Assoc.....163, 164
Hemenway, Ex parte..... 516
Hempstead v. City of Des Moines. 455
Hempstead v. Watkins 405
Henderson v. San Antonio etc. R. R. Co.....692, 693
Henderson v. N. Y. etc. R. R. Co. 663
Henderson etc. R. R. Co. v. Dickerson 396, 482
Hendrickson v. Beers 632
Hendrickson v. Cardwell....512, 514
Heninghausen v. Tischer..... 164
Henly v. Mayor of Lyme Regis.. 336
Henry v. Earle 702
Henry v. Gregory 203, 205
Henry v. Root 619
Henry v. Sargeant..... 705
Henshaw v. Robins 58
Hensley v. Baker..... 367
Hentz v. Long Island R. R. Co.. 654
Hepburn v. Jones..... 584
Herbert v. Kenton B. etc. Assoc. 161
Herbert v. Mechanics' B. &. L. Assoc..... 165
Hern v. Nichols.....683, 684, 689
Herring v. Wilmington etc. R. R. Co..... 551
Hersey v. Supervisors of Milwaukee Co..... 200
Hervey v. McLaughlin..... 736
Hester v. Wilkinson 419
Heyneman v. Danneberg..... 419
Heywood v. City of Buffalo..199, 200
Hickerson v. Benson..... 632
Hickman v. Dale 449
Hickok v. Trustees etc. of Plattsburgh 335, 337
Hickox v. City of Cleveland.396, 579
Hicks v. Pope..... 743
Higginbotham v. Higginbotham. 449
Higgins's Case..... 556
Hill v. Freeman..... 121
Hill v. Gust..... 319
Hill v. Hill..... 372
Hill v. Owen..... 223
Hill v. Parker..... 341
Hill v. Richmond..... 336
Hill v. Sewald..... 516
Hillary v. Gay..... 754
Hilliard v. Cagle..... 419
Hilliard v. Kearney..... 735
Hilliard v. Richardson..... 98
Hilliker v. Loop..... 87
Hillsborough v. Deering 499, 501
Hilton v. Adams..... 223
Hinchey v. Nichols..... 751
Hinckley v. Beckwith..... 726
Hinckley v. Emerson..... 103

PAGE

Hinde v. Whitehouse..... 55
Hinds, Estate of..... 515
Hinds v. Pugh..... 387
Hine v. Dodd..... 176
Hipp v. State..... 651
Hiss v. Bartlett..... 677
Hoagland v. Township of Delaware..... 199
Hoboken B. Assoc. v. Martin. 152, 161, 163
Hoboken Land etc. Co. v. Mayor etc. of Hoboken..... 199
Hockaday v. Willis..... 632
Hochreiter's Appeal..... 674
Hochster v. De La Tour..... 260
Hodge v. Manley..... 696
Hodges v. New England Screw Co..... 157
Hodges v. Shields..... 511
Hodges v. Strong..... 454
Hodsoll v. Stallebrass ..256, 259, 260
Hoffman v. Mackall..... ....195, 418
Holbrook v. Armstrong..... 120
Holbrook v. Utica etc. R. R. 226, 384
Holbrook v. Wight 90
Holden v. Fitchburg Co..... 319
Holden v. Trust Co..... 348
Holdship v. Doran 365, 367
Holladay v. Marsh..... 429
Holland v. Long..... 459
Hollinshead v. Von Glahn..... 348
Hollister v. Abbott 381
Hollister v. Sherman..... 199
Holman v. Green 374
Holman v. Inhabitants of Townsend..... 336
Holmes v. Holmes.....616, 773
Holmes v. Remsen..... 742
Holmes v. Tremper 515
Holmes v. Wilson..... 259
Holt v. Somerville..... 275
Home Ins. Co. v. Jones 374
Home Life Ins. Co. v. Sherman . 510
Home Mut. B. Assoc. v. Thursby. 164
Honyman v. Campbell 618
Hoeban v. Bidwell 90
Hood v. Fahnestock..... 535
Hooker v. New Haven etc. R. R. Co..... 563
Hooker v. N. H. & N. Co 579
Hoopes v. Strasburger..... 126
Hopkins v. Boyd 126
Hopkins v. Crombie..... 540
Hopkins v. Gilman 516
Hopkinson v. Marquis of Exeter. 673
Horan v. Wahrenburger..... 589
Hore's Estate 374
Horn v. Chandler..... 260
Hornbeck v. Westbrook..... 501
Horner's Case 778
Horton v. Critchfield..... 381
Hoskins v. Mechanics' B. & L. Assoc.....161, 162, 164
Houghton v. Austin 194

Digitized by Google

	PAGE
Houghton v. Butler	543
Houghton v. First Nat. Bank	693
House v. House	232
Houser v. Hermann B. Assoc	162
Houston v. Dyche	90
Houston etc. R. R. v. Presidio Co	204
Howard v. North	361, 411, 751
Howard v. North Bridgewater	548
Howard v. Sexton	583
Howard Mut. L. etc. Assoc. v. McIntyre	152
Howe v. Butterfield	247
Howe v. Plainfield	536
Howe Machine Co. v. Pease	224
Howell v. Ashmore	399
Howell v. Schenck	514, 515
Howth v. Franklin	221
Hoy v. Sterrett	98
Hoyt v. Demon	558
Hubbard v. City of Concord	544, 551
Hubbard v. Hubbard	173
Hubbard v. Supervisors of Johnson Co	202
Hubler v. Pullen	705
Huck v. Chicago etc. R. R.	202
Hudson v. Commissioners of Atchison Co	205
Hudson v. Porter	515
Hueske v. Broussard	455
Huggins v. Ketchum	762
Hughes v. Kline	199
Hughes v. Westmoreland Coal Co.	459
Hughes's Appeal	162
Hull v. Richmond	548
Hunnewell v. City of Charlestown	199
Hunt v. Adams	293
Hunt v. Easterday	204
Hunt v. Goodlake	460
Hunt v. Gregg	365, 366, 368
Hunt v. Lowell G. L. Co.	239
Hunt v. Mullanphy	515
Hunt v. Town of Pownal	547, 548
Hunt v. Wolfe	510
Hunter v. Jones	513, 515
Hunter v. Hatton	705
Hunter v. United States	62
Huntington v. Palmer	203
Hurd v. Chesley	520
Hurd v. Curtis	92
Hurst, In re	126
Hutchins v. Hope	186
Hutchins v. Smith	664
Hutchinson v. Boston G. L. Co.	239
Hutchinson v. Bowker	457, 458
Hutchison v. Kelly	419
Huth v. R'y etc. Co	443
Hutson v. Mayor of N. Y.	336, 535
Hyatt v. Taylor	225, 226
Hyatt v. Wood	508, 755
Hyde v. Noble	90
Hyde v. Stone	508
Hyde v. Woods	672, 676
Iddings v. Nagle	514, 515
Ide v. Stanton	53
Illingworth v. Miltenberger	367
Illinois Cent. R. R. Co. v. Cassell	454
Illinois etc. R. R. Co. v. Cobb	727
Ilsley v. Nichols	244, 270
Indiana & Ill. Cent. R. R. Co. v. Davis	606
Indianapolis etc. R'y v. Commissioners of Tipton Co	202
Indianapolis etc. R. R. Co. v. Hartley	662
Ingals v. Plamondon	642
Ingoldby v. Riley	153, 163
Inhabitants of Alna v. Plummer	55
Inhabitants of Cheshire v. Inhabitants of Shutesbury	273
Inhabitants of the First Parish in Freeport v. Bartol	55
Inhabitants of Springfield v. Conn. R. R. R. Co	661
Inhabitants of Trescott v. Moan	83
Innes v. Wylie	673, 676
Insurance Co. v. Transportation Co	314
Iowa R. R. Land Co. v. Carroll Co	200
Iowa R. R. Land Co. v. Sac Co.	200
Ireland v. Higgins	518
Irish v. Clayes	558
Irving Bank v. Wetherold	691
Irwin v. Davidson	731
Isom v. First Nat. Bank	387
Isom v. Mississippi Cent. R. R. Co	396
Ives v. Hazard	56
Ives v. Ives	755
Ivinson v. Hance	200
Jackson v. Allen	306
Jackson v. Bowen	712
Jackson v. Burchin	443
Jackson v. Carpenter	443
Jackson v. Chamberlain	484
Jackson v. Claw	613
Jackson v. Cory	501
Jackson v. Crawford	588
Jackson v. Davis	504
Jackson v. Dieffendorf	712
Jackson v. Douglas	712
Jackson v. Dysling	709, 712
Jackson v. Ets	501
Jackson v. Farmer	755
Jackson v. Hathaway	546
Jackson v. Kingsley	306
Jackson v. Lervey	501
Jackson v. Lowe	747
Jackson v. McCall	712
Jackson v. Morse	755
Jackson v. Post	484
Jackson v. Robinson	588
Jackson v. Rutland & B. R. R. Co	106

Digitized by Google

	PAGE
Jackson v. Town	484
Jackson v. Vedder	712
Jackson v. Whitbeck	597
Jackson v. Winne	613
Jacobs v. Bangor	548
James v. Hayward	543
James River & Kanawha Co. v. Turner	479
Janes v. Whitbread	193
Jarrett v. Cope	162
Jefferson v. Washington	70
Jenkins v. Spooner	642
Jenkins v. Supervisors of Rock Co	201
Jennings v. Hodges	367, 374
Jennings v. Lyons	79
Jennings v. Wood	556
Jewell v. Jewell	617
Jewett v. Smith	558
Johns v. Johns	559
Johnson v. Atlantic & St. L. R. R.	564
Johnson v. Buck	297
Johnson v. Fall	632
Johnson v. Goodridge	82
Johnson v. Hannahan	755
Johnson v. Haverhill	535, 544
Johnson v. Lewis	93, 94
Johnson v. Nations	556
Johnson v. Patterson	550
Johnson v. Rayner	273
Johnson v. Roberts	203, 204
Johnson v. Rochester	664
Johnson v. Richardson	221, 224, 225
Johnson v. Stone	219
Johnston v. Elizabeth B. & L. Assoc.	159, 161, 165
Jolly v. Single	726
Jolly v. Young	458
Jones v. Austin	761
Jones v. Jones	504
Jones v. Judkins	381
Jones v. Kokomo B. Assoc.	165
Jones v. Null	365, 367
Jones v. State	117
Jones v. Sumner	200
Jones v. Syer	195
Jones v. Walker	749
Jones v. Weathersbee	443, 705
Jones v. Western Vermont R. R. Co	564, 693
Jones v. Williams	635
Jordin v. Crump	550
Joyce v. Williams	685
Juanita B. & L. Assoc. v. Hetzel	160
Judd v. Town of Fox Lake	201
Juniata B. & L. Assoc. v. Mixell	153, 159, 160
Kaehler v. Dobberphul	200, 204
Kavanagh v. Gudge	754
Keener v. Harrod	692
Keith v. Johnson	247, 389
Kellar v. Savage	82
Kelley v. Kennard	546
Kelley v. Todd	514
Kellinger v. Forty-second Street etc. R. R. Co	663
Kellogg v. Ely	204
Kellogg v. Larkin	580
Kellogg v. Oshkosh	200
Kellogg v. Sweeny	222, 223, 224, 225
Kelly v. Bemis	469
Kelly v. Mobile B. & L. Assoc	159
Kelsall v. Tyler	151
Kelsey v. Glover	548
Kelsey v. King	662, 664
Kemble v. Farren	716
Kemp v. Knickerbocker Ice Co.	718, 727
Kennebec Co. v. Augusta Ins. & Banking Co	313
Kennedy v. Williamson	760
Kent Benefit B. Soc., In re	158
Kent v. Waite	109
Kent v. Shuckard	222, 223
Kershner v. Kersher	226
Kerwhacker v. Cleveland etc. R. R. Co	106, 550, 551, 628
Key v. Jennings	467
Kidd v. Cromwell	454
Killion v. Kelley	304
Kimball v. Merchants' Sav. etc. Co	202
King v. Boston & Worcester R. R.	318
King v. Fowler	512
King v. Gwynn	200
King v. Moore	768
King v. Pease	573
King v. Regina	326
King v. State	650
King v. Wilson	205
King v. Woodruff	510
Kingsbury v. Collins	512
Kinlyside v. Thornton	760
Kinyon v. Duchene	201
Kip v. Brigham	621
Kip v. Norton	712
Kissam v. Barclay	516
Kissam v. Roberts	705, 706
Kisten v. Hildebrand	221
Kittredge v. Elliott	103
Kittredge v. Woods	515
Klemence v. Steere	760
Kline v. Baker	455
Knapp v. Maltby	717
Kneeland v. Ensley	743
Knell v. Green Street B. Assoc.	164
Kniffen v. McConnell	706
Knight v. Moloney	371
Knigseasing B. Assoc. v. Roan	163
Knorr v. Germantown etc. R. R. Co	396
Knowlton v. Supervisors of Rock Co	201
Knox v. Mayor etc. of New York	663
Knox v. Shepherd	151
Krank v. Nichols	508
Kreamer v. Building Assoc	162

Digitized by Google

PAGE
Krevet v. Meyer..... .....486, 756
Krom v. Levy..... ...706, 725, 727
Krone v. Sweeny..... 226
Kuhlmann v. Meier..... 516
Kunkel v. Spooner..... 386
Kupfert v. Guttenberg B. Assoc. 162
Kyle v. Proctor.... .....509, 510
Kyles v. Tait..... 373

Labadie v. Dean..... 200
Labouchere v. Wharncliffe..... 677
Ladbroke v. James.... 586
Lafond v. Deems..... 677
Lake Shore & M. S. Co. v. McCormick..... 319
Lambert v. Addison..... 677
Lambert v. People..... 329
L'Amistad de Rues..... 720
Lamkin v. Crawford....364, 366, 367
Lamont v. Singer etc. Stone Co.. 202
Lamphere v. Grand Lodge..... 676
Lancashire etc. R'y Co. v. Evans. 562
Lancaster v. Baltzell.... 114
Lancum v. Lovell..... 216
Landsberger v. Magnetic Tel. Co. 725
Lane v. King..... 514
Langdon v. Potter.... 554
Lansdown v. Elderton..... 370
Lansing v. Gaine..... 685
Lapeer Ins. Co. v. Doyle..... ... 454
Lapier's Case..... 779
Larkin v. Avery..... 756
Lasala v. Holbrook..... 638
Latham v. Atwood..... 514
Latham v. Washington B. & L. Assoc..... 161
Laverty v. Burr..... 685
Law v. East India Co 68
Lawson v. Jeffries..... 396
Laythoarp v. Bryant..... 747
Lea v. Henry..... 457
Leach v. Tilton..... 560
Learned v. Corley..... 399
Leavitt v. Palmer..... 691
Lediard v. Boucher..... 701
Lee v. Ashbrook..... 79
Lee v. Bareda..... 212
Lee v. Clark 620
Lee v. Gansel..... 246
Lee v. Lenox..... 74
Lee v. Pittsburgh etc. Coal Co.. 694
Lee v. Risdon..... 514
Lee v. Tebo & N. R. R. Co..... 482
Leech v. Harris....672, 673, 675, 676
Lefferts v. Supervisors of Calumet Co.....201, 202
Leitch v. Wentworth 202
Leonard v. N. Y. etc. Tel. Co... 726
Leoni v. Taylor..... 338
Le Page v. McCrea..... 87
Le Roy v. Mayor etc. of N. Y.. 200
Leutz v. Strok..... 518
Leviston v. Junction R. R. Co .. 454
Levy v. Gadsby 454

PAGE
Lewenthal v. Mayor etc. of N. Y. 649
Lewis v. Eshleman..... 205
Lewis v. Harvey 112
Lewis v. Herndon..... 504
Lewis v. Jones.....276, 515, 546
Lewis v. McNatt 513
Lewis v. Miner..... 630
Lewis v. Mobley..... 772
Lewis v. Spencer 203
Lexington etc. R. R. Co. v. Applegate.....396, 579
Lexington and West Cambridge R. R. Co. v. Chandler..... 280
Lick v. O'Donnell..... 411
Licking County S. etc. Assoc. v. Bebout..... 164
Liddle v. Hodges..... 632
Liebstein v. Mayor etc. of Newark..... 199
Lincoln B. & S. Assoc. v. Benjamin..... 161
Lincoln B. & S. Assoc. v. Graham. 161, 165
Linfield v. Old Colony R. R 106
Link v. Germantown B. Assoc. 162, 163
Linten v. Mayor etc. of Athens.. 199
Lisloff v. Hart..... 405
Lister v. Log Cabin B. Assoc.... 164
Litchfield v. Polk Co..... 202
Little v. Banks..... 718
Little v. Lathrop..... 429
Little v. Silverthorne..... 582
Littleton v. Richardson.....548, 622
Livingston v. Hastie..... 685
Livingston v. Hollenbeck..... 199
Livingston v. Mayor etc..... 480
Lloyd v. Erwin..... 373
Lloyd v. Heath..... 732
Lloyd v. Lloyd..... 424
Lloyd v. Loaring.....667, 671
Lloyd v. Maund..... 455
Lockwood v. City of St. Louis... 203
Lockwood v. Mitchell..... 604
Lodge v. Simonton..... 535
London v. City of Wilmington 201, 204
London & N. R. R. Co. v. Bradley..... 395
Londonderry v. Chester..... 618
Long v. Weller.....368, 373
Longworthy v. City of Dubuque. 204
Loomis v. Terry..... 103
Loosey v. Orser..... 705
Lord Audley's Case..... 266
Lord Bindon v. Earl of Suffolk.. 735
Lord v. Chadbourne....262, 405, 622
Lord Douglas v. Chalmer..... 737
Lord v. Essex B. Assoc..... 165
Lorillard v. Town of Monroe.... 504
Loud v. City of Charlestown.... 199
Louisville & N. R. R. Co. v. County Court..... 482
Louisville etc. R. R. v. Gaines.. 201

Digitized by Google

PAGE

Louisville R. R. Co. v. Milton.. 106
Love v. Taylor..... 386
Low v. Elwell..... 755
Low v. Mumford.....86, 87
Low v. Tibbetts..... 275
Lowell v. Daniels..... 306
Lowell v. Gage..... 111
Lowell v. Robinson..... 289
Lowenstein v. Chappel..... 725
Lowery v. Lowery..... 775
Lowfield v. Stoneham..... 736
Lowremore v. Berry..... 772
Lowry v. Bradley..... 74
Lowry v. McMillan..... 381
Lowry v. Megee..... 454
Low Street B. Assoc. v. Zucker 153, 164
Lucas v. Greenville B. & S. Assoc. 165
Lucas v. Groning.....452, 456
Lucas v. Moore..... 372
Lucas v. New Bedford etc. R. R. Co.....81, 239, 551
Lucas v. Wilson..... 581
Luce v. Carley..... 289
Lucketts v. Townsend 122, 776
Luckhart v. Ogden..... 457
Ludwick v. Huntzinger..... 347
Ludwig v. Fuller..... 90
Luey v. Bundy..... 122
Lumbard v. Aldrich..... 751
Lund v. Inhabitants of Tyngsborough..... 284
Lunsford v. Turner..... 511
Luttin v. Benin..... 270
Lyerly v. Wheeler..... 757
Lyle v. Jacques..... 205
Lynch v. Nurdin..... 548
Lynes v. State..... 118
Lyon v. Hunt..... 734

Macbeath v. Haldimand..... 457
Macklot v. City of Davenport... 200
Macomber v. Mayor etc. of N. Y. 650
Macon v. Patty..... 396
Macy v. City of Indianapolis.... 589
Macy v. Whaling Ins. Co..... 312
Mad River etc. R. R. Co. v. Barber..... 628
Madison etc. R. R. Co. v. Norwich Savings Soc..... 693
Magee v. Cutter.....200, 205
Magee v. McNeil..... 455
Magee v. Scott..... 90
Mahon v. N. Y. Cent. R. R. Co. 663
Mahoney v. O'Callaghan 632
Mahorner v. Hooe 743
Makinnon v. Penson 334
Malcolm v. Hodges.....192, 194
Maltby v. Chapman..... 225
Maltus v. Shields..... 455
Mandeville v. Stackett..... 380
Manhood v. Crick 556
Manice v. Brady 718
Mann v. Board of Education.... 199

PAGE

Mann v. Taylor 763
Manners v. Manners..... 775
Manning v. Wells..... 221
Manning v. Winter..... 706
Marathon v. Oregon 338
Marcardier v. Chesapeake Ins. Co.....310, 311
March v. Allabough..... 454
Marcy v. Stone 443, 510
Maretzek v. Cauldwell.....705, 706
Marine Bank v. Clements 693
Marine Nat. Bank v. Nat. City Bank 691
Mark v. Hudson R. B. Co..... 632
Mark v. Patchin 724
Marlatt v. Warwick 605
Marples v. Bainbridge 425
Marsh v. City of Brooklyn... .. 199
Marsh v. Ellsworth..... 707
Marsh v. Gilbert 692
Marsh v. Jones..... 103
Marsh v. Supervisors of Clark Co.....201, 203
Marshall v. Wood 558
Martin v. Atkinson.....401, 411
Martin v. Black 132
Martin v. Jewell 172
Martin v. Knapp 512
Martin v. Nashville B. Assoc.... .....158, 161, 162
Martin v. Oliver 419
Martin v. Simpson..... 239
Martin, Pleasants & Co. v. Harris.....376, 377
Mason v. Brooklyn etc. R. R. Co. 663
Mason v. Fenn..... 516
Mason v. Hill..... 92
Mason v. Keeling.....100, 101
Mason v. Kennebec & P. R. R. Co. 395, 563, 575
Mason v. Moyers..... 514
Mason v. Thompson.....221, 223
Mason's Case..... .....779, 780
Massey v. Belisle..... 750
Massey v. Citizens..... 161
Massey v. Citizens' B. etc. Assoc. 159. 160, 165
Masterton v. Mayor etc. of Brooklyn.....722, 725, 727
Mateer v. Brown.....221, 222
Mathewson v. Phœnix Iron Foundry.....615, 618
Matson v. Calhoun..... 488
Matteson v. Elderfield..... 164
Mattis v. Robinson..... 511
Matts v. Hawkins 634
Maulding v. Steele..... 367
Mauney v. Pemberton..... 374
Maupin v. Emmons..... ....474, 484
Mau-zau-mau-ne-kah v. United States 354
Maxham v. Day..... 270
Maxwell v. Harrison..... 90
May v. Burdett..... 101

Digitized by Google

	PAGE
May v. Luckett	508
May v. Princeton	548
May v. State	118
Mayall v. City of St. Paul	201
Mayflower, The	727
Maynard v. Buck	319
Maynard v. Crick	556
Mayo, Re	371
Mayo v. Fletcher	514
Mayor v. Root	184
Mayor v. State	232
Mayor etc. of Baltimore v. Boul-din	201, 205
Mayor etc. of Baltimore v. Grand Lodge I. O. O. F.	205
Mayor etc. of Baltimore v. Por-ter	201
Mayor etc. of Brooklyn v. Mese-role	200
Mayor etc. of Lyme Regis. v. Henley	336
Mayor etc. of Mobile v. Baldwin	203
Mayor etc. of Mobile v. Waring.	203
McAdam v. Walker	618
McAllister v. Smith	54
McAndrews v. Collerd	580
McAvoy v. Long	457
McBride v. City of Chicago	200, 202
McCabe v. Father Matthew etc. Society	674
McCahan v. Columbian B. Assoc.	154, 164
McCann v. Taylor	198
McCartee v. Chambers	678
McCarty v. State	355
McCaskill v. Elliott	103
McCausland, Estate of	615
McClung v. Livesay	205
McCombs v. McKennan	363
McConkey v. Smith	202
McCoombs v. Wright	55
McCord v. McClintock	449
McCormick v. Nixon	734
McCoy v. Chilicothe	199
McCoy v. Danley	98
McCoy v. McKowen	692
McCracken v. Beall	447
McCulloch v. Hutchinson	559
McCulloch v. Norwood	619
McCutchen v. McCutchen	454
McDaniel v. State	782
McDaniels v. Robinson	221
McDonald v. Murphree	199
McDonald v. Smalley	447
McDowell v. Ackley	674
McDowell v. Goldsmith	112
McEntire, Den ex dem., v. Dur-ham	360
McGannon v. Central B. Assoc.	153
McGilvery v. Capen	243
McGrath v. Hamilton Sav. & L. Assoc.	154
McGrath v. Hudson R. R. R. Co.	628
McGregor v. Balch	340
McIlvaine v. Smith	422
McIntire v. Preston	83, 705
McIntyre v. Kline	384
McKay v. Draper	707
McKee v. Lineberger	365, 366, 368
McKenzie v. Sykes	454
McKeon v. See	664
McKinney v. People	651
McLain v. Mayor etc. of N. Y.	649, 650
McLaughlin v. Citizens' B. etc. Assoc.	161, 165
McLeod v. First Nat. Bank	387
McLeod v. Oates	766
McMahan v. McMahan	443
McMahon v. Henning	320
McNaughton's Case	648
McNeely v. Hart	508
McPherson v. McPherson	598
McPike v. Pew	199
Meader v. Stone	755
Mechanics' Bank v. City of Kan-sas	201
Mechanics' Bank v. N. Y. R. R. Co.	694
Mechanics' Bank v. N. Y. & New Haven R. R. Co.	689, 690
Mechanics' Banking Ass'n v. N. Y. etc. Lead Co.	693
Mechanics' etc. Bank Assoc. v. Meriden Agency Co.	159, 162
Mechanics' B Assoc. v. Stevens.	165
Mechanics' etc. B. Assoc. v. Wil-cox	161
Mechanics' etc. Bank v. Debolt.	199
Mechanics' B. & L. Assoc. v. Conover	165, 164
Mechanics' etc. B. & L. Assoc. v. Dorsey	161
Meister v. Moore	617
Meno v. Hoeffel	509
Merchants' Bank v. Cent. Bank.	693
Merchants' Bank v. Thomson	370
Meredith v. Anbries	596
Meredith v. Andres	443, 597
Meriam v. Harsen	464
Merrill v. Calkins	664
Merrill v. Clason	55
Merrill v. Gorham	199
Merrill v. Hampden	545
Merrill v. Humphrey	202, 203
Merrill v. McIntyre	161
Merritt v. Farris	200
Messeck v. Supervisors of Colum-bia Co.	199
Metcalf v. Hess	221
Meyer v. Bishop	605
Meyers v. Amey	172
Meyers v. Smith	132
Miazza v. State	353
Michener v. Lloyd	374
Middlebrook v. Corwin	515
Middleton v. Pritchard	289
Miles v. Miles	760

Digitized by Google

	PAGE
Miles v. Stevens	462
Milford v. Wesley	226
Milhau v. Sharp	658, 663
Miller v. Allison	180
Miller v. Chase	89
Miller v. Collyer	369
Miller v. Goddard	384
Miller v. Gorman	201
Miller v. Grandy	200
Miller v. Humphrey	204
Miller v. Jamison	595
Miller v. Jefferson B. Assoc.	154, 156
Miller v. Lang	511
Miller v. Second Jefferson B. Assoc.	153
Miller v. Shackleford	454
Miller v. Thomson	608
Miller v. Tollison	559
Miller v. White	622
Miller's Estate	158
Mills v. Gleason	200
Mills v. Johnson	200
Mills v. Salisbury B. & L. Assoc.	161
Miltenberger v. Hill.	369, 371, 373, 375
Miltimore v. Supervisors of Rock Co.	200
Milton v. Hudson River Steamboat Co.	725
Milwaukee Iron Co. v. Hubbard.	201, 202
Miner v. Mayor etc. of N. Y.	711
Miner v. Stevens	755
Minnesota Linseed Oil Co. v. Palmer	201
Minor v. President etc. of Natchez	763
Minor v. Staples	224
Minor v. State	340
Minturn v. Hays	199
Missouri River etc. R. R. v. Morris	199
Missouri River etc. R. R. v. Wheaton	204
Mitchell v. City of Milwaukee	201
Mitchell v. Cornell	726
Mitchell v. Jenkins	63
Mitchell v. Lipe	559
Mitchell v. Walker	504
Moale v. Mayor etc. of Baltimore.	396
Mobile B. & L. Assoc. v. Robertson	160, 161
Mobley v. Clark	608
Moies v. Bird	112
Moir v. Hopkins	692
Monmouthshire Canal v. Harford.	263
Monongahela Nav. Co. v. Coon.	98, 579
Montag v. Linn	454
Montague v. Boston & A. R. R.	242
Monteith v. Robb	619
Montgomery Mut. B. & L. Assoc. v. Robinson	151, 161, 164
Monumental etc. Soc. v. Lewin	153
Moody v. Whitney	90
Moody v. Wright	172
Mooers v. Smedley	200
Moore v. Abbot	548
Moore v. Boyd	506, 756
Moore v. Byers	757
Moore v. Hardcastle	129
Moore v. Hillebrant	243
Moore v. Lesseur	454
Moore v. Love	256
Moore v. Mason	755
Moore v. Moore	509
Moore v. Rawlins	154
Moore's Case	779
Moorell v. Irving Fire Ins. Co.	705
Morain v. Devlin	277
Moran v. Daws	171
Morean v. U. S. Ins. Co.	310
Morey v. Town of Newfane.	335, 336
Morgan v. Cox	239
Morgan v. Groff	632
Morgan v. Mason	110
Morgan v. U. S.	506, 510
Morice v. Bishop of Durham	600
Morrell v. Frith	455, 457, 458, 460
Morris v. Hershire	204
Morris Canal & Banking Co. v. Jersey City	590
Morris Canal etc. Co. v. Mayor etc. of Jersey City	201
Morrison v. Dobson	618
Morrison v. Dorsey	152, 158
Morrison v. Glover	159
Morrow v. Weed	589
Morse v. Glendon Co.	319
Morse v. Weymouth	454, 455
Morton v. Dean	55
Mosby v. Hunt	368, 370, 372
Mosley v. Baker	164
Motz v. City of Detroit	204
Moulton v. Robinson	506
Mount v. Harris	122
Mount Morris Square, In Matter of	588
Mount Vernon v. Dusouchett	535
Mowatt v. Carow	739
Mower v. Inhabitants of Leicester	336
Mower v. Watson	65
Mowers v. Fethers	222, 223, 224
Mowry v. Stogner	454
Moxy's Appeal	672, 676
Moye v. May	741
Moye v. Sparrow	158
Mugford v. Richardson	755
Mulligan v. Cole	460
Mullikin v. Mullikin	374
Mulliken v. Reeves	204
Mullock v. Jenkins	158
Mulloy v. Fifth Ward B. Assoc.	154, 161
Mulry v. Mohawk etc. Ins. Co.	705
Mumford v. Stocker	556
Mumford v. Whitney	487
Munger v. Tonawanda R. R. Co.	551, 548
Municipality v. Hennen	369

Digitized by Google

	PAGE
Munn v. Reed	239
Munson v. Miller	202
Munson v. Minor	200
Munson v. Payne	372
Murch v. Concord R. R. Co.	548
Murchison v. Sergent	225
Murdock's Case	369, 370
Murphy v. Harrison	199
Murphy v. Murphy	743
Murrah v. State	381
Murray v. Hatch	309
Murray v. Mayor etc. of N. Y.	649
Murray v. S. C. R. R. Co	319
Muscatine v. Mississippi etc. R. R. Co	200
Musick v. Barney	467
Mussey v. Eagle Bank	680
Mussey v. Holt	272
Mussey v. Scott	756
Mutrie v. Harris	759
Mutual Benefit L. Ins. Co. v. Supervisors of N. Y	203
Mutual B. & L. Assoc. v. Hammell	157
Mutual Life Ins. Co. v. Goddard	605
Mutual Life Ins. Co. v. Sturgis	605
Mutual Safety Ins. Co. v. Cohen	221
Myers v. Burns	726
Myrick v. City of La Crosse	204
Myers v. Cottrill	223, 224
Myers v. Dodd	430
Nailor v. Bowie	129
Nash v. Driscoe	454
Nash v. Harrington	115
Nash v. Kemp	642
Nathan's Case	615
National etc. Assoc. v. Hubley	156
National etc. B. Assoc., In re Estate of	156
Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n	691
Nat. Bank v. Kimball	203
Nat. Bank v. Sprague	605
Nat. F. I. Co. v. McKay	622
Nat. Mechanics' Bank v. Nat. Bank	212
Nat. Permanent Benefit B. Soc., In re	158
Neary v. Bostwick	725
Needham v. Allison	515
Needham v. Heath	340
Needles v. Howard	221, 224
Negley v. Farrow	460
Negley v. Stewart	365
Neilson v. Harford	454
Nelson v. Garey	247
Nelson v. Hagerston Bank	181
Nelson v. Vermont & C. R. R. Co.	106
Nesbitt v. Turrentine	734
New Boston v. Dunbarton	495, 496, 500
New Brunswick etc. Co. v. Tiers	384
New Brunswick v. Williamson	580
Newby v. Platte County	476
Newell v. Borden	678
Newhall v. Ireson	275
New Hampshire etc. Bank v. Colcord	69
New Orleans etc. R. R. Co. v. Frederic	396
New Orleans etc. R. R. Co. v. Moye	396
Newson v. Axon	223
Newton v. Harland	754
New York etc. R. R. Co., Matter of	662
New York etc. R. R. Co. v. Mayor etc. of N. Y	662
New York etc. R. R. Co. v. Schuyler	694
New York Life Ins. Co. v. Supervisors of N. Y	203
New York R'y Co., In re	649
New York & Erie R. R. Co. v. Skinner	106
New York & N. H. R. R. Co. v. Schuyler	628
Nicholay v. Kay	705
Nicholl v. Larkin	696
Nicholl v. Williams	701, 702
Nichols v. Nichols	775
Nichols v. Patten	90
Nicholson v. N. Y. & N. H. R. R.	276, 546, 579
Nicholson v. State	354
Niles v. Ransford	510
Nixon v. Porter	751
Nixon v. Ruple	590
Noble v. Milliken	225
Noel v. McCrory	508, 509, 510, 756
Nolan v. Bank of N. Y. etc. Ass'n	691
Nomaque v. People	435
Norcross v. Norcross	221
Norcum v. Gaty	443
Norris v. Androscoggin R. R. Co.	104, 105, 106
Norris v. Litchfield	544
North v. Belden	559
North America B. Assoc. v. Sutton	151, 152, 154, 163
North Beach etc. R. R. Co., Appeal of	662
North Hempstead v. Hempstead	501
North River Bank v. Aymar	686, 690, 692
Norton v. Ladd	518
Norwich etc. Provident B. Soc., In re	158
Norwood v. Grype	556
Nowlan v. Nelligan	737
Nowlen v. Colt	508
Noyes v. Smith	319
Noyes v. Town of Morristown	336
Oak Cottage B. etc. Assoc. v. Eastman	162, 164

Digitized by Google

	PAGE
Oakley v. Morton	749
Oaky v. Mayor etc	480
Oatman v. Taylor	609
Occidental B. & L. Assoc. v. Sullivan	153, 158
Ocmulgee B. & L. Assoc. v. Thompson	154, 164
Odiorne v. Lyford	92, 94
Ogilvie v. Richardson	368, 370, 371
Ohio v. Frank	348
Ohio and Lexington R. R. Co. v. Applegate	655
Ohio etc. R'y Co. v. Selby	628
Ohio L. I. & T. Co. v. Merchants' L. & T. Co	462
Oland's Case	512, 513
Old Colony R. R. Corp. v. Evans	140, 262, 749
Oliver v. Hawley	455
Oliver v. Memphis etc. R. R.	199
Ombony v. Jones	516
O'Neal v. Virginia etc. Bridge Co.	200
O'Neill v. Bradford	691
Orange County Bank v. Brown	219
O'Rourke v. West Penn. L. & B. Assoc	156
Orr v. Amory	356
Orr v. McBride	766
Orrok v. Commonwealth Ins. Co.	314
Osborn v. Governors of Guy's Hospital	243
Osborn v. U. S. Bank	202, 203
Osborne v. Eakin	341
Osborne v. Endicott	422
Osceola Tribe v. Schmidt	676
Osgood v. Pearsons	295
O'Toole v. Garvin	706
Ottowa Glass Co. v. McCaleb	204
Overall v. Ruenzi	204
Overby v. Fayetteville B. & L. Assoc	155, 162, 164
Overdeer v. Lewis	508, 755
Overton v. Hill	767
Overton v. Tracy	559
Owen v. Field	274
Oystead v. Shed	244
Pabst v. Trustees etc. of Economical B. Assoc	155, 161
Pacific Hotel Co. v. Hieb	202
Pacific Mail Steamship Co. v. Mayor etc. of New York	203
Packard v. Northcraft	225
Paddock v. Commonwealth Ins. Co.	314
Page v. City of St. Louis	199
Page v. De Puy	756
Page v. Mayor etc. of Baltimore	205
Page v. Webster	68
Paine v. Noelke	619
Paine v. Ringold	459
Paine v. Smith	372
Paine v. Woods	299
Palin v. Hills	736
Palmer v. Andover	547, 548
Palmer v. Boling	201
Palmer v. Dougherty	275
Palmer v. Portsmouth	536
Palmer v. Rich	201
Palmer v. Township of Napoleon	204
Pangborn v. Citizens' B. Assoc	157
Panton v. Holland	638
Pardee v. Drew	219
Paret v. Bayonne	589
Park v. Spaulding	678
Parker v. Butcher	153
Parker v. Crammer	582
Parker v. Fulton L. & B. Assoc	161
Parker v. Guillow	554
Parker v. Hollis	510
Parker v. Parker	734
Parker v. U. S. B. etc. Assoc	152, 153
Parkhurst v. Sumner	622
Parkinson v. State	232
Parkist v. Alexander	175
Parks v. Boston	589
Parks v. Ingram	114
Parmer v. Giles	757
Parmley v. St. Louis etc. R. R.	198, 201
Parsons v. Tuolumne Co. W. Co.	469
Parsons v. Winslow	425, 426
Passinger v. Thorburn	725
Patch v. City of Covington	262, 724
Patten v. N. Y. Elevated R. R. Co.	663
Patterson v. Carneal	361
Patterson v. People	651
Pattison v. Albany B. & L. Assoc.	155, 164
Patton v. Cities of Philadelphia and New Orleans	615
Paul v. Carver	275, 663
Paul v. Crocker	555
Paul v. Hummell	431
Payne v. Clark	691
Peace v. Jones	765
Pearce v. Chastain	604
Pearce v. Hooper	306
Pearson v. Rolfe	98
Peck v. Carpenter	598
Peck v. Hibbard	386
Peck v. Peck	615, 616
Peck v. School District	203
Pegg v. Warford	220
Pells v. Webquish	301, 306
Pelly v. Rawlins	243
Pembroke v. Allenstown	492, 497
Penn Co. v. Frana	455
Penn. R. R. Co. v. Langdon	81
Penobscot Boom Corp. v. Lamson	83, 504
Penobscot R. R. Co. v. Dummer	280
Penobscot R. R. Co. v. White	280
Penrice v. Wallis	396
Penton v. Robart	514
People v. Allen	649
People v. Aro	169, 433

Digitized by Google

PAGE
People v. Bostwick..... 692
People v. Cassity.....663, 664
People v. Coffman..... 651
People v. Common Council of Brooklyn..... 648
People v. Contracting Board.... 692
People v. Cunningham..542, 545, 546
People v. Davis..... 650
People v. Field..... 755
People v. Garbutt..... 651
People v. Gonzalez..... 651
People v. Haines..... 664
People v. Hills 650
People v. Hovey..... 62
People v. Hubbard..... 247
People v. Janson.... 68
People v. Kane..... 341
People v. Kerr.... 663
People v. Kingston etc. Turnpike Co 501
People v. Law..... 664
People v. Lawrence..... 649
People v. Lockwood..... 118
People v. Maloney..... 518
People v. Mayor of Brooklyn.... .....480, 481, 482
People v. Mayor etc. of N. Y.... 588
People v. McCann..... 650
People v. Millis..... 341
People v. Morgan..... 649
People v. N. Y. Benevolent Soc. 675
People v. O'Brien..... 650
People v. President etc. of Manhattan Co..... 501
People v. Richards. 329, 332
People v. Saunders..... 332
People v. Schryver.... 651
People v. Stevens..... 649
People v. St. Louis..... 190
People v. Supervisors of Chautauque..... 649
People v. Waltz..... 650
People's etc. B. Assoc. v. Collins 161, 162, 165
People's B. & L. Assoc. v. Wroth. 157
People's Savings Bank v. Tripp. 199
Peoria v. Calhoun..... 455
Perkins v. Douglas..... 120
Perkins v. N. Y. Cent. R. R. Co. 628
Perminter v. Kelly 90
Perrin v. N. Y. Cent. R. R. Co. 664
Persons v. McKibben.... 272
Perth Amboy M. Co. v. Condit.. 454
Peters v. Rylands..... 628
Peter's B. Assoc. v. Jaecksch.... 153
Peterson v. Kier..... 513
Pettillo, Re..... 372
Peyton v. Mayor etc. of London. 637
Pfeitser v. Wheeler B. Assoc.... .....152, 153, 160, 161, 162
Phelps v. Johnson..... 556
Philadelphia & Trenton R. R. Co. 658
Philadelphia etc. R. R. v. Weaver. 226
PAGE
Philadelphia Mercantile L. Assoc. v. Moore..... 163
Philanthropic B. Assoc. v. McKnight..... 162
Philibert v. Burch..... 459
Philips v. Harriss..... 121
Phillips v. Bordman.... 642
Phillips v. Coffee..... 362
Phillips v. Goldman..... 367
Phillips v. Kingfield.... 74
Phillips v. Medbury.... 424
Phillips v. Moses.... 85
Phillips v. Rensselaer..... 628
Phillipsburg Mut. L. & B. Assoc. v. Hawk..... 165
Phillipse v. Higdon..... 763
Phinney v. Baldwin..... 348
Phipps v. Jones..... 678
Phœnix Bank etc. v. Curtis..... 83
Phœnix Iron Co. v. Samuel..... 458
Pickering v. Orange..... 103
Pier v. Finch..... 706
Pierce v. Carleton... 768
Pierce v. Columbian Ins. Co.... 314
Pierce v. Dyer..... 642
Pierce v. Ocean Ins. Co..... 312
Pierce v. Woodward..... 255
Pierrepont v. Barnard..... 486
Pike v. Balch.....55, 56
Pike v. Hayes..... 281
Pilford's Case..... 255
Pillsbury v. Humphrey.... .199, 204
Pingry v. Washburn..... 580
Pinkerton v. Woodward..... 226
Pinkham v. Macy..... 50
Piper v. Pearson..... 589
Pitcher v. Barrows..... 114
Pitts v. Bullard..... 422
Pittsburgh etc. R'y Co. v. Vining..... 239
Plant v. Long Island R. R. Co.. 654
Plumer v. Harper.....93, 94
Plummer, Ex parte..... 131
Plunket's Case.....779, 781
Polk v. Rose..... 205
Polk v. State..... 650
Pollen v. Brewer..... 754
Pollett v. Long.....725, 727
Pollock v. Gilbert..... 595
Pomeroy v. Mills..... 546
Poock v. Lafayette B. Assoc..... 159
Pool v. Hathaway..... 555
Pope v. Bank of Albion..... 694
Pope v. Hall..... 225
Port v. Port.....615, 616
Porter v. Douglass..... 404
Porter v. Foster..... 90
Porter v. Hooper..... 508
Porter v. Rockford etc. R. R.... 202
Post v. Bank of Utica..... 558
Potter v. Hall.... 269
Potts v. Smith..... 559
Poultney v. Bachman.....674, 677
Powell v McAshan..... 516

Digitized by Google

	PAGE
Powell v. Young	140
Powers v. Bowman	200
Powers v. Ware	256
Prather v. Ross	458
Pratt v. Hutchinson	150
Pratt v. Phillips	422
Pratt v. Law	139
Premium Fund Assoc.'s Appeal	162
Prescott v. Williams	110
Presley v. Davis	739
Preston v. Leighton	215
Preston v. Perton	556
Price v. Bray	586
Price v. Clevenger	594
Price v. Commercial Bank of Columbus	83
Price v. Green	717
Price v. Johnson	739
Price v. Keyes	727
Price v. Mazange	454
Price v. McDonald	176, 180
Price v. Pickett	514
Prichard v. Martin	383
Prideaux v. Prideaux	600
Pringle v. Dunkley	425, 427
Pritchard v. Citizens' Bank	743
Pritchett v. State	381
Proctor v. Newhall	554
Profilet v. Hall	225
Prop. etc. v. Nashua & Lowell R. R. Co	563
Prop. of Enfield v. Permit	504
Provident Permanent B. Assoc. v. Greenhill	153
Protchett v. Schaeffer	672
Protzman v. Indianapolis etc. R. R. Co	662
Puckett v. Jankins	371
Pulcifer v. Page	172
Pumpelly v. Phelps	725
Pumpelly v. Village of Oswego	650
Purnel v. Daniel	733
Purvis v. Coleman	225
Putnam v. Lewis	125
Putnam v. Ritchie	513
Putnam v. Wise	507, 508
Putney v. Day	749
Pynchon v. Stearns	760
Queen v. Millis	616, 618
Queen v. Rynier	224
Quin v. Lloyd	705
Quinn v. City of Patterson	580
Quinton v. Courtney	223
Radcliff v. Mayor etc. of Brooklyn	568, 571, 638
Ragsdale v. Williams	90
Rains v. McNairy	508
Ralston v. Wood	126
Ramsley v. Leland	225, 226
Ramsay v. Bell	775
Ramsey v. Erie R. Co	706
Ramsey v. Matthews	350
Rand v. Hather	85
Rankin v. Harper	421
Ranlett v. Blodgett	172
Rauney v. Higby	457
Rapelye v. Prince	620
Raver v. Webster	226, 384
Rawlings v. State	168
Ray v. Thompson	122
Raymond v. Johnson	356
Raymond v. Lowell	524, 535
Rayner v. Linthorne	297
Raynor v. Timerson	711
Read v. Amidon	221
Read v. Burley	269
Read v. City of Buffalo	608
Reading v. Weston	558
Red v. Johnson	199
Red Bank Mut. B. & L. Assoc. v. Patterson	161, 165
Redwine v. Gate City L. & B. Assoc	161
Reed v. Northfield	535, 548
Reed v. Sheppard	368
Reeder v. Purdy	756
Rees v. Berrington	68
Rees v. Warwick	452, 456
Reeves v. Goff	582
Regents etc. of Maryland v. Williams	580
Regina v. Allen	265
Regina v. Atkinson	249
Regina v. Ipswich	496
Regina v. Parker	325, 331
Regina v. Rogers	250
Regina v. Watson	98
Regina v. Williams	250
Reid v. Boyd	405
Reid v. Largent	761
Reiff v. Reiff	512, 514
Reilly v. Mayer	165
Reimer v. Stuber	264
Reiser v. William Tell etc. Assoc.	162
Reissner v. Oxley	460
Relief etc. Assoc. v. Longshore	160
Remington v. King	155
Requa v. Rea	368, 600
Rex v. Briggs	290
Rex v. Chalkley	290
Rex v. Davis	232
Rex v. Eccles	325
Rex v. Gill	325, 326, 331
Rex v. Gnosil	782
Rex v. Hamilton	327
Rex v. Helps	518
Rex v. Huggins	100
Rex v. Jones	326, 542
Rex v. Kenrick	327
Rex v. Macclesfield	695
Rex v. Mayor etc. Stratford-upon-Avon	496
Rex v. Rudd	323
Rex v. Russell	542
Rex v. Searing	518
Rex v. Seward	325

Digitized by Google

PAGE

Rex v. Spragg 325
Rex v. Turner 325
Rex v. Whitney 290
Rex v. Wilson 753
Reynolds, Ex parte 448
Reynolds v. Kenyon 693
Reynolds v. Stansbury 705
Rhoades v. Barnes 556
Rhoads v. Hoernerstown 158
Rhodes v. Cousins 171
Rice ads. Burnett 422
Rice v. Manley 726
Rice v. Montpelier 548
Rice v. Shute 340
Rich v. Barterfield 98
Richard v. Brehm 615
Richards v. Richards 649
Richards v. Rose 637
Richardson v. Jones 369, 370, 371
Richardson v. McPherson 348
Richardson v. Mellish 255
Richardson v. Scott 201
Richardson v. Society 674
Richart v. Scott 642
Rickett v. Johnson 516
Ricketts v. Spraker 200
Riddle v. Brown 488
Riddle v. Hill 375
Riddle v. Prop. etc 336
Rider v. Union Rubber Co 696
Ridgely v. Dobson 678
Ridgway v. Ingram 56
Ried v. Belfast 336
Rigby v. Connol 677
Riggs v. Pursell 370, 373
Riggs v. Waldo 294
Riley v. Gerrish 293
Riley v. Griffin 411, 711
Riley v. Riley 455
Riley v. Western Union Tel. Co. 202
Rinard v. Nordyke 204
Ringgold v. Barley 74
Rio Grande R. R. v. Scanlan 204
Ripka v. Pope 608
Ripley v. Sampson 243
Risk v. Delphos B. & S. Assoc. 162, 164
Ritter v. Patch 203
Roberts v. Bourne 399
Roberts v. Westbrook 366
Roberts v. Wyatt 776
Robertson v. McNiel 709
Robertson v. State 619
Robertson v. Wood 466
Robinson v. Gaar 199
Robinson v. Garth 365, 366
Robinson v. N. Y. etc. R. R. Co. 664
Roby v. Phelon 114
Rochester W. L. Co. v. Rochester 535
Rockford etc. R. R. Co. v. Phillips 628
Rockingham Savings Bank v. Portsmouth 199

PAGE

Rodgers v. Evans 589
Rodoncanachi v. Buttrick 294
Roe v. Angevine 705
Roe v. Lincoln Co 201
Roe v. Taylor 455
Rogers v. Beard 726
Rogers v. Boynton 510
Rogers v. Carey 422
Rogers v. Colt 452, 454
Rogers v. Huie 90
Rohrabacher v. Ware 454
Ronse v. Lewis 632
Rood v. Supervisors of Mitchell Co 202
Roosa v. Boston Lumber Co 282
Roosa v. Crist 357
Rose v. Bevan 173
Rose v. Clark 613
Rowe v. Addison 563
Rose v. Story 122
Roseberry v. Huff 204
Rosenplaenter v. Rosenplaenter. 225
Rosenstock v. Formefi 212
Roth v. Miller 454
Rothschild v. Schuberth 693
Rowan v. Lyttle 509
Rowell v. City of Lowell 535, 551
Rowell v. Klein 513
Rowland v. First School District. 199, 201
Royce v. Guggenheim 510
Ruckman v. Pitcher 629, 630, 631
Russell v. Arthur 457
Russell v. Long 737
Russell v. Men of Devon 334, 501
Russell v. Smyth 187
Russell's Appeal 175
Rust v. Cooper 187
Rust v. Low 429
Rust v. Ware 604
Rutherford v. Green 737
Rutherford v. Jones 775
Ryan v. Commissioners of Leavenworth Co 200
Ryan v. Dayton 384
Ryan v. Dunlap 694
Ryder v. Mansell 511

Sabin v. Vermont Cent. R. R. Co. 562, 563
Safford v. Wyckoff 680
Sage v. Harpending 755
Sale v. First Regular Baptist Church 677
Salina B. etc. Assoc. v. Nelson 161
Salmon v. Clagett 138, 186, 187
Salters v. Ralph 718
Saltonstall v. Riley 275
Sampson v. Henry 755, 756
Samson v. Rose 513
Samson v. Thornton 112, 292
Sanborn v. Chamberlin 297
Sanders v. Ellington 512, 513
Sanderson v. Stockdale 173

Digitized by Google

	PAGE
Sands v. Taylor	363
Sandwich v. Fish	82
San Francisco etc. R. R. Co. v. Caldwell	664
Sangston v. Gaither....192,	194
Santo v. State....232, 396, 648,	649
Sarah v. State	290
Sargent v. Ballard	263
Sargent v. Parsons	596
Sartor v. Sartor	455
Sassen v. Clark....221, 222,	225
Satterwhite v. McKie	350
Savage v. Bangor....338,	535
Savage Mfg. Co. v. Armstrong.	83
Savile v. Savile	369
Savings & Loan Soc. v. Austin	199
Sawyer v. Northfield	336
Sayre v. Tompkins	199
Scanlan v. Geddes	274
Schaub v. Clark	387
Schaus v. Manhattan Gas-light Co	706
Schettler v. City of Fort Howard.	201
Schile v. Brokhahus....642,	727
Schneider v. Cochrane	54
School District v. Lynch	459
Schooner Lively	720
Schruyer v. Mayor etc. of New York	706
Schutt v. Baker....725,	726
Scituate v. Hanover	555
Scobey v. Decatur Co	204
Scofield v. City of Lansing...201,	205
Scott v. Avery	675
Scott v. Johnson	706
Scott v. Perkins	90
Scott v. Rogers	725
Scott v. Tyler	424
Scribner v. Allen	199
Scribner v. Beach	755
Scuyler v. Smith	509
Seabrook v. Williams	559
Seagrave v. Pope....149, 161,	164
Seaman v. Hicks	370
Seaman v. Riggins	604
Seaman v. Whitney	144
Searing v. Heavysides	202
Seawall v. City of St. Paul	201
Seaward v. Malotte	454
Second American B. Assoc. v. Platt	154
Seeley v. Peters	429
Seeley v. Town of Westport	201
Seizer v. Mali	694
Selden v. Reliable S. & B. Assoc. 161,	163
Selden v. Washington	129
Sellam v. Janson	755
Sellars v. Johnson	458
Selma & Tennessee R. R. Co. v. Tipton	504
Selma Building & L. Ass'n v. Morgan	203
Semayne v. Gresham	244
Service v. Heermance	586
Settle v. Alison....411,	504
Seymour v. Delancy	140
Shaddon v. Knott	419
Shaefer v. O'Brien....369, 370,	372
Shaffrey v. Workingmen's S. etc. Assoc	161
Shahan v. Herzberg	513
Shann v. Jones	368
Shannon v. Dunn	161
Shannon v. Howard Mut. B. Assoc....153, 161,	164
Shannon v. People	332
Sharman v. Walker	365
Sharp v. Speir	588
Shaw v. Berry	221
Shaw v. Rixby	348
Shaw v. Wilkins	401
Sheldon v. Center School District	205
Sheldon v. Conn. etc. Ins. Co.	79
Sheldon v. Davey	508
Shelton v. Eslava	510
Shepard v. De Barnales	75
Shepard v. Richards	272
Shepard v. Spaulding	516
Shepardson v. Colerain	548
Sherburne v. Jones	512
Sherman v. Benford	201
Sherman v. Globe	114
Sherman v. Leonard	199
Sherman B. Assoc. v. Rock	164
Sherred v. Cisco....634,	640
Sherron v. Wood	583
Sherwood v. Marwick	79
Shiells v. Blackburne	627
Shinn v. Commonwealth	157
Shinn v. Roberts....369, 373,	749
Shipley v. Ritter	734
Shirley v. Jacobs	701
Shober v. Accommodation etc. L. Assoc	163
Shoecraft v. Bailey	226
Shoemaker v. Commissioners of Grant Co	202
Shook v. Blount	456
Shotwell v. Lawson	381
Shute v. Hamilton	718
Sibley v. Hoar	258
Sickles v. Mather	696
Sidener v. Norristown etc. Co.	664
Sidwell v. Evans	59
Silver v. Barnes....150, 160,	162
Silverthorne v. Fowle	458
Sim v. Miles....618,	619
Simpkins v. Rogers	508
Simpkins v. Ward	201
Simpson v. Greenfield B. etc. Assoc	157
Simpson v. Harry	766
Simpson v. Hartopp	269
Simpson v. Margitson	457
Simpson v. Wallace	775
Simpson v. Watts	389

Digitized by Google

PAGE

Sims v. Ross 357
Singerly v. Johnson..... 675
Sinnickson v. Johnson .....
.....573, 574, 578, 579
Sioux City etc. R. R. v. Osceola Co..... 200
Sir John Lade v. Shephard 657
Sixth Ward Building Assoc. No. 5 v. Williams..... 181
Sizer v. Daniels..... 678
Skinner v. Deming..... 504
Slaughter v. Cunningham..... 443
Sleeper v. Bullen 204
Small v. Smith 630
Smart v. Smith..... 511
Smith v. Allt 509, 510
Smith v. Arnold..... 297
Smith v. Bryan..... 749
Smith v. Causey..... 226
Smith v. Clayton 454
Smith v. Faulkner 455, 458, 459
Smith v. Godfrey..... 743
Smith v. Hamilton 711
Smith v. Humphrey 204
Smith v. Kinney 374
Smith v. Lawrence 115
Smith v. Littlefield 509
Smith v. Lovell 555
Smith v. Lowe..... 762
Smith v. Mayor etc. of N. Y.... 649
Smith v. McCann..... 757
Smith v. Mundy..... 510
Smith v. N. Y. Cent. R. R. Co.. 628
Smith v. Osburn..... 202
Smith v. Pettee 724, 725
Smith v. Pilkington..... 164
Smith v. Randall 184
Smith v. Sasser..... 776
Smith v. Smith....232, 548, 555, 556
Smith v. Tatman 348
Smith v. Thompson..... 456
Smith v. Wiley..... 508
Smith v. Wood..... 226
Smithies v. Harrison..... 701
Smithwick v. Ellison..... 515
Smoot v. Eslava..... 226
Smoot v. Mayor of Wetumpka.. 336
Snap v. People 430
Snavely v. Wagner..... 757
Sneed v. Reardon..... 360
Snow v. Eastern R. R. Co..... 215
Snow v. Housatonic R. R. Co... 319
Snow v. Orleans..... 274
Snow v. Union Ins. Co..... 314
Snow v. Warner..... 692
Snow v. Wheeler 675
Snyder v. Kurtz..... 454
Soltan v. De Held..... 188
Somerset County B. etc. Assoc. v. Canman 161
Somerset County B. etc. Assoc. v. Vandervere..... 163
Southerin v. Mendum..... 558
Southerland v. Jackson..... 276

PAGE

South Platte Land Co. v. Com'rs of Buffalo County..... 201
South-western R. R. v. Wright . 201
Southwick v. Smith..... 120
Sparrow v. Farmer..... 164
Spaulding v. Chamberlain 381
Spear v. Smith 715
Speed v. Braxwell..... 486
Speed v. Hann 559
Spencer v. Trafford 226
Spencer v. White..... 76
Spooner v. Rowland..... 609
Spragg v. Shriver..... 469
Sprang v. Schneider..... 366
Spring Garden Assoc. v. Tradesmen's Loan Assoc..... 163
Springville etc. L. Assoc. v. Raber..... 163
Spruill v. Moore..... 739
Stack v. Beach..... 294
Stall v. Catskill Bank..... 685
Stamper v. Griffin..... 466
Stanton v. Leland.... ....222, 225
Staple v. Spring..... 92
Staples v. Parker 718
Starbird v. Barrods..... 725
Stark v. Barrett..... 454
Starr v. Peck.....610, 613, 619
State v. Able..... 440
State v. Allen..... 769
State v. Baltimore & Ohio R. R. Co..... 184
State v. Baltimore etc. R. R..... 232
State v. Baltimore etc. Steam Co. 226
State v. Boll..... 471
State v. Brown..... 590
State v. Calhoon..... 434
State v. Carlisle..... 440
State v. City of Passaic..... 589
State v. City of Perth Amboy.589, 590
State v. City of St. Louis..... 482
State v. Coleman..... 586
State v. Cooper..... 342
State v. Covington..... 756
State v. Cox..... 434
State v. Creighton..... 434
State v. Davis..... 769
State v. Fleming..... 469
State v. Fourth N. H. Turnpike. 501
State v. Freeman..... 434
State v. Great Works etc. Co.... 579
State v. Greenville B. & S. Assoc. 159
State v. Hamer..... 340
State v. Harman..... 440
State v. Hewett.....327, 331
State v. Hodgskins..... 116
State v. Hornes..... 519
State v. Houser..... 441
State v. Inhabitants of Trenton.. 589
State v. Jackson..... 455
State v. Jersey City 590
State v. Johnson..... 252
State v. King..... 769
State v. Lash..... 62

Digitized by Google

	PAGE
State v. Lines	367, 368
State v. Marler	650
State v. Mayor etc. of Orange	590
State v. McIntire	469
State v. Miller	433
State v. Mobile	545
State v. Moore	507, 513, 770
State v. Murphy	266, 435
State v. Nixon	253
State v. Oberlin B. & L. Assoc.	158, 159
State v. Parker	332
State v. Parkville etc. R. R.	199
State v. Ray	355
State v. Rickey	329
State v. Ripley	327
State v. Roberts	328
State v. Robinson	519
State v. Rose	471
State v. Smith	651
State v. Spencer	646, 648
State v. Squire	434
State v. Scott	290
State v. Sexton	342
State v. Stout	342
State v. Thurston	354
State v. Town of Union	589
State v. Trexler	780, 782
State v. Union Merchants' Exchange	675
State v. Vaughn	433
State v. Weaver	340
State v. Whitfield	753
State v. Williams	672, 675
State v. Winkley	117
State v. Woody	769
State v. Woram	87
State v. Young	232, 649
State of Illinois v. Delafield	686
State R. R. Tax Cases	199, 203
State Sav. Assoc. v. Kellogg	155
Staylor v. Ball	129
Steamboat Charlotte v. Hammond	559
Steamer Sparkle	605
Stearns v. Atlantic & St. L. R. R. Co	106
Stearns v. Marsh	705
Stearns v. Sampson	508
Stebbins v. Challiss	201
Stebbins v. Jennings	501
Steckert v. City of East Saginaw	204
Stedman v. McIntosh	509
Steele v. Burkhardt	239
Stein v. Burden	93, 94
Stein v. Indianapolis etc. Assoc.	162
Steines v. Franklin Co	199
Stephens v. Ely	586
Stephens v. Hollister	454
Stephens v. Magruder	371, 372, 373
Sternfels v. Clark	725, 727
Sterns v. Sampson	755
Stetson v. Faxon	96
Steuart v. Meyer	201
Stevens v. Brown	559
Stevens v. Corn Exchange Bank	691
Stevens v. Dedham Institution for Savings	242
Stevens v. Muir	559
Stevens v. Prop. etc	395
Stevenson v. Mudgett	85
Stewart v. Doughty	513
Stewart v. Parsons	262
Stiles v. Laird	545
Stiles's Appeal	158, 159
Stimson v. Mead	369, 370
St. James Club, In re	678
St. John v. Bumpstead	454
St. John v. Quitzow	511
St. Johns v. Skinner	705
St. Joseph etc. B. Assoc. v. Thompson	159, 162
St. Louis & S. E. R. R. Co. v. Valirius	319
Stoddard v. Treadwell	706
Stoddard v. Waters	509
Stoddert v. Ward	200
Stockton v. Frey	705
Stockwell v. Marks	515
Stokes v. Saltonstall	221
Stone v. Knight	261
Stone v. Lothrop	457
Stoney v. American Life Ins. Co.	680
Storey v. Robinson	269
Stowell v. Flagg	395
Streeter v. Streeter	454
Striker v. Kelly	480
Studwell v. Ritch	429
Stultz v. Dickey	515
Stump v. Henry	757
Stuyvesant v. Dunham	712
Sublett v. Bedwell	396
Sullivan v. Carberry	755
Sullivan v. McLenans	422
Sullivan v. Scripture	239
Summers v. Roos	419
Summerlin v. Hesterly	763
Sumner v. Hicks	195
Sumner v. State	651
Sumner v. Williams	108
Sunbolf v. Alford	269
Supervisors etc. of Galway v. Stimson	338
Supervisors of Du Page Co. v. Jenks	200, 202, 205
Supp v. Kensing	508
Surtees v. Wotherspoon	616
Susquehanna Bank v. Supervisors of Broome Co	199
Sutton v. Clark	568, 570, 571
Sutton v. Madre	759
Sutton's Hospital	501
Swann v. Wilson	511
Swans, Case of	518
Swift v. Cobb	554
Swift v. Moseley	121
Swinney v. Beard	202
Sydnor v. Roberts	763

Digitized by Google

PAGE
Symmes v. Brown..... 459
Symonds v. Hall..... 508

Taber v. Huston..... 226
Talbot v. Hill.....512, 513
Tallassee Mfg. Co. v. Glenn..... 199
Tallassee Mfg. Co. v. Spigener.. 203
Tally v. Reed..... 757
Tanner's Appeal..... 162
Tarleton v. Baker..... 632
Tarleton v. Johnson..... 381
Tate v. Blackburne..... 516
Taunton v. Castor.....486, 754
Taylor, In the Matter of..... 613
Taylor v. Benney..... 114
Taylor v. Bradley..... 725
Taylor v. Cole..... 754
Taylor v. Cozart..... 763
Taylor v. Edson..... 674
Taylor, Jackson ex dem., v. Cullum..... 341
Taylor v. McNutt..... 459
Taylor v. Monnot..... ....221, 225
Taylor v. Richards..... 705
Taylor v. Snyder..... .....129, 316
Taylor v. State..... 290
Taylor v. Swett..... .....117, 618
Taylor v. Thompson..... 203
Telfair v. Howe..... 739
Temple Grove Seminary v. Cramer 201
Templeman v. Biddle..... 515
Ten Eyck v. Delaware & Raritan Canal Co.....568, 576, 577, 578
Terbell v. Downer..... 608
Terry v. Shively..... 455
Teyn, In re..... 696
Thatcher v. Dusenbury..... 199
Thayer v. Boston..... 579
Thayer v. Clark..... 622
Thickstun v. Howard 221
Thomas v. Babb..... 488
Thomas v. Eilmaker..... 677
Thomas v. Garvin.....597, 774, 775
Thomas v. Thomas 454
Thompson v. Adams....672, 675, 676
Thompson v. Bondurant..... 450
Thompson v. Bridgewater 518
Thompson v. McManama..... 366
Thompson v. Powning..... 65
Thompson v. Reed..... 696
Thompson v. Rose..... 90
Thompson v. Williams..... 732
Thomson v. MacGregor..... 622
Thorne v. McVeagh..... 726
Thornton v. Fairfax.....372, 368
Thorpe v. Rutland etc. R. R. Co. 580
Thurber v. Martin.....93, 98
Thurlow v. Commonwealth..229, 231
Thursby v. Myers 429
Thwing v. Washington Ins. Co... 314
Ticonic Bank v. Bagley 83
Ticonic Bank v. Stackpole..... 84
Tiernan v. Jackson..... 143
Tifft v. Barton..... 102

PAGE
Tifft v. Walker..... 555
Tillotson v. Preston..... 258
Tillotson v. Smith..... 94
Tinsman v. Belvidere etc. R. R. Co..... 567
Tittle v. Bonner... 380
Todd v. Emly..... 678
Todd v. Jackson..... .....508, 755
Todd v. State Ins. Co..... 314
Tolar v. Tolar..... 742
Toledo etc. R. R. v. City of Lafayette..... 202
Tome v. Merchants' etc. Building & L. Co..... 205
Tonawanda R. R. Co. v. Munger 103, 106, 430
Towle v. Blake..... 84
Towle v. Hoit..... 558
Towle v. Leavitt..... 692
Town of Ottawa v. Walker..... 202
Townsend v. McDonald.....92, 94
Townshend v. Simon.....369, 371
Towson v. Havre de Grace Bank 222
Trabue v. Mays 65
Traders' Ins. Co. v. Farwell. ... 200
Treat v. Lord..... .....226, 384
Trenton Water Power Co. v. Raff 580
Tribble v. Frame..... 755
Trieber v. Burrows..... .....222, 225
Tripp v. Cook.....601, 603
Trotter v. Williams..... 736
Trow v. Vermont Cent. R. R. Co. 106, 551
Troy v. Cheshire R. R..... ....256, 260, 270, 546
Troy v. Norment..... 733
True v. Plumley..... 64
Truesdell's Appeal..... 200
Trustees of the Presbyterian Society of Waterloo v. Auburn & Rochester R. R. Co..... .....656, 657, 659, 661
Tucker v. Atkinson..... 768
Tucker v. Moreland..... 443
Tull v. David..... 297
Turley v. Tucker..... 772
Turner v. Beale..... 586
Turner v. Buckfield..... 70
Turner v. Hall..... 466
Turner v. Martin 696
Turner v. Meymott... .....486, 754
Turnpike Co. v. McCarty..... 83
Turpin v. Public Administrator. 619
Tuttle v. Brown..... 59
Twombly v. Monroe..... 460
Tyler v. Young..... 749
Tyndale v. Hemming..... 306
Tyson v. Watts..... 137

Uhrig v. City of St. Louis..... 482
Underwood v. Parks.....701, 702
Underwood v. Simonds..... 293
Union Bank Assoc. v. Masonic Hall Assoc.....154, 160

Digitized by Google

	PAGE
Union Bank v. Heyman	455
Union Bank v. Knapp	696
Union Bank v. Willis	292
Union Institution for Savings v. Boston	348
Union M. & M. Co. v. Daugberg.	264
Union Pacific R'y v. Donnellan	201
Union Pacific R. R. v. Lincoln Co	200, 203
Union Pacific R. R. v. McShane.	201
Union Trust Co. v. Weber	202
United States v. Cruikshank	332
United States v. Illinois etc. R. R. Co	664
United States v. Murphy	215, 217
United States v. Shaw	457
United States v. Wiltberger	232
United States B. & L. Assoc. v. Silverman	154, 156
United States Ins. Co. v. Shriver.	175
Usher v. Moss	510
Van Amringe v. Barnett	664
Vance v. Campbell	425
Vance v. Foster	370, 374
Van Cott v. Supervisors of Milwaukee Co	203
Vandevere v. Delaware & Raritan Canal Co	568
Van Doren v. Everitt	512, 513, 515
Van Doren v. Mayor etc. of N. Y	199, 200
Van Gieson v. Van Gieson	700
Van Leuven v. Lyke	102, 103
Vann v. Fayetteville B. & L. Assoc.	161
Van Ness v. Fisher	725, 727
Van Ness v. Pacard	515
Vanover v. Davis	205
Van Rensselaer v. Kidd	199, 200
Van Tuyl v. Van Tuyl	616
Van Vactor v. Walkup	460
Van Valkenburg v. Rogers	457
Van Vliet v. Jones	559
Van Wyck v. Howard	225
Van Wyck's Case	222
Vaughn v. Phebe	504
Vaughn v. Tracy	472
Veazie v. Dwinel	98
Venable v. Baptist Church	672
Venable v. McDonald	454
Victoria etc. Soc., In re	158
Vicksburgh etc. R. R. Co. v. Patton	430
Vieley v. Thompson	202
Village of Nunda v. Village of Chrystal Lake	202
Volger v. Ray	678
Vosburgh v. Teator	711
Vose v. Mortin	484
Voshell v. Hynson	172
Vrooman v. Lawyer	101
Wade v. City of Newbern	749
Wade v. Kalbfleisch	619
Wager v. Troy etc. R. R. Co	662
Waggoner v. Jermaine	94
Wagner v. Corkhill	726
Wagner v. Egleston	454
Waite v. Gilbert	258
Wakefield v. Lithgow	301
Walker v. British Guarantee Assoc	157
Walker v. Dunspaugh	711
Walker v. Harris	232
Walker v. Lovell	84, 85
Walker v. Shepardson	190
Wallace v. Fletcher	501
Waller v. Long	349
Waller v. Thomas	678
Walse v. Peet Valve Co	319
Walsh v. Mathews	423, 426
Walsh v. Porterfield	223
Walter v. Haynes	301
Walter v. Riehl	153
Walters v. Pfeil	638
Wann v. McNulty	705
Ward v. Jewett	718
Ward v. N. Y. etc. R. R. Co.	725, 726
Warden v. Supervisors of Lafayette Co	200
Ware v. Bradford	361
Ware v. Cartledge	65
Warlick v. Peterson	455
Warner v. Commonwealth	232
Warner v. Miltenberger	454, 455, 460
Warren v. Aller	508
Warwicke v. Noakes	301
Washburn v. Hale	243
Washburn v. Jones	223
Washington B. & L. Assoc., State ex rel. v. Hornbacher	163
Washington Cemetery v. Prospect Park etc. R. R. Co	663
Wason v. Rowe	454
Waterbury Savings Bank v. Lawler	199, 201
Waters v. Dashiell	130, 362
Waters v. Riggin	195
Waters Peirce Oil Co. v. City of Little Rock	201
Watford v. Forester	455
Watkins v. Holman	411
Watkins v. Peck	501
Watkins v. Workingmen's B. & L. Assoc	154, 163
Watkins v. Worthington	179
Waterman v. Johnson	289
Watson v. Bane	175
Watson v. Birch	599
Watson v. Blaine	459
Watson v. Duykinck	210
Wau-kon-chaw-neek-kaw v. U. S.	434
Way v. Butterworth	294
Wayne v. Mayor etc. of Savannah.	204
Weber v. City of San Francisco.	204
Webster v. Hale	737
Webster's Case	434
Wedge v. State	232

Digitized by Google

	PAGE
Weeks v. State	354
Wehle v. Butler	705, 706
Wehle v. Haviland	705, 725
Weisenger v. Taylor	225
Weiss's Appeal	163
Welch v. Lawson	262
Wellborn v. Weaver	418, 419
Wells v. Canton Co	182
Wells v. Dayton	199, 203
Wells v. N. Y. Cent. R. R. Co	628
Welsh v. Dusar	454
Welton v. Adams	691
West v. Ballard	200
West Cambridge v. Lexington	62
West, Roe ex dem., v. Davis	66
Western etc. Road Co. v. Cox	725, 727
Western Maryland R. R. v. Patterson	205
Westervelt v. Smith	621
Westfield Bank v. Coonen	692
West Winsted etc. Assoc. v. Ford	161, 165
West Winsted etc. Assoc. v. Rice	161, 165
Wetmore v. Tracy	543
Wetterwulgh v. Knickerbocker B. Assoc	155
Wharton v. School Directors	199
Wheatley v. Crisman	94
Whedbee v. Stewart	195
Wheeler v. Dascomb	302
Wheeler v. Schroeder	459
Wheelock v. Wheelwright	119
Whipple v. Blackington	242
Whipple v. Farrar	757
White v. Brownell. 672, 673, 675,	676
White v. Flannigain	733
White v. Maynard	247
White v. Mechanics' B. Assoc	161
White v. Miller	725
White v. Nichols	664
White v. Stender	203
White Sulphur Springs Co. v. Robinson	199
White v. Wilkinson	315
White v. Wilson	600
White v. Winnissimmet Co	236
Whitcomb v. Vermont Cent. R. R. Co	562, 563
Whiteford v. Burckmyer	194
Whiteford v. Munroe	454
Whiteman v. Wilmington etc. R. R. Co	396
Whitfield v. Rogers	190
Whiting v. Brastow	516
Whiting v. Mayor etc. of Boston	199
Whitlock v. Heard	121
Whitman v. Taylor	474
Whitmarsh v. Cutting	512
Whitney v. Clarendon	259, 705
Whitney v. Sweet	756
Whitridge v. Rider	129
Whittaker v. City of Janesville	204
Whittelsey v. Kellogg	454
Wickham v. Freeman	755
Wiggin v. Mayor etc. of N. Y	199
Wiggins v. Armstrong	173
Wight v. Shelby	280
Wigmore's Case	618
Whitmarsh v. Cutting	514
Wilborn v. Whitfield	510
Wilde v. Cantillon	486, 755
Wilkerson v. Walters	199
Wilkins v. Earle	226
Wilkins v. Wells	378
Wilkinson v. Tyler	91
Willard v. Harvey	555
Willets v. Van Alst	369, 374
Willey v. Conner	514
Williams v. Birch	706
Williams v. Blakey	368, 370, 372
Williams v. Cowden	423, 427
Williams v. Everett	143
Williams v. Garrison	511
Williams v. Lanier	760
Williams v. Lines	367, 368
Williams v. Nelson	92, 94
Williams v. N. Y. Cent. R. R. Co	663
Williams v. Peinny	202
Williams v. People	649
Williams v. Walbridge	685
Williams v. Waters	454
Williams v. Williams	145
Williams v. Wood	457, 458
Williar v. Baltimore Butchers's L. etc. Assoc	162
Williard v. Ramsberg	180
Willis v. Bernard	282
Willoughby v. Willoughby	295
Willson v. Whitfield	455
Wilson v. Brett	627
Wilson v. Campbell	375
Wilson v. Carson	144
Wilson v. Comm'rs of Hamilton Co	200
Wilson v. Davol	622
Wilson v. Halpin	225
Wilson v. Hooper	90
Wilson v. Little	242
Wilson v. Mayor etc. of N. Y	203
Wilson v. McCullough	535
Wilson v. State	340
Wilson v. Weber	203
Wilson v. Williams	685
Wimer v. Obear	365, 367
Winchell v. Stiles	555
Wincher v. Shrewsbury	90
Winchester v. Baltimore etc. R. R. Co	176, 178
Winchester B. Assoc. v. Gilbert	161
Windsor v. Bandel	164
Winkley v. Hill	559
Winne v. Elderkin	705
Winship v. Enfield	536, 546
Winslow v. Leonard	90
Winston v. Franklin Academy	510

Digitized by Google

	PAGE
Winston v. Westfeldt	622
Winter v. Peterson....276, 545,	546
Winterbottom v. Wright	627
Wintz v. Morrison	631
Witt v. Mayor etc. of N. Y	508
Wittenbrock v. Bellmer	160
Wittman v. Concordia B. Assoc.	156
Wolbach v. Lehigh B. Assoc. 159,	162
Wolcott v. Melick.....190,	664
Wolcott v. Van Santvoord	607
Wolfe v. Dowell	422
Wolford v. Beazely	747
Wonson v. Sayward	559
Wood v. Helmer	204
Wood v. Ingraham	419
Wood v. Lafayette	711
Wood v. Leadbitter	486
Wood v. Mann.....369,	370
Wood v. Waterville	530
Woodling v. Knickerbocker	460
Woodman v. Chesley	455
Woodman v. Hubbard.....90,	121
Woodman v. Tufts	93
Woods v. State	232
Woodward v. Bullock	604
Woodward v. Harbin	705
Woodward v. Moss	221
Woollen v. Hillen	181
Worcester v. Great Falls M. Co. 262, 724,	725
Worcester v. Wilbraham	74
Work v. Hunter	361
Worrall v. Munn	749
Worth v. Commissioners of Fayetteville	203
Worthen v. Badgett	203
Wright v. Dannah	297
Wright v. Irwin	609
Wright v. Malden & M. R. R. Co.	239
Wright v. South-western R. R..	201
Wright's Appeal.....371,	374
Wyandotte etc. Bridge Co. v. Comm'rs of Wyandotte Co	205
Wyatt v. Barwell	176
Wyatt v. Harrison	638
Wyman v. Farrar	98
Wyman v. Hurlbut	94
Wyman v. Penobscot & K. R. R. Co	106
Yarmouth v. North Yarmouth..	580
Yates, In re.....369, 370,	371
Yates v. Donaldson.....124,	125
Yeates v. Reed	705
Young v. Adams	443
Young v. Harris	386
Young v. Rummell	705
Young v. State Bank	545
Youngblood v. Sexton	203
Youse v. Norcoms	243
Zachary v. Pace	90
Zemp v. Wilmington etc. R. R. Co.....81,	551
Zimmermann v. Marchland	11
Zorger v. Township of Rapids	99

Digitized by Google

AMERICAN DECISIONS

VOL. LXIX.

Digitized by Google

Digitized by Google

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MAINE.

LEWISTON FALLS BANK *v.* LEONARD.

[43 MAINE, 144.]

CERTIFICATE OF PROTEST BY NOTARY IS SUFFICIENT EVIDENCE OF NOTICE OF DISHONOR to the indorser of a note, where it states that the notary exhibited the note at the promisors' place of business and demanded payment, and was answered by the person in charge that the promisors had left no funds there to pay it, and that the note remaining unpaid, he duly notified the indorsers by written notices sent them by mail at the request of the holder, the time limited and grace having expired.

NOTICE TO INDORSER IS PRESUMED TO CONTAIN FACTS STATED IN CERTIFICATE of protest of the notary sending it, at least in substance.

NOTICE OF DISHONOR OF NOTE SENT TO INDORSER'S FORMER RESIDENCE, where he has changed his residence, is nevertheless sufficient if he has held himself out to the public by his conduct as still residing at the former place, and has thereby led the holder to believe that such was the fact.

ASSUMPSIT against the indorser of a note. The facts appear from the opinion.

Morrill and Fessenden, for the plaintiffs.

Record and Walton, for the defendant.

By Court, GOODENOW, J. This is an action of *assumpsit* against the defendant, as indorser of a promissory note, of which the following is a copy:

"$5,000. BOSTON, March 12, 1856.

"Four months after date, we promise to pay to the order of Rufus K. Page, five thousand dollars, value received, for Maine Carpet Company. E. E. RICE, Treasurer.'

This note was indorsed by Page, in these words: "Pay to the order of A. Leonard," and by the defendant indorsed in

Digitized by Google

blank; also indorsed by "Alb't H. Small, cash'r" in these words. "Pay C. H. Warren, cashier, or order."

The plaintiffs offered in evidence the note, also the notarial certificate of protest, and notices of non-payment of the note, signed by A. Bates, notary public, dated at Boston, July 15, 1856.

The defendant contends that the notice which the plaintiffs have undertaken to prove, if duly sent or received, is defective and insufficient; that it does not state that the note has been dishonored, or state facts from which its dishonor might reasonably have been inferred.

The notary states what he did do; that he exhibited the note at the place of business of the promisors in Harrison avenue, and demanding payment thereof, was answered by the person in charge that the promisors had left no funds there to pay said note, and that said note remaining unpaid, he duly notified the indorsers by written notices sent them by mail, etc.; and that this was done at the request of the cashier of the Bank of Commerce, on the fifteenth day of July, 1856, the time limited and grace having expired.

It may be reasonably inferred that he stated substantially these facts in the written notices which he sent. By the revised statutes, c. 44, sec. 12, the protest, duly certified by a notary public, under his hand and official seal, shall be legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or indorser, in any court of law. In *Bradley* v. *Davis*, 26 Me. 50, Mr. Chief Justice Whitman says: "It is not stated in the statute that such certificate shall be conclusive evidence of those facts;" all that was stated in the notarial certificate in this last-named case, after stating the demand, etc., was: "I then notified the maker and indorser of the non-payment of said note;" and the court say: "We have no reason to doubt that the notice contained all that it was essential that a notice should contain; and that it contained information that the note had been protested for non-payment." In the case at bar, if the notice had, in part, been deficient in any important respect, it might easily have been proved by the defendant, as his daughter, Mrs. Hill, stated in the deposition taken by him in this case that she had the notices in her house at the time the deposition was given. This case differs from those cited, where the notices were actually produced, or the exact terms of them proved or admitted, by which their inefficiency was conclusively established; as in the case of *Gilbert* v. *Dennis*, 3 Met. 506 [38 Am. Dec. 329]; *Pinkham, Ex'x*, v. *Macy*, 9 Id. 174.

Digitized by Google

The next and most important question in this case is, Was the notice to the defendant rightly directed and sent to him at Hallowell? He contends that his residence at the time the note was protested was in the city of New York, and that notice should have been sent to him at that place, instead of Hallowell.

There is nothing on the note to indicate the residence of the defendant. It is dated at Boston. Rufus K. Page was a prominent business man in Hallowell. The defendant had been for many years a resident of Hallowell, a prominent business man there, and a director and president of the Hallowell bank. The plaintiffs were in Maine.

The defendant contends that in January, 1853, he transferred his residence from Hallowell to New York, and that he has had no residence in Hallowell since that time, but that his residence has been in the city of New York.

When the note was negotiated by Alden Sampson, he represented to the plaintiffs that the defendant was president of the Bank of Hallowell, in Hallowell.

Daniel Holland, president of the Lewiston Falls Bank, testified that at the time the note was discounted he learned from E. E. Rice that the defendant was a prominent business man in Hallowell, and always had been, and was president of the Bank of Hallowell.

The defendant testified that he removed from Hallowell in the month of January, 1853, to the city of New York, and that he has ever since had his residence there. A. S. Washburn, cashier of the Bank of Hallowell, testified that there had been no new bills issued from the Bank of Hallowell since 1854; that he "thought there were bills of that bank dated as late as the winter of 1854, over the signature of the defendant, and issued by witness as cashier; . . . . that the defendant had signed some bills of the Bank of Hallowell since he had been in New York."

By the records of the Bank of Hallowell, it appears that at the annual meeting of the stockholders, held October 9, 1855, the defendant was chosen one of the directors of the bank, and is the first person named on the list, and the second person named is R. K. Page. In January, 1853, the defendant was elected president of the Bank of Hallowell, by the directors, and not since. He held the office of director of the bank until October, 1856. He never made any formal resignation as director at any time. He was not re-elected a director in October, 1856.

Digitized by Google

Thomas W. Newman testified that he was and had been postmaster at Hallowell since the first of May, 1853; that the defendant has had a box in the post-office at Hallowell, which has been marked and known as the box of Artemas Leonard during all that time; that all letters directed to Artemas Leonard or Mrs. Hill, his daughter, have been put into that box; that the bills have been made out in the name of the defendant, and have been paid by Mr. A. S. Washburn, cashier of the bank.

By the statute of this state, on banks, chapter 77, section 4, it is provided that none but a stockholder in such bank, and a citizen of and resident in the state, shall be eligible by the stockholders to the office of director. Men are presumed to know the law; and it is not to be presumed that the stockholders of this bank and the defendant, or either of them, intended to violate it in their management of this institution. Will it be said that he was chosen a director of the bank after his removal from the state, without his knowledge and consent? This to us seems improbable. Besides, it is satisfactorily proved that he acted as president of the bank, and signed bills as such after his alleged removal to New York. Every bill signed by him and put in circulation after January, 1853, was notice to the public that at the date of the bill his residence was in this state; and it is not contended that he had a residence at any other place in the state if he had none in Hallowell. The defendant does not state that he has, or ever had, a place of business in New York, that he ever kept house there, or voted or paid taxes in that city. He might have had a temporary residence there for the purpose of avoiding taxation in Hallowell; or he might have supposed by residing in New York he could give a wider circulation to the bills of the bank; or he may have desired to have the place of his residence uncertain and equivocal, in order to avoid his responsibility as an indorser.

Notwithstanding his actual residence was in the city of New York at the time he indorsed the note in suit, and at the time it became due, yet if he held himself out to the public, or allowed others to hold him out to the public, as a resident of Hallowell, and thereby deceived the plaintiffs, and led them to alter their course, he is in the same category with one who holds himself out as a partner of others when he is not such in fact. He is estopped to deny the fact.

We cannot avoid the conclusion that if the defendant did not receive due notice of the protest for non-payment of the note in

Digitized by Google

suit it was because he did not wish to receive such notice. It was his own fault.

The notice was duly deposited in the post-office, directed to him at Hallowell. It came into the hands of his daughter, Mrs. Hill. In answer to the question, "Since 1853, have any letters been received at the Hallowell post-office for your father, and if so, what became of them?" she says: "I have taken some of them and sent them to him; some I have taken and have not sent them." Subsequently the inquiry is made of her, "What kind of letters was it that you received and did not forward to your father?" She answered: "Notices from the Lewiston Falls Bank. I have them in the house now." She says subsequently: "My father did not ask me to send them." She does not say that she was not instructed by her father not to send them. It would have been very natural for her to have forwarded the notices to her father after having ascertained what they contained, unless she had, in some way, intimations from him not to do so, but to retain them. We are to draw such inferences in this case as a jury might draw. It seems to us a question of fact rather than a question of law. The fact seems to be established that the defendant has actually resided in the city of New York most of the time since January, 1853, till the present. That since that time he has held himself out, or allowed others to hold him out, as a resident in this state, by permitting himself to be chosen a director of the Bank of Hallowell, and president of the same, and acting as such by signing its bills. That the plaintiffs were led by these circumstances communicated to them to believe that his residence was in Hallowell at the time the note in suit was indorsed, and at the time it was protested for non-payment, and that they acted accordingly. They might well have supposed, from all the facts and circumstances known to them, that his permanent residence was still in Hallowell, and that a notice directed to him at Hallowell would be more likely to reach him through the post-office than if directed to him at the city of New York.

We are of opinion that the plaintiffs have used due diligence in order to give the defendant notice of the non-payment of the note when it became due and payable, and that, according to the agreement of the parties, a default must be entered. If it should be supposed that proof of depositing notices in the post-office directed to the defendant at Hallowell, and received by his daughter, Mrs. Hill, is not equivalent to actual notice, and therefore does not sustain the allegation in the writ of actual

Digitized by Google

notice, the plaintiffs may have leave to amend by alleging the use of due diligence on their part in order to give notice.

MAY and DAVIS, JJ., concurred in the result.

NOTARIAL CERTIFICATE OF PROTEST AS EVIDENCE OF NOTICE: See *Schneider* v. *Cochrane*, 61 Am. Dec. 204; *McAllister* v. *Smith*, 65 Id. 651; *Ticonic Bank* v. *Stackpole*, 66 Id. 246, and notes thereto.

O'DONNELL *v.* LEEMAN.

[43 MAINE, 158.]

MEMORANDUM SIGNED BY AUCTIONEER AT TIME OF SALE, stating the terms of sale and the parties thereto, is sufficient, within the statute of frauds, to validate a sale of realty, the auctioneer being deemed the agent of both parties.

MEMORANDUM BY AUCTIONEER MUST SHOW MATERIAL CONDITIONS OF CONTRACT, either by itself or by reference to some other paper, upon a sale of realty, or no action will lie thereon, either at law or in equity.

MEMORANDUM OF AUCTIONEER NOT SHOWING TERMS OF PAYMENT upon an auction sale, except by stating "one third cash down," is not sufficient within the statute of frauds.

EVIDENCE OF HANDBILLS AND NEWSPAPER NOTICES OF SALE TO AID MEMORANDUM, where it fails to state the terms of payment, is inadmissible.

MONEY PAYABLE IN REASONABLE TIME CANNOT BE DIVIDED at the election of the payor so as to make it payable at different times, reasonable time being indivisible.

ACTION for breach of contract; exception to the rejection of evidence, and order of nonsuit. The opinion states the facts.

C. W. Goddard and P. R. Guiney, for the plaintiff.

J. Goodenow, for the defendant.

By Court, MAY, J. The declaration in this case alleges a contract in writing of a sale from the defendant to the plaintiff, of a dwelling-house, at auction, upon certain specified terms and conditions. According to the contract alleged, the price to be paid was twelve hundred dollars; one third cash down, and the residue in equal payments, in one and two years. The memorandum of sale, as contained in the auctioneer's book, is as follows:

"October 9, 1855. This day sold W. H. Leeman house and land on Bartlett street, in Lewiston; was struck down to Patrick O'Donnell for one thousand two hundred dollars, one third cash down. HAM BROOKS, Auctioneer."

Digitized by Google

That the auctioneer, in cases of such sales, whether of real or personal estate, is the agent of both parties; and that a memorandum signed by him at the time of the sale, stating the particulars of the contract, and the parties thereto, is a sufficient signing within the statute of frauds—is well settled: *Emmerson* v. *Heelis*, 2 Taunt, 46; *McCoombs* v. *Wright*, 4 Johns. Ch. 666; Chit. Con. 305; *Cleaves* v. *Foss*, 4 Me. 1; *Inhabitants of Alna* v. *Plummer*, Id. 258.

It is equally well settled that unless there be a memorandum showing, within itself, or by reference to some other paper, all the material conditions of the contract, no action can be maintained upon such contract, either at law or in equity. Sales at auction are now held to fall within the statute, as much so as other sales: *Pike* v. *Balch*, 38 Me. 302 [61 Am. Dec. 248]; *Merrill* v. *Clason*, 12 Johns. 102; *Bailey* v. *Ogden*, 3 Id. 309 [3 Am. Dec. 509]; *Morton* v. *Dean*, 13 Met. 385; and it cannot well be doubted that evasions of this statute, made as it was for the suppression of perjury, ought not to be encouraged.

The memorandum in this case contains no reference to the condition of the payment, except in the words "one third cash down." It does not appear from it when the residue was intended to be paid. It was attempted at the trial to show the terms of payment to be as alleged in the writ, by the introduction of certain handbills and newspaper notices signed by the defendant, and published by him just before the sale, and which, it is said in argument, were exhibited at the time of the sale, and in which the terms of the sale, it is said, were fully stated. The evidence offered by the plaintiff to connect the handbills and notices with the memorandum, and to explain it, was excluded by the presiding judge.

That such extrinsic evidence was inadmissible, the following authorities clearly show: 2 Parsons on Cont. 298; *Hinde* v. *Whitehouse*, 7 East, 558; *First Baptist Church in Ithaca* v. *Bigelow*, 16 Wend. 28; *Inhabitants of the First Parish in Freeport* v. *Bartol*, 3 Me. 340.

It is said, however, that if such evidence is not admissible, then the contract upon its face, as stated in the memorandum, stipulates for the payment of one third cash down, and the residue in a reasonable time; and that if so, the notes tendered in this case, having been made payable in one and two years, should be deemed a compliance with the terms of the contract in this respect. Considering the nature and value of the estate to be conveyed, and that long credit is often, if not usually given in

Digitized by Google

such sales, perhaps a somewhat extended time of payment might be regarded as reasonable; but we know of no rule by which money that is made payable in a reasonable time can, at the election of the party paying, be divided so as to make it payable at different times and in different years. A reasonable time is indivisible; and the party to whom the money is payable, under such a contract, cannot be required to take it in separate payments and at separate times.

The auctioneer's memorandum in this case failing to show any such contract as is alleged, so far as relates to the terms of payment, it becomes unnecessary to decide upon its sufficiency in other respects, or upon the admissibility of the other evidence offered. According to the agreement of the parties, the nonsuit must stand.

STATUTE OF FRAUDS APPLIES TO AUCTION SALES: See *Pike* v. *Balch*, 61 Am. Dec. 248, and notes.

AUCTIONEER'S MEMORANDUM OF SALE, SUFFICIENCY OF, UNDER STATUTE OF FRAUDS: See *Pike* v. *Balch*, 61 Am. Dec. 248, and notes.

MEMORANDUM MUST SHOW WHOLE CONTRACT upon its face, or in connection with some paper therein referred to, in order to be valid under the statute of frauds: *Doty* v. *Wilder*, 60 Am. Dec. 756. To the same effect, see *Ridgway* v. *Ingram*, 50 Ind. 148, citing the principal case. The memorandum must show the price as well as the other terms: *Ide* v. *Stanton*, 40 Am. Dec. 698. See also *Ives* v. *Hazard*, 67 Id. 500.

RANDALL v. THORNTON.

[43 MAINE, 226.]

EXPRESS WARRANTY IN SALE OF CHATTELS MAY BE MADE WITHOUT USING WORD "WARRANT," or any precise form of expression, by any clear and distinct affirmation of a fact as to the essential qualities of the article, made as an inducement to the sale, and upon faith of which the vendee purchases.

AFFIRMATIONS OF QUANTITY AND QUALITY PENDING SALE ARE WARRANTIES if they are made with a view to bring about a sale, and have that effect; but they must constitute an essential inducement to the purchase.

WARRANTY IS NOT CREATED BY DESCRIPTIVE WORDS IN BILL OF SALE OF VESSEL, contained in a carpenter's certificate incorporated therein, respecting the capacity of the vessel.

WRITTEN CONTRACT MUST BE CONSTRUED BY COURT, and not by the jury.

ACTION for breach of warranty of the tonnage of a vessel. A nonsuit was ordered, subject to the opinion of the whole court. The facts appear from the opinion.

Digitized by Google

Rand, for the plaintiffs.

Fessenden and Butler, for the defendants.

By Court, RICE, J. This is an action of case for an alleged breach of warranty in the sale of the bark Oak Hill. The consideration paid for the bark was twenty-eight thousand dollars. The bill of sale describes said bark as "now lying at Portland, not yet registered, but described as follows, to wit:

"DISTRICT OF PORTLAND AND FALMOUTH,
PORT OF PORTLAND, March 5, 1855.

"Ira Milliken, master carpenter, of Scarborough, do certify that the bark named the Oak Hill was built under my direction at Scarborough, during the year 1854, for John Libby, 3d, of Scarborough, state of Maine; that the said bark is United States built, has two decks, three masts, is one hundred and thirty-seven feet and six inches in length, twenty-nine feet five and a half inches in breadth, and fourteen feet and eight and three fourths inches in depth, and of five hundred and forty-seven and twenty-seven ninety-fifths tons burden; as witness my hand the day and year aforesaid.

"(Signed) IRA MILLIKEN."

Then follow covenants of general warranty of title.

The proof in the case shows that on an accurate admeasurement the bark was not as long, wide, nor deep as specified in the carpenter's certificate recited above, and that she did not measure as much by thirty-seven and thirty-nine ninety-fifths tons as therein specified.

There is no evidence that either party examined the vessel or made any measurement of her dimensions before the sale.

On these facts, the presiding judge ordered a nonsuit, and the plaintiffs excepted.

The books are full of cases in which the question of warranty or no warranty is discussed. These cases are by no means all consistent with each other. In an early case, *Chandelor* v. *Lopus*, Cro. Jac. 4, it was held that the bare affirmation that the article sold was a bezoar stone, without warranting it to be so, is no cause of action. The doctrines of this case, though received with approbation in England and in this country, have not been adopted in both this state or Massachusetts without some qualification, rendered necessary, perhaps, from the imperfect manner in which the original case is reported. The inference from the report is, that unless there be an express warranty, in terms, an action for breach of warranty will not lie;

Digitized by Google

that bare words of affirmation will not, in law, constitute a warranty.

The established doctrine now is, that to create an express warranty the word "warrant" need not be used, nor is any precise form of expression necessary, but if the vendor at the time of the sale affirms a fact as to the essential qualities of his goods as an inducement to the sale, in clear and distinct terms, and the vendee purchases on the faith of such affirmations, that will constitute an express warranty: *Henshaw* v. *Robins*, 9 Met. 83 [43 Am. Dec. 367]; *Bryant* v. *Crosby*, 40 Me. 9. Affirmations of quantity and quality which are made pending the negotiations for a sale, with a view to procure a sale, and having that effect, will be regarded as a warranty: Parsons on Merc. L. 57. To give simple representations or affirmations this effect, they must be of a character to enter into the essential elements of the contract—to constitute a substantial inducement to the purchase. If the language used is merely by way of description, to identify the thing sold, and not for the purpose of describing its quantity or quality, then they are to be treated as mere words of description, and not of warranty.

The express terms of warranty, in the bill of sale before us, are clearly confined to the title, and do not apply to the dimensions or quality of the bark. Are the descriptive words of the carpenter's certificate, incorporated into this bill of sale, to be construed as terms of warranty? Ordinarily, the number of tons in a vessel, like the quantity of land in a deed, are treated as matters of description only, and not of warranty: 1 Greenl. Ev., 26, and note; *Dyer* v. *Lewis*, 7 Mass. 284.

So, too, where articles capable of division and enumeration are sold in the aggregate, the parties intending to sell the whole for a given price, an enumeration of the articles and fixing a price in detail will be treated as matter of description, and not of warranty. Thus in the case of *Covas* v. *Bingham*, 22 Eng. L. & Eq. 183, the original defendants sold the plaintiff a cargo Ibralia Indian corn, sixteen hundred and sixty-seven and three fifths quarters, at thirty shillings per quarter. The corn was then afloat, and was sold by the bill of lading. On measurement, the corn fell short fifty-three and one tenth quarters. For this deficiency the plaintiff brought his action and recovered in the county court. But on error in the queen's bench the judgment was reversed. Lord Campbell remarked: "I think that the intention of the parties, to be gathered from the contract itself, was, that the cargo should be taken by the purchaser for better or for worse, for less or for more."

Digitized by Google

In the case before us, a round sum was paid for the bark as a whole. She was not purchased at a specific price by the ton, the price for the whole ship to be determined by the number of tons she should measure, but was sold as an entire ship, at a fixed price *in solido*, larger or smaller. While we do not intend to assert that a bill of sale of ship may not contain matter of description as to her capacity, which may properly be construed to be representations amounting to and constituting a warranty, we are of opinion that in this case the certificate of the master, as incorporated into this bill of sale, is to be treated as mere matter of description, and does not constitute a warranty as to the dimensions of the bark, and was not so intended by the parties. The contract, being in writing, is to be construed by the court, and not by the jury.

Nonsuit confirmed.

WHAT REPRESENTATIONS AMOUNT TO WARRANTY ON SALE of chattel: See *Tuttle* v. *Brown*, 64 Am. Dec. 80, and notes.

WRITTEN CONTRACT TO BE CONSTRUED BY COURT: See *Sidwell* v. *Evans*, 21 Am. Dec. 387.

STATE *v.* WEATHERBY.

[43 MAINE, 258.]

ADULTERY, BY CIVIL LAW, IS CARNAL KNOWLEDGE OF ANOTHER MAN'S WIFE.

ADULTERY IN MAINE IS ILLICIT INTERCOURSE BETWEEN PERSONS ONE OR BOTH OF WHOM ARE MARRIED.

DIVORCE SEVERS MARRIAGE TIE AS TO BOTH PARTIES, without reference to the question as to which was in fault.

DIVORCED MAN DOES NOT COMMIT ADULTERY BY MARRYING AND COHABITING with another woman, though the divorce was procured by his wife and he has obtained no divorce.

INDICTMENT for adultery and verdict of guilty under the instructions of the court, subject to the opinion of the whole court as to whether or not the facts constituted the crime of adultery. The opinion states the facts.

Record and Walton, for the defendant.

S. C. Andrews, for the state.

By Court, RICE, J. The defendant was indicted for adultery. On the trial, it was proved and admitted that in 1837 the defendant was lawfully married to Elizabeth Whitney, in the town of Bath, in this state, and that they lived together as husband and

Digitized by Google

wife about nine years; that some five years since she was divorced from the defendant by the supreme judicial court of this state, on her own application, and that she has since that time been again married to a person other than the defendant, with whom she is now living; that the defendant and Catharine F Thompson, the person with whom the alleged crime was committed, were married in Nashua, New Hampshire, May 14, 1854, and in the following June moved into Mexico, in the county of Oxford, where they have since cohabited together as husband and wife. The question now presented for our determination is, Do these uncontroverted facts render the defendant amenable to the charge of adultery?

The civil law defines adultery to be the "carnal knowledge of another man's wife," and as is said in Wood's Institutes, 272, the connection of a married man with a single woman does not make him guilty of the crime of adultery.

Adultery is the carnal connection of a man with another's wife. The man may be either married or single; but the woman must be married; for the essence of the crime is in the adulteration of the offspring, the spuriousness of the issue. If a married man has carnal knowledge of a single woman, it is not adultery, but fornication: 2 Swift's Laws of Connecticut, 227. Noah Webster defines it to be the violation of the marriage bed; a crime or a civil injury which introduces or may introduce into a family a spurious offspring. Such would seem to have been the more ancient and common meaning attached to the term "adultery." With us, however, the term has a more comprehensive signification, and renders both parties implicated equally liable to punishment if either the man or woman be married: R. S., c. 160, sec. 1.

In this state, marriage is purely a civil contract. When contracted in violation of positive prohibitions of law, as in case of the marriage of an idiot, an insane person, or of a white person and a negro, Indian, or mulatto, it is absolutely void; and the contract may be dissolved in other cases, at the discretion of the supreme judicial court. This discretion is, however, usually exercised within the rules and for the causes heretofore prescribed by the legislature. When the power of the court has been exercised, and a divorce from the bond of matrimony has been decreed on the application of one party, for the misconduct of the other, in what condition are the parties left? That the innocent party is absolutely absolved from all obligations created by the prior marriage contract, and is at liberty to marry

Digitized by Google

again, has never been controverted. But the condition of the guilty cause of the divorce is not, in popular estimation at least, so free from doubt. There seems also to have been an impression in the minds of the legislature that such party was not by such decree relieved from all obligations imposed by the former marriage. Hence, it was provided in section 2, chapter 89, of the revised statutes, clause 7: " In all cases where one party has been, or shall be, divorced from the bonds of matrimony, the court granting the same may, on application of the other party, grant a like divorce on such terms and conditions as such court in the exercise of a sound discretion may judge reasonable."

The origin of this opinion may probably be found in chapter 40, section 2, of the laws of 1784, providing for the punishment of adultery and polygamy. That section contains the following proviso: " That this act, or anything therein contained, shall not extend to any person that is or shall be at the time of such marriage divorced by sentence of any court whatever, which has or may have legal jurisdiction for that purpose, unless such person is the guilty cause of such divorce."

The above provision was in substance re-enacted by the legislature of this state: Laws of 1821, c. 10, sec. 2. These acts do, by implication, restrain the party who has been the guilty cause of divorce from contracting another marriage, and in case of violation of such restraint, impose the penalty prescribed for polygamy. There is nothing in either of these acts affirming the continuation of the marriage contract as to either party, nor declaring that the " guilty cause of divorce " shall be deemed guilty of adultery in case of a second marriage. For reasons of public policy, it may be supposed the legislature deemed it expedient to restrain such guilty party from contracting a second marriage, by rendering them liable to punishment, as for the crime of polygamy. This, however, is by inference only. How far it was ever binding as a formal statute, we do not now inquire.

The statute of 1821 was modified by act of 1834, c. 116, sec. 32, and by the provisions of the revised statute, so as to authorize the court to grant the guilty cause of divorce a like divorce.

Adultery in this state can only be committed by parties one of whom, at least, is married, and by parties who are not married to each other. To affirm that a person is married, and yet has no legal husband or wife, is manifestly a solecism. In the very nature of things, the marriage contract under such circumstances cannot exist. There cannot be a husband without a wife, nor a

Digitized by Google

wife without a husband. The existence of one necessarily and conclusively implies the existence of the other. Husband and wife are correlative terms. Anything, therefore, which destroys that relation as to one party necessarily destroys it as to the other.

A decree of divorce from the bond of matrimony effectually and fully abrogates the marriage contract, and sets the parties free from their marital relations to each other: *People* v. *Hovey*, 5 Barb. 117; *Commonwealth* v. *Putnam*, 1 Pick. 136; *West Cambridge* v. *Lexington*, 1 Id. 506.

By operation of the decree of the court granting a divorce from the bonds of matrimony to the former wife of the defendant, he ceased to be a married man. Whether he could, therefore, legally contract a new marriage would depend upon the laws of the place where such marriage was contracted: *West Cambridge* v. *Lexington*, *supra*. The last marriage of the defendant was contracted in New Hampshire. We are not aware of the existence of any law in that state which would restrain a party situated as the defendant was at the time of his alleged marriage with Catharine F. Thompson from entering into the marriage contract: See Comp. Laws N. H., c. 233, secs. 5, 6.

But however this may be, this case cannot be affected by it. Nor can this case be affected by the existence or non-existence of a law in this state which shall make a person who has been divorced, and was the guilty cause of such divorce, who shall marry again, amenable to the punishment provided for polygamy. He is not indicted for the violation of such a statute, if any such exist. There is no law in this state which declares that such acts as have been proved against the defendant constitute the crime of adultery. Nor would those acts constitute that crime at the common law. This indictment cannot be sustained.

Exceptions sustained and a new trial granted.

ADULTERY, WHAT CONSTITUTES: See *Commonwealth* v. *Call*, 32 Am. Dec. 284; *State* v. *Lash*, Id. 397; *Hunter* v. *United States*, 39 Id. 277; *Cook* v. *State*, 56 Id. 410, and notes.

JELLISON *v.* GOODWIN.

[43 MAINE, 287.]

DISTINCTION BETWEEN ACTUAL MALICE AND LEGAL MALICE IN SLANDER IS, that the former implies a desire and intention to injure, while the latter is not necessarily inconsistent with an honest or even laudable purpose.

LEGAL MALICE IN SLANDER IS PRESUMPTION OF LAW, BUT ACTUAL MALICE a question of fact for the jury.

Digitized by Google

LEGAL MALICE ALONE IS SUFFICIENT, IN SLANDER, to support the action.

LEGAL MALICE IS IMPLIED FROM SPEAKING ACTIONABLE WORDS which are not privileged, and no further proof of malice is necessary.

EVIDENCE OF ACTUAL MALICE IN SLANDER IS ADMISSIBLE TO ENHANCE DAMAGES, and disproof of it goes only in mitigation.

PROOF THAT WORDS WERE PRIVILEGED COMMUNICATIONS REPELS LEGAL MALICE, and is a complete justification, in an action for slander.

QUESTION AS TO PRIVILEGED COMMUNICATIONS RELATES ONLY TO LEGAL MALICE, as contradistinguished from actual malice, in slander.

LEGAL MALICE, BEING QUESTION OF LAW, IS FOR COURT, and not for the jury, upon the evidence, in an action for slander.

QUESTION AS TO WHAT IS PRIVILEGED COMMUNICATION IS FOR COURT TO DETERMINE, in an action for slander.

REFUSAL OF CORRECT ABSTRACT INSTRUCTIONS, applicable to no evidence in the case, is not error.

ACTION for slander. Verdict for the plaintiff. Exceptions to the refusal of certain instructions stated in the opinion, and of the giving of others not necessary to be stated.

T. M. Hayes and R. P. Tapley, for the defendant.

Emery and Loring, for the plaintiff.

By Court, DAVIS, J. In this case the defendant admitted the speaking and publication of the words charging the plaintiff with the crime of adultery; but he justified on the ground that the words were not uttered maliciously. And he requested the presiding judge to instruct the jury "that the law does not recognize fixed and limited numbers and classes of privileged communications; but that the jury are authorized to decide, from all the circumstances of the speaking and publication, whether the words were maliciously spoken, notwithstanding they may be actionable in themselves." This instruction was not given.

The distinction between malice in law and malice in fact has not always been regarded sufficiently in judicial opinions, and some apparent conflict has resulted. Nor does the term "malice" always have the same signification in law. In actions for malicious prosecution, the word has a meaning and force different from what it has in actions on the case for slander: *Mitchell* v. *Jenkins*, 5 Barn. & Adol. 588.

As understood in this latter class of actions, malice in fact implies a desire and an intention to injure. But malice in law is not necessarily inconsistent with an honest, or even a laudable purpose. If one makes a false accusation against another, without knowing it to be false, but with no sufficient cause or excuse, it is legally malicious: *Bromage* v. *Prosser*, 4 Barn. & Cress. 247, 255.

Digitized by Google

If he makes such an accusation, knowing it to be false, it is actually malicious. The former is a presumption of law from certain facts proved. Whether the latter existed in any given case is a question of fact for the jury.

Legal malice alone is sufficient to support an action for slanderous words. And if the words are actionable in themselves, and are not privileged, the speaking of them is sufficient evidence of this kind of malice. The law implies such malice from the uttering of such words, and no other evidence of malice is necessary. But the plaintiff may, if he chooses, prove actual malice also to enhance the damages: *True* v. *Plumley*, 36 Me. 466.

If the defendant shows that the words were spoken as privileged communications, so that there was no legal malice, it is a full justification, upon which he is entitled to a verdict in his favor. But proof that there was no actual malice goes only in mitigation of damages.

The requested instructions applied to privileged communications, making no allusion to the question of damages, and they obviously had reference only to malice in law. The question whether the words spoken were privileged communications necessarily relates to the question of legal malice, as distinguished from actual malice. But upon the proof or admission of certain facts, whether legal malice existed is a question of law, and is not to be "decided by the jury from the circumstances of the speaking and publication." There was no error in declining to submit this question to the jury.

The counsel for the defendant has argued at some length the correctness of the first part of the request—"that the law does not recognize fixed and limited numbers and classes of privileged communications."

There are certain classes of communications in regard to which the law is well settled that they are privileged. If there are or may be other classes not yet recognized by courts, but founded upon like reasons and of like necessity, the defendant should have proved that the words spoken by him were embraced in such other class, and then he might properly have called for appropriate instructions. But the case does not show that any such proof was introduced or offered; nor is any intimation given as to what new kind or class of privileged communications the court should recognize. So that, however correct the instruction might have been as an abstract legal proposition, there being no evidence in the case to which it could apply, there was no good reason for giving it to the jury.

Digitized by Google

If, by the instructions requested, it was intended to assert that the question as to what kinds and classes of communications are privileged is not a question of law to be decided by the court, but that the jury are to determine this question, and may find any kind of communications privileged, according to the circumstances of the speaking and publication, we have no hesitation in expressing the opinion that such a proposition is erroneous.

The exceptions must be overruled.

LEGAL MALICE PRESUMED FROM SPEAKING ACTIONABLE WORDS: See *Eates* v. *Antrobus*, 13 Am. Dec. 496; *Farris* v. *Starke*, 33 Id. 536; *Byrket* v. *Monohon*, 41 Id. 212; *Hatch* v. *Potter*, 43 Id. 88, and notes.

EVIDENCE OF ACTUAL MALICE ADMISSIBLE to enhance damages, in slander: See *Ware* v. *Cartledge*, 60 Am. Dec. 489, and note 494. In *Thompson* v. *Powning*, 15 Nev. 208, it was held, citing the principal case, that in an action for libel, if the article is ambigious or the intentions of the publisher doubtful, evidence of express malice is admissible to enhance the damages.

MALICE IN SLANDER IS QUESTION FOR JURY, WHEN: See *Trabue* v. *Mays*, 28 Am. Dec. 61.

PRIVILEGED COMMUNICATIONS IN SLANDER: See *Hastings* v. *Lusk*, 34 Am. Dec. 330; *Mower* v. *Watson*, Id. 704, and notes.

NASH v. UNION MUTUAL INSURANCE CO.

[43 MAINE, 343.]

DEBTOR IS ENTITLED TO BE SATISFIED OF AUTHORITY OF PERSON DEMANDING PAYMENT before complying with the demand, and a refusal upon that specific ground is justifiable.

POSSESSION OF SIGNED RECEIPT IS SUFFICIENT EVIDENCE OF AUTHORITY to demand payment of the receipted liability, if the receipt is signed by the proper person, and a demand under such authority is equivalent to a personal demand by the signer of the receipt.

MUTUAL INSURANCE COMPANY LEVYING AND COLLECTING ASSESSMENT TO PAY LOSS DOES NOT WAIVE its right, under its by-laws, of exemption from liability for such loss on the ground of refusal by the assured to pay assessments, as stipulated in the by-laws.

ASSUMPSIT on policy of insurance. The defendants claimed to be exempt from liability under a provision in their by-laws to the effect that if the assured should neglect for ten days, "when personally called upon," to pay any premium or assessment, the risk on the policy should be suspended until it was paid, and that for refusal to pay an assessment the directors might terminate the policy after due notice to the insurer. It appeared that one Holmes called upon the plaintiff and presented to him for payment a bill for an assessment made by the defendants

Digitized by Google

upon the plaintiff, and receipted by the treasurer of the company. The plaintiff said he would have the money in a few days, and he would settle it. Holmes afterward returned the bill unpaid to the agent of the company from whom he received it, it having been transmitted to the latter by the treasurer for collection. The facts were agreed on by the parties.

C. Danforth, for the plaintiff.

Bradbury, Morrill, and Merserve, for the defendant.

By Court, HATHAWAY, J. The plaintiff had a right to be satisfied that Holmes was duly authorized to receive the money, before he acted upon his demand, and a refusal, upon that specific ground, would have been justifiable: *Solomons* v. *Dawes*, 1 Esp. 83; *Roe ex dem. West* v. *Davis*, 7 East, 363. But he did not refuse upon that ground; he made no questions concerning the authority of Holmes, or the genuineness of the receipt. The call by Holmes, with the bill receipted in his hand, was as much a personal call upon the plaintiff as if it had been made by the treasurer who signed the receipt.

The defendant company cannot be considered as having waived their right to be exempted from liability for the plaintiff's loss, by their subsequent assessment and collection to recover it. The plaintiff was no party to that proceeding; he claimed that the company were liable to him for the loss, and whether or not they were liable might depend upon the uncertain result of a lawsuit. They might, very properly, have made the assessment and collection. If they were liable, they would then have funds to pay for the loss. If they were not liable, they would have a surplus, which they would, of course, be bound to appropriate, according to the legal rights of those interested therein.

Plaintiff nonsuit.

SPRINGER v. TOOTHAKER.

[43 MAINE, 381.]

JOINT PROMISOR ON NOTE KNOWN TO CREDITOR TO BE SURETY is entitled to all the benefits appertaining to that character.

WHERE SURETY IS SUED ALONE, WHATEVER WOULD DISCHARGE HIM in equity is a good defense at law.

CREDITOR HAVING SECURITY FROM PRINCIPAL MUST HOLD IT FOR SURETY as well as for himself, in equity, and if he parts with it without the knowledge or consent of the surety, the latter is released to the amount of the property surrendered.

Digitized by Google

SURETY IS RELEASED BY CREDITOR'S SURRENDERING ATTACHED PROPERTY OF PRINCIPAL to the amount of the property so surrendered, where it is done without his consent and after the creditor's lien has become absolute by the recovery of judgment.

SURETY IS NOT DISCHARGED BY CREDITOR'S DISCONTINUING PROCEEDINGS AGAINST PRINCIPAL where there is no abandonment of any absolute lien or security.

ACTION against a surety upon a note. The opinion states the facts.

Whitmore, for the plaintiff.

Clay and Evans, for the defendant.

By Court, HATHAWAY, J. The note upon which this action was brought was signed by the defendant and H. P. Toothaker, who were legally holden thereon as joint and several promisors.

The defendant, however, was in fact only the surety of H. P. Toothaker, and that was known by the plaintiff. Hence the defendant was entitled to all the benefits belonging to the character of a surety.

The evidence reported does not authorize the conclusion that there was any such agreement between the plaintiff and H. P. Toothaker to enlarge the time of payment as would operate as a discharge of the defendant from his liability as surety on the note. The defendant offered to prove that after the note became due the plaintiff commenced a suit thereon against H. P. Toothaker, the principal debtor, and attached as his a large amount of personal property, and certain interests in real estate; that he prosecuted the suit to final judgment, on which he duly obtained execution, which he neglected to levy on the personal property attached, and ordered the officer in possession by virtue of the attachment to surrender it, which he did; that the equity of redemption attached was by the plaintiff's direction seized on the execution by the officer holding it for collection, and duly advertised for sale at a time and place named, but that it was not exposed for sale; that the sale was postponed from time to time, and the attachment lost and abandoned by the plaintiff's order, and without the defendant's consent, and that the equity of redemption was worth six hundred dollars, and would have sold for that sum if it had been exposed for sale; all of which testimony offered was excluded by the presiding judge, and the question presented to the court is, whether or not it was properly excluded.

Digitized by Google

The defendant, the surety, is sued alone, and whatever would discharge the surety in equity will be a good defense in law: *Baker* v. *Briggs*, 8 Pick. 128, 129 [19 Am. Dec. 311], and authorities there cited.

The contract of suretyship imports entire good faith and confidence in the whole transaction. In equity, a creditor who has the personal contract of his debtor with a surety, and has also, or takes afterwards, property from the principal as security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as for himself, and if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered: *People* v. *Janson*, 7 Johns. 337 [5 Am. Dec. 275]; *Rees* v. *Berrington*, 2 Ves. jun. 542; *Law* v. *East India Co.*, 4 Ves. 849; *Baker* v. *Briggs*, 8 Pick. 122 [19 Am. Dec. 311], 1 Story's Eq. Jur., secs. 324–326.

When the plaintiff had recovered judgment against the principal debtor his right had attached absolutely to the property which he had taken on the writ, and remained a fixed and permanent lien for thirty days: *In the Matter of Cook*, 2 Story, 376; R. S., c. 114, sec. 82; and if he voluntarily surrendered it without the defendant's consent, he did so at the peril of discharging the defendant as surety for the amount thus surrendered.

Although the plaintiff was not legally bound to use active diligence in collecting the debt of the principal, and the surety would not be discharged by reason of his delay in his matter, and though the plaintiff might have discontinued proceedings against the principal debtor, which he need not have instituted, yet it would be clearly inequitable to allow him to abandon an absolute lien or security upon the property of the principal, which he had obtained as the result of those proceedings, and to retain his hold upon the security for the whole debt: 2 Am. Lead. Cas. 256.

The plaintiff was not bound at his own risk and expense to seize and sell, on the execution, the personal property attached when the title might be doubtful: *Page* v. *Webster*, 15 Me. 249.

But as to the equity of redemption, the testimony offered and excluded presents it as the property of the principal debtor, upon which the plaintiff had obtained an absolute lien for the payment of the debt, and which, without any risk or expense to the plaintiff, would have been sold for six hundred dollars and appropriated for that purpose, unless he had interfered and prevented the sale.

Digitized by Google

He had no equitable or legal right to the injury of the surety, the defendant, thus to surrender and abandon such security. The testimony excluded was legally admissible, and should have been received.

In addition to the numerous authorities cited in argument, see *Edgerly* v. *Emerson*, 23 N. H. 555 [55 Am. Dec. 207]; Adams's Eq. 269, 270; and the opinion of Tenney, J., in *Fuller* v. *Loring*, 42 Me. 481.

As agreed by the parties, the action must stand for trial.

EVIDENCE THAT JOINT PROMISOR IS SURETY ADMISSIBLE WHEN, as against payee: See *Dickerson* v. *Ripley County*, 63 Am. Dec. 373, and note.

DISCHARGE OF SURETY BY CREDITOR SURRENDERING SECURITY, or lien against principal's property: See *Cullum* v. *Emanuel*, 34 Am. Dec. 757; *New Hampshire etc. Bank* v. *Colcord*, 41 Id. 685; *Baker* v. *Marshall*, 42 Id. 528; *Bangs* v. *Strong*, Id. 64; *Curan* v. *Colbert*, 46 Id. 427; *Bank* v. *Fordyce*, 49 Id. 561; *Burke* v. *Cruger*, 58 Id. 102, and notes.

RELEASE OF SURETY BY INDULGENCE TO PRINCIPAL, GENERALLY: See *Dickerson* v. *Ripley Co.*, 63 Am. Dec. 373; *Harris* v. *Taylor*, 67 Id. 576, and notes.

INHABITANTS OF WARREN v. INHABITANTS OF THOMASTON.

[43 MAINE, 406.]

RESIDENCE, TO GAIN SETTLEMENT UNDER PAUPER LAW, MEANS HOME OR dwelling-place.

RESIDENCE, DWELLING-PLACE, AND HOME DIFFER FROM SETTLEMENT, under the pauper law, and a person may have a settlement in one town and a residence in another.

RESIDENCE DOES NOT INVOLVE CONTINUED PERSONAL PRESENCE necessarily, and temporary absences do not work a change of residence.

RESIDENCE IS ACQUIRED ONLY BY PERSONAL PRESENCE WITHOUT PRESENT INTENT TO DEPART, under the pauper law, and when once acquired, is lost only by departure with intent to abandon it.

DOMICILE IS NOT SYNONYMOUS WITH RESIDENCE, DWELLING-PLACE, OR HOME, in its ordinary legal sense, but it must be regarded as synonymous with those terms when used with respect to the *status* of a pauper as to habitation.

RESIDENCE UNDER PAUPER LAW IS ABANDONED BY DEPARTURE without a present intent to return, and a subsequent intent to return formed upon disappointment of business expectations does not cure the abandonment.

PARTICULAR HOUSE TO WHICH PARTY MAY RESORT AS MATTER OF RIGHT is not necessary to enable him to acquire or maintain a residence, within the meaning of the pauper law.

ASSUMPSIT for support furnished a pauper. The pauper's original derivative settlement was in Warren, the plaintiff town,

Digitized by Google

and the question was whether he had gained a settlement in Thomaston, the defendant town, where he had worked several summers for one Gilman. The verdict was for the plaintiff, and the case was brought up on exceptions and a motion for a new trial, on grounds which are sufficiently stated in the opinion, so far as material to the case here.

A. P. Gould, for the defendants.

M. H. Smith, for the plaintiffs.

By Court, RICE, J. The case comes up on motion and exceptions. The motion is based upon several specifications, which may, however, be reduced to two general propositions: 1. That the verdict is against the evidence in the case; 2. That it is against law. The first proposition may properly be discussed under the motion; the second, under the exceptions.

The question at issue was the legal settlement of a pauper by the name of Lawrence. It appears from the case that the original derivative settlement of the pauper was in Warren. The proposition to be established by the plaintiffs was that he had lost that settlement, and gained one in Thomaston in his own right. If such change has been effected, it was under the sixth mode of the revised statutes, sec. 1, c. 32, which provides that "any person of the age of twenty-one years who shall hereafter reside in any town within this state for the term of five years together, and shall not, during that term, receive, directly or indirectly, any supplies or support as a pauper from any town, shall thereby gain a settlement in such town."

The rights of the parties in this case depend very much upon the meaning which is attached to the word "reside," as used in the statute provision above cited.

To reside is to dwell permanently, or for a length of time; to have a settled abode for a time: Webster's Dict. The word "residence" is synonymous with the words "dwelling-place" or "home:" *Drew* v. *Drew*, 37 Me. 389. "Dwelling-place" and "home" mean some permanent abode or residence with intention to remain: *Turner* v. *Buckfield*, 3 Id. 229; *Jefferson* v. *Washington*, 19 Id. 293.

In our pauper law, the terms "residence," "dwelling-place," "home," have a different meaning from the word "settlement." The place of one's settlement is a place where such person has a legal right to support as a pauper. It may be in a place other than the one where such pauper has his dwelling-place, home, or residence. Thus a person may have a settlement in a place

Digitized by Google

where he has never had a residence, as by derivation. So, too, a person may have a residence or home different from their settlement.

Residence in a given place does not necessarily involve continued personal presence in that place. A person may be temporarily absent and remain from home, without a change of residence: *Drew* v. *Drew*, 37 Me. 389.

When, however, a person voluntarily takes up his abode in a given place, with intention to remain permanently or for an indefinite period of time; or, to speak more accurately, when a person takes up his abode in a given place without any present intention to remove therefrom, such place of abode becomes his residence or home, and will continue to be his residence or home, notwithstanding temporary personal absences, until he shall depart with intention to abandon such home.

Thus to establish a "residence," within the meaning of the statute, there must be personal presence without any present intention to depart. And to break up such residence, when once established, there must be departure with intention to abandon.

In the discussions in our books upon the pauper laws, the term "domicile" is frequently used. This term is not found in the statute, but has been interpolated upon it by the courts. Its introduction has, at times it is feared, tended to confuse and mislead, rather than to simplify and aid in the trial of this class of causes. In its ordinary sense, as used by legal writers, it has not the same restricted meaning as the words "residence," "dwelling-place," and "home" have in the statute under consideration: Story's Confl. L. 39. See also, as to change of domicile, Id. 47, sec. 47.

The term "domicile," therefore, not being used in the statute to indicate any particular *status* of the pauper, as to habitation, can only be used properly as strictly synonymous with the terms "residence," "dwelling-place," or "home." In any other sense, its use would be erroneous, and tend to mislead. Whether the judge, at the trial, in his frequent use of this word thus limited its signification, is not certain. In presenting a cause to a jury, it is of great importance that the terms used should be distinctly and clearly defined, and that the legal propositions involved should be so arranged and presented as to be easily understood. Otherwise confusion and uncertainty will be likely to follow.

In his general charge to the jury, the judge says: "But if, when he [the pauper] left he had an expectation or intention of remov-

Digitized by Google

ing somewhere else, in case he could find some other place to suit him, or in pursuance of some previous arrangement, and failing to find such place, or being unable to complete his expected arrangement, did soon afterwards return, then his domicile might not be interrupted thereby." This was evidently based upon the hypothesis that the jury should have found that the pauper had before taken up his residence in Thomaston. As a distinct legal proposition, it is incorrect. If Lawrence had made arrangements for business elsewhere, and when he left Thomaston to engage in that business did so with the intention not to return, such departure would be an abandonment of his residence in that town, and whether he found his expected business as he had anticipated or not would be wholly immaterial. The fact of abandonment, or not, depended upon the intention of the pauper when he departed. But, it may be said, if there is any defect in this proposition, it was fully remedied in the instructions which immediately follow, wherein the judge says: "And if from all the facts in the case the jury are satisfied that when he left he intended to return, if he failed in the object for which he left, then his domicile may be regarded as being in Thomaston during such absence." The infirmity in the instruction, when taken as a whole, is the uncertainty in which the jury were left. Distinct legal propositions are announced by the court, apparently conflicting, and so left as not clearly to indicate to the jury the precise rule by which they are to be governed.

The second request was: "That if he did go to Thomaston more than five successive summers, and at the close of each he intended to return there the next spring and work the next summer for a definite period, and he did in fact engage to work, and work six months, or any other definite period each year, such acts would not constitute a residence for five years, within the meaning of the statute."

This request was given with qualification, "providing that if when he left Gilman's he did intend to go back to some other place where he had a domicile." This limitation or qualification is clearly improper. The true question to be decided was not whether he intended to return to any particular place when he should leave Gilman's, but whether he was at Gilman's for a specific purpose, and for a definite period of time, intending to leave when that purpose had been accomplished and that time had expired. It was entirely immaterial whether he intended to return to a place whence he came, or where he had a

Digitized by Google

domicile, or to go to some other place in search of a new home. In further qualification of the second request, the jury were also instructed "that if he had no other place to return to, but was at Gilman's without intention of returning when he had finished his summer's work, then they might find his domicile in Thomaston, if they were satisfied the evidence warranted it upon the instructions given."

Here again is uncertainty or manifest error. It is not distinctly perceived how he could have intended to return to a place if he had no place to return to. But as already remarked, it is immaterial whether he had or had not a particular place in view to which he intended to return. Did he intend to make Gilman's or Thomaston his home? Was he in that town intending to remain an indefinite period of time, or rather without any intention to go elsewhere? If so, then he was residing in Thomaston, within the meaning of the statute. If not, he was a temporary sojourner, not a resident. The qualification leaves this point in uncertainty.

The fourth was refused. It was as follows: "That he must have had such a residence in Thomaston during all the year, five consecutive years, to entitle the plaintiffs to prevail, and if his residence did not continue during the winter season as well as the summer, they could not prevail."

In refusing this request, the judge said: "He must have a domicile, but need not reside there in person, but must intend to return while he was away; he must have a domicile, but need not have a home there."

Here perplexing uncertainty arises by the introduction of the word "domicile," a word not found in the statute, and apparently attaching to it a meaning different from "residence" or "home," which are the words of the statute. Thus the statute provides that any person of the age of twenty-one years who shall reside in any town in this state, etc., shall gain a settlement. The court say he must have a domicile, but need not reside there in person; he must have a domicile, but need not have a home there.

If the judge intended to use the word "domicile" as synonymous with "residence" and "home," the language used is repugnant and contradictory. If he intended to use the word as having a meaning different from residence or home, such use would be unauthorized. But if he intended to use the word "domicile" as strictly synonymous with "residence" or "home," and only intended to say that to acquire and maintain

Digitized by Google

such a residence or home it was not necessary that a person should be at all times personally present in such a place, or should have a particular house to which he could resort as matter of right, the principle intended to be enunciated would be correct. But the difficulty is, the language used as reported is not appropriate to convey such idea. The jury could not have so understood it.

There are other objections to the instruction of the court in this case, which have been argued at considerable length; but being of opinion, for reasons already suggested, that the case should be again presented to a jury, it is not deemed important to give them further consideration at this time. Nor is it necessary to examine the questions raised by the motion.

Exceptions sustained and a new trial granted.

RESIDENCE, DOMICILE AND DWELLING-PLACE, WHAT CONSTITUTES, AND DISTINCTION BETWEEN: *Frost* v. *Brisbin*, 32 Am. Dec. 423; and *Ringgold* v. *Barley*, 59 Id. 107, with notes thereto fully discussing this subject; see also *Bucknam* v. *Thompson*, 61 Id. 237; and *Hairston* v. *Hairston*, Id. 530, and notes thereto. The principal case is referred to in connection with *Worcester* v. *Wilbraham*, 13 Gray, 586, as sufficiently discussing the question of residence or domicile under the poor-laws, in *Lee* v. *Lenox*, 15 Id. 498.

CHANGE OF DOMICILE OR RESIDENCE: See the notes referred to in the preceding paragraph; see also *Phillips* v. *Kingfield*, 36 Am. Dec. 760; *Lowry* v. *Bradley*, 39 Id. 142; *Ringgold* v. *Barley*, 59 Id. 107; and *Bucknam* v. *Thompson*, 61 Id. 237.

HOLT *v.* WESTCOTT.

[43 MAINE, 445.]

CONSIGNOR IS ORIGINALLY LIABLE FOR FREIGHT on goods shipped by him under contract, or for his benefit, and the insertion in the bill of lading of a stipulation for delivery to the consignee, "he or they paying freight," does not of itself relieve the consignor; such provision being for the benefit of the carrier, who may waive it and resort to the consignor, unless the latter is exonerated by some special stipulation.

ACTION to recover freight. The opinion sufficiently presents the facts.

B. W. Hinckley, for the plaintiff.

T. Robinson, for the defendants.

By Court, RICE, J. The question presented by this report is whether in a case where a ship-owner by charter-party contracts with a shipper to carry a cargo at a stipulated price, and subsequently signs a bill of lading, in which he stipulates to deliver

Digitized by Google

such cargo to the consignee of the shipper, or his assignee, in good order, etc., dangers of the sea only excepted, he or they paying freight at the rate stipulated in the charter-party, the owner is thereby bound to look only to the consignee for his freight, and is concluded from demanding it from the shipper in case he shall fail to collect it of the consignee.

It is often provided in charter-parties that the goods shall be delivered agreeable to bills of lading, to be signed by the master; and the master, upon receiving the goods, signs bills of lading, agreeing to deliver them on the payment of freight, or with words of similar import, giving him a right to refuse to make delivery to the person designated by the bill of lading, without payment of freight. And as it has sometimes happened that the master has not insisted upon the exercise of this right, it has been much questioned whether the merchant charterer was answerable for the freight; and it has been determined that he is answerable: Abbott on Shipping, 141.

It was once held that if the master parted with the goods to the consignee without securing his freight he was deprived of all recourse to the consignor; but it is now decided otherwise. If the master cannot recover the freight from the consignee to whom he has delivered the goods without receiving the freight, he still has his remedy over on the charter-party against the shipper, and the condition precedent to the delivery inserted in the bill of lading was intended only for the master's benefit: 3 Kent's Com., 4th ed., 222.

Such is the settled law in England, though at one time Lord Kenyon at *nisi prius* ruled differently. The case was, however, carried to the king's bench, and the ruling of Lord Kenyon overruled by the full bench, and subsequently, in the case of *Shepard* v. *De Bernales*, 13 East, 565, the question was again before the king's bench, and the English authorities fully reviewed by Lord Ellenborough, and the decision was that the provision, "he or they paying the freight," usually inserted in bills of lading, was for the benefit of the master or owners, which provision they might waive, if they saw fit, and fall back upon the consignor for payment.

In *Barker* v. *Havens*, 17 Johns. 234 [8 Am. Dec. 393], the same rule is adopted. In giving the opinion of the court, Spencer, C. J., remarked that the effect of the clause "he or they paying freight" has been repeatedly before the English courts, and the decision has been uniform in both the king's bench and common pleas. But he continues, quoting the lan-

Digitized by Google

guage of Lord Ellenborough, "I should be clearly of the opinion that if it appeared that the goods were not owned by the consignor, and were not shipped on his account and for his benefit, the carrier would not be entitled to call on the consignor for freight; and I should be inclined to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee."

Parsons, in his recent work on mercantile law, p. 352, thus states the rule: "If the bill of lading requires delivery to the consignee or his assignees, 'he or they paying freight,' which is usual, and the master delivers the goods without receiving freight, which the consignee fails to pay, the master or owner cannot, in the absence of an express contract, fall back on the consignor, and make him liable, unless he can show that the consignor actually owned the goods; in which case the bill of lading in this respect is nothing more than an order by a principal upon an agent to pay money due from the principal."

In *Spencer* v. *White*, 1 Ired. L. 236, the defendant shipped on board a vessel belonging to the plaintiff then lying at Elizabeth City a cargo of corn, for which the captain signed bills of lading, that the cargo was to be delivered to John Williams, at Charleston, in South Carolina, or to his assigns, "he or they paying freight for the same." The consignee received the cargo and paid the freight, except the sum of one hundred dollars, and for that balance the action was brought.

The hundred dollars was withheld on account of the damaged state of the corn. At the trial the defendants contended that it was the duty of the plaintiff to have collected the freight of the consignee, and also that the corn was damaged by the negligence of the plaintiff. The evidence showed, however, that the damage was occasioned by the dangers of the sea, and the court held the plaintiff was entitled to recover, and was not obliged to look solely to the consignee.

The same doctrine was held in *Hayward* v. *Middleton*, 3 McCord, 121 [15 Am. Dec. 615]. *Grant* v. *Wood*, 21 N. J. L. 292 [47 Am. Dec. 162], was an action by the owners against the consignor of a quantity of lumber for a balance due for freight, the consignee having paid in part only. There was no charter-party; but a bill of lading with the usual clause as to payment of freight by the consignee. The claim was resisted by the consignee, who was the owner of the lumber, on the ground that the consignee alone was liable after the delivery of the lumber. The court, however, after a careful examination of the authori-

Digitized by Google

ties, held the defendant to be liable, and that the fact that the consignee had also made himself liable by a reception of the lumber, did not relieve the consignor from his original liability; that the right of the master to retain the goods until freight is paid is an additional security for his benefit.

The same rule prevailed in *Domett* v. *Beckford*, 5 Barn. & Adol. 521.

Kent, C. J., in announcing the opinion of the court in *Griswold* v. *New York Ins. Co.*, 3 Johns. 322 [3 Am. Dec. 490], remarked that the lien which the ship-owner has on the goods conveyed is only an additional security for the freight. This lien is not incompatible with the personal responsibility of the shipper, and does not extinguish it. The consideration for the freight is the carriage of the articles shipped on board, and the state or condition of the articles at the end of the voyage has nothing to do with the contract. It requires a special agreement to limit the remedy of the carrier for his lien to the goods conveyed.

The cases in which this question has been before the courts in this country and England are numerous, and the circumstances attending those cases, of course, various. Without further citations, we think the general rule deducible from them to be that in all cases where goods are shipped by a consignor under a contract, or for his benefit, he is originally liable for freight, and that the insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, etc., "he or they paying freight," will not, of itself, relieve him from that liability; that provision being designed for the benefit of the carrier, he may waive it if he choose so to do, and resort to his employer, the consignor, for his freight, unless there is some special stipulation by which that employer is to be exonerated.

The action must stand for trial.

CONSIGNOR'S LIABILITY FOR FREIGHT: See *Grant* v. *Wood*, 47 Am. Dec. 162; *Barker* v. *Havens*, 8 Id. 393; *Hayward* v. *Middleton*, 15 Id. 615.

LAKEMAN *v.* POLLARD.

[43 MAINE, 463.]

EVIDENCE OF TERMS OF HIRING OF OTHER EMPLOYEES OF SAME EMPLOYER is inadmissible for the purpose of ascertaining the terms upon which another employee was hired.

ERRONEOUS ADMISSION OF EVIDENCE WHICH PRODUCED NO EFFECT on the jury, as shown by their findings, affords no ground of complaint.

Digitized by Google

EMPLOYEE PREVENTED BY SICKNESS OR SIMILAR DISABILITY FROM FULFILLING CONTRACT of service may recover on a *qua tum meruit* for what he has done.

EMPLOYEE QUITTING SERVICE BECAUSE OF PREVAILING DANGEROUS EPIDEMIC, of such a character that a man exercising ordinary care and prudence would have been justified in leaving by reason of it, is excused for not fulfilling his contract, though it appears that employees who continued at work in the same service were healthy and continued so.

JURY ARE JUDGES WHETHER EMPLOYEE QUITTING SERVICE BECAUSE OF EPIDEMIC prevailing in the vicinity had adequate cause for so doing.

ASSUMPSIT for wages. The material points in the case are sufficiently presented in the opinion.

N. Abbott, for the plaintiff.

C. P. Brown, for the defendants.

By Court, HATHAWAY, J. The plaintiff labored for the defendants at their mills in St. Johns, and by this action claims to recover his wages.

The defense is that the labor was performed under a contract on his part to work for the defendants during the sawing season of 1854, which he did not fulfill.

The testimony of Bagley, Nute, and Stone, that "they were not hired by the season, but only to remain there as long as they pleased," could have no legitimate effect upon the rights of the parties in this suit, and was improperly admitted. That testimony was introduced by the plaintiff as tending to show that he was not hired for a specified time. But the jury found that he was so hired. Else they could not have found, as they did, specially, that "he quit the defendants' employ, without their leave or consent, before the expiration of the time for which he was hired." The defendants were not aggrieved by the admission of that testimony, for the special findings of the jury show that it produced no effect.

The plaintiff contends that he was excused from the performance of his contract, and justified in quitting when he did, by reason of the alarm and danger occasioned by the prevalence of the cholera in the vicinity of the mills, and that he is entitled to a reasonable compensation for the labor performed. If the fulfillment of the plaintiff's contract became impossible by the act of God, the obligation to perform it was discharged. If he was prevented by sickness or similar inability, he may recover for what he did on a *quantum meruit*: 1 Parsons on Cont. 524.

The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so

Digitized by Google

dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it, nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so. He could not then have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must necessarily have acted at his peril, under the guidance of his judgment.

The propriety of his conduct in leaving his work at that time must be determined by examining the state of facts as then existing. When the laborer has adequate cause to justify an omission to fulfill his contract, such omission cannot be regarded as his fault. Whether or not the plaintiff had such cause was a question of fact, to be determined by the jury upon the evidence.

"Where there are conflicting proofs, or some necessary facts are to be inferred from others which are proved, then it is the province of the jury to decide the cause under instructions from the judge, as to the principles of law which should govern them:" *Sherwood* v. *Marwick*, 5 Me. 295. The question was rightly submitted to the jury, and with appropriate instructions.

No question is presented by the exceptions concerning the rulings of the court upon the subject of damages, or the amount, if any, recoverable for wages.

A report of the whole evidence, signed by the presiding judge, as the law requires, has not been furnished to the court. Therefore the motion for a new trial cannot be entertained.

Exceptions and motion overruled.

Judgment on the verdict.

TENNEY, C. J., and APPLETON, J., concurred.

GOODNOW, J., concurred in the result only.

MAY, J., concurred, remarking that the testimony of Bagley Nute, and Stone was admitted as contradictory of other witnesses introduced by the defendant, and not upon the main question; and for such purpose was clearly admissible.

ERRONEOUS ADMISSION OF EVIDENCE NOT AFFECTING VERDICT is no ground for a new trial: *Sheldon* v. *Connecticut etc. Ins. Co.*, 65 Am. Dec. 565.

EMPLOYEE QUITTING SERVICE FOR JUST OR LEGAL CAUSE, RIGHTS OF: See *Lee* v. *Ashbrook*, 55 Am. Dec. 110.

SICKNESS AS EXCUSE FOR QUITTING SERVICE BY EMPLOYEE: See the note to *Harmon* v. *Salmon Falls etc. Co.*, 58 Am. Dec. 725. In *Jennings* v. *Lyons*, 39 Wis. 557, the principal case is cited as authority for the proposition that where the contract calls for an act which the promisor alone can perform, and he is disabled from performing it by sickness or death, the contract is discharged.

Digitized by Google

KEITH v. PINKHAM.

[43 MAINE, 501.]

STAGE-COACH PASSENGER, TO RECOVER FOR INJURY BY CARRIER, must show negligence or want of ordinary care and prudence by the carrier, occasioning the injury, without fault on his own part.

PASSENGER RIDING ON OUTSIDE OF COACH, AGAINST WARNING of the stage-agent that he does so at his peril, assumes only the risks incident to his exposed situation, and may nevertheless recover for an injury caused by the negligence of the carrier or his servants.

ACTION for an injury to the plaintiff as a passenger in the defendant's coach, by the overturning of the coach through the driver's negligence. Verdict for the plaintiff and exceptions by the defendants. The grounds of exception, so far as material, appear from the opinion.

J. A. Lowell, for the plaintiff.

Bion Bradbury, for the defendant.

By Court, APPLETON, J. The plaintiff, to entitle him to recover, was bound to satisfy the jury that the injury for which he seeks to recover compensation occurred without fault on his part, and through the neglect or want of ordinary care and prudence on the part of the defendant or his servants.

No exceptions have been taken to the instructions given, which relate to the relative duties and obligations of the plaintiff and the defendant. They may thus be assumed to be correct.

The plaintiff, it seems, was riding on the outside of the defendant's coach when the injury in question was sustained. The counsel for the defendant requested the presiding judge to instruct the jury "that if Nathaniel Crocker, who claimed to be an agent of the defendant, requested the plaintiff to take an inside seat, there being a seat for him inside, and the plaintiff declined to take it, and the said Crocker informed him if he remained in his seat he must do it at his own risk, that the plaintiff can recover no damages in this action." This requested instruction was declined, and, as we think, correctly. It may be true that the plaintiff, by riding outside, incurred the peculiar risks, if any there were, arising from his exposed situation. But that is all. He did not assume those resulting from the negligence of the defendant or those in his employ. He or they would not be exonerated from their duties, and if the plaintiff was injured through his or their neglect, he being in the exercise of ordinary and common care, in no way contributing to the injury by his position, he might well maintain this suit.

Digitized by Google

The fact that the plaintiff took his position outside was a circumstance proper for the consideration of the jury in determining whether his negligence contributed in any way to the production of the injury. But the requested instructions took from the jury all inquiries as to the defendant's negligence, and they were rightfully withheld.

The instructions as to damages were correct. If the defendant had desired them to be more explicit or definite in any aspect of the case, he should have made his requests to that end. Being correct so far as given, it is no cause of complaint that supposed instructions, but not requested, might have been given, which would have been correct.

Exceptions overruled.

CARRIER'S LIABILITY FOR INJURY TO PASSENGER, GENERALLY: See *Farish* v. *Reigle*, 62 Am. Dec. 666; *Galena etc. R. R. Co.* v. *Fay*, 63 Id. 323; *Hegeman* v. *Western R. R. Co.*, 64 Id. 517; *Zemp* v. *Wilmington etc. R. R. Co.*, Id. 763; *Galena etc. R. R. Co.* v. *Yarwood*, 65 Id. 682; *Lucas* v. *New Bedford etc. R. R. Co.*, 66 Id. 406, and cases in this series referred to in the notes thereto.

AS TO BURDEN OF PROOF IN NEGLIGENCE IN CASE OF INJURY TO PASSENGERS, see the note to *Farish* v. *Reigle*, 62 Am. Dec. 679.

PASSENGER INJURED WHILE RIDING IN EXPOSED SITUATION, or when guilty of other negligence, right of to recover: See *Galena etc. R. R. Co.* v. *Fay*, 63 Am. Dec. 323; *Zemp* v. *Wilmington R. R. Co.*, 64 Id. 763; *Galena etc. R. R. Co.* v. *Yarwood*, 65 Id. 682; *Lucas* v. *New Bedford etc. R. R. Co.*, 66 Id. 406, and notes thereto. In *Pennsylvania R. R. Co.* v. *Langdon*, 92 Pa. St. 31, the principal case is commented on and distinguished from a case where a passenger was injured while riding in a baggage-car, on the ground that the passenger had no right to ride in such car in any event, while in the principal case the place occupied by the injured passenger, though exposed and hazardous, was a proper place for a passenger.

INHABITANTS OF ORONO *v.* WEDGEWOOD.

[44 MAINE, 49.]

CORPORATE EXISTENCE OF PLAINTIFF IS ADMITTED BY DEFENDANT'S PLEADING GENERAL ISSUE, and they cannot afterwards contest it.

TAX COLLECTOR WHO HAS COLLECTED MONEY WITHOUT OBJECTION FROM TAX-PAYERS MUST ACCOUNT TO TOWN THEREFOR.

SURETIES ON TAX COLLECTOR'S BOND ARE LIABLE FOR MONEYS THEIR PRINCIPAL OUGHT TO ACCOUNT FOR; but they should not suffer from a mistake of the treasurer in passing a credit to the wrong account.

ACTION upon bond given by tax collector for the faithful discharge of the duties of his office. The facts are in the opinion.

S. H. Blake and W. C. Crosby, for the plaintiffs.

J. S. Rowe and N. Wilson, for the defendants.

Digitized by Google

By Court, APPLETON, J. By pleading the general issue, the defendants admit the corporate existence of the plaintiff, and are not afterwards permitted to contest it.

This action is upon a collector's bond, the condition of which is "that whereas said John G. Wedgewood has been chosen a collector of taxes for said town for the year 1855, now if said John G. Wedgewood shall well and faithfully perform all the duties of his said office, then this obligation to be void," etc. In *Ford* v. *Clough*, 8 Me. 335 [23 Am. Dec. 513], the bond was conditioned to "faithfully discharge his duty as collector," etc. It was there held that the sureties could not, in an action on the bond for not paying over moneys collected, controvert the legality of the meeting at which he was chosen, nor the legality of the assessment of taxes antecedent to their commitment to him; nor any act of the town for which they would not be liable in consequence of their suretyship. In *Johnson* v. *Goodridge*, 15 Id. 29, it was decided that a collector of taxes who has given bond is bound to pay over money voluntarily paid to him by the inhabitants, although he has received no collector's warrant, and the tax bills are imperfect and illegal. In *Kellar* v. *Savage*, 20 Id. 199, it was held that a collector of taxes, having acted in that capacity and given bond, was estopped to deny the legality of his election; and that in a suit on the bond it was no defense that the assessment and the warrant accompanying the same had not been signed by the assessors: *Kellar* v. *Savage*, 17 Id. 445. In *Sandwich* v. *Fish*, 2 Gray, 298, Shaw, C. J., says: "Defects in the warrant or tax list might be a good excuse for not executing the warrant. But to say that a collector, who has collected the money without objection by the tax-payers, is not liable to account therefor would be as contrary to the rules of law as to justice." No reason is perceived why the defendants should not be held to account for the moneys collected by the principal in the bond.

The evidence satisfactorily shows that a deduction should be made from the amount found due by the auditor, of the sums of one hundred and twenty-five dollars, which was passed to the credit of the collector in the wrong year, and for twenty-three dollars and seven cents, which appears to have been collected on the warrant of the treasurer, against the collector, by the sale of his property. The sureties should not suffer from a mistake of the treasurer in passing the credit to a wrong account.

Defendants defaulted.

Digitized by Google

EXISTENCE OF CORPORATION IS ADMITTED BY PLEADING GENERAL ISSUE: *Prince* v. *Commercial Bank of Columbus*, 34 Am. Dec. 773; *Savage Mfg. Co.* v. *Armstrong*, 35 Id. 227; *Phœnix Bank etc.* v. *Curtis*, 36 Id. 492; *Alderman* v. *Finley*, 52 Id. 244, and note 247. It can only be questioned by a plea in abatement: *Penobscot Boom Corporation* v. *Lamson*, 33 Id. 656, and note 663; *Savage Mfg. Co.* v. *Armstrong*, 35 Id. 227; a plea in bar: Note to *McIntire* v. *Preston*, 48 Id. 330; or perhaps be met by a demurrer: *Turnpike Co.* v. *McCarty*, 65 Id. 768, and note 771.

THE PRINCIPAL CASE WAS CITED in *Inhabitants of Trescott* v. *Moan*, 50 Me. 353, to the point that although the proceedings of a town are very irregular and informal, at a meeting where assessors, treasurer, and tax collector are elected, and taxes voted to be assessed, yet the collector is legally bound to pay over to the treasurer *de facto* all taxes voluntarily paid to him by the tax-payers; and in *Ticonic Bank* v. *Bagley*, 68 Id. 251, that a plea of the general issue admitted plaintiffs' corporate existence and power to sue, and precluded defendant from contesting them.

BOYD v. EATON.

[44 MAINE, 51.]

CONTRACT IS NOT ENTIRE AND INDIVISIBLE, WHERE ENTIRE STOCK OF GOODS IS SOLD at one and the same time, if each article was sold for a separate and distinct price agreed upon; and though the sale of some of the articles was prohibited by law, this illegality will not render the sale of the other articles illegal also, but an action can be maintained for the price of the latter.

PLAINTIFF WILL BE ALLOWED TO AMEND HIS DECLARATION BY STRIKING OUT ITEMS OF ILLEGAL TRAFFIC, where he has brought an action for the value of a stock of goods sold, each article at an agreed price, but where the sale of some of the articles was prohibited by statute.

ASSUMPSIT upon an account annexed. The facts are in the opinion.

S. H. Blake, for the plaintiff.

A. Sanborn, for the defendant.

By Court, APPLETON, J. This was an action of *assumpsit* upon an account annexed. It appeared in evidence that the plaintiffs, having a stall and stock of goods in the market-house in Bangor, sold, on the twenty-ninth of December, 1856, to the defendant, their fixtures, and such articles of their stock as he might select; that he selected those specified in the account in suit, among which are found various articles the sale of which is prohibited by law. The articles are all charged as of the same date, but separate prices were affixed to each article. At the trial at *nisi prius*, the plaintiff's counsel moved to amend by

Digitized by Google

striking out of the account the articles, the sale of which was unlawful. This amendment was allowed, against the protest of the counsel for the defendant.

It was insisted, in argument, that the sale of goods as above stated constituted an entire contract; that being entire, it is void by the statute prohibiting the sale of spirituous liquors; and that the presiding judge erred in allowing the amendment.

It was held in *Towle* v. *Blake*, 38 Me. 528, that in a suit upon an account, some of the items of which were for spirituous liquors sold in violation of law, that the plaintiff might amend by striking out the items for liquor, and recover on the account thus amended. The account in that case embraced some months, during which the articles were delivered, and it is urged that as they were sold at different times they may be regarded as several sales, and that therein it differs from the case at bar. But the precise question under consideration came before the supreme court of New Hampshire, in *Walker* v. *Lovell*, 28 N. H. 138 [61 Am. Dec. 205], and in *Carleton* v. *Woods*, Id. 291, where it was held that where an entire stock of goods is sold at one and the same time, but each article for a separate and distinct agreed price, the contract of sale is not to be regarded as entire and indivisible, and if the sale of some of the articles be prohibited by law, the illegality will not render the sale of the other articles illegal also. "We are unable," says Woods, J., "to see how this case differs from the case of a sale by a merchant of various goods to his customer, at one and the same time, for separate values, stated at the time, which, when computed, would of course amount to a certain sum in the aggregate. When in such case the goods are charged to the customer, and the sale of part of the goods should be found to be illegal, we think it would be difficult to maintain upon any legal or equitable principles that under a proper declaration the value of the goods which were proper and legal articles of sale could not be recovered."

In the case before us, the defendant was to select such goods as he might choose. Each article selected had its appropriate price. The bargain for its purchase was several and distinct. The defendant ought not to be permitted to evade the payment of articles legally sold because he may have subsequently elected to purchase other articles at an agreed price, the sale of which was prohibited by statute.

Default to stand.

Digitized by Google

CONTRACT VOID IN PART IS NOT NECESSARILY VOID IN TOTO: *Walker* v. *Lovell*, 61 Am. Dec. 605, and note 611, referring to other cases; but the entire contract is void when it is founded upon an indivisible consideration, part of which is illegal: *Filson* v. *Himes*, 47 Id. 422, and note 424, in which other cases are collected; *Rand* v. *Hather*, 59 Id. 135, in note, where other authorities are given.

AMENDMENTS, GENERAL DOCTRINES RELATIVE TO: See extended note to *Stevenson* v. *Mudgett*, 34 Am. Dec. 158–162.

THE PRINCIPAL CASE WAS CITED in *Phillips* v. *Moses*, 65 Me. 71, to the point that where one who has sold and delivered goods which may be the subject of lawful sale does not forfeit his right to recover the price thereof because he has concurrently, in point of time, made sales to the same party, in violation of law, of other goods, the sale of which is prohibited by statute. He may strike out of his account the illegal items which the law will not aid him to recover, and have judgment for what appears to be legally due. In *Goodwin* v. *Clark*, Id. 283, it was cited to show that after such objectionable items were struck out in such a case by an amendment, there would be no valid ground of objection left.

SOUTHARD *v.* HILL.

[44 MAINE, 92.]

GREATEST ACCURACY AND PRECISION ARE REQUIRED IN FRAMING PLEAS IN ABATEMENT, as they delay the trial of the merits of the action.

THERE IS SETTLED DISTINCTION BETWEEN MERE PERSONAL ACTIONS OF TORT and such as concern real property.

PLAINTIFF IN ACTION EX DELICTO SHOULD NOT BE REQUIRED TO INCLUDE ALL TORT-FEASORS, because he may not know them, or be able to find proof against them; but where the gist of the action is that the defendants are proprietors of the land, and have neglected a duty incident to their title, it is otherwise.

ONE TENANT IN COMMON MAY PLEAD TENANCY IN COMMON IN ABATEMENT if he alone be sued in trespass, trover, or case for anything respecting the land held in common.

DAM IS NOT NECESSARILY REAL ESTATE. If built by one person on the land of another, with the latter's consent, it would be personal estate.

PLEA IN ABATEMENT FOR NON-JOINDER OF TENANTS IN COMMON OF DAM, without an averment that the dam was real estate, will be overruled on demurrer.

PLEA IN ABATEMENT OF WRIT MAY BE BOTH OF WRIT AND DECLARATION; and it must be so where it is intended to plead in abatement only to a part of the writ, and the cause of abatement arises only on some of the counts in the declaration.

TRESPASS for injury done to a dam. Defendant pleaded in abatement the non-joinder of other persons, but did not aver that the dam was real estate. Plaintiff demurred to the plea, and defendant joined in the demurrer, which was sustained, and defendant excepted. The other facts are in the opinion.

Digitized by Google

E. Kent, for the defendant.

I. Washburn, for the plaintiff.

By Court, GOODENOW, J. This is an action of trespass. The defendant pleads in abatement the non-joinder of certain other persons, named in his plea, as to the second, third, and fourth counts of the writ, and takes no notice of the first count; and in conclusion, prays judgment of said writ, and that it may be quashed, and for his costs. To this plea there is a demurrer and joinder.

It is undoubtedly true that there is a settled distinction between mere personal actions of tort and such as concern real property; and that if one tenant in common only be sued in trespass, trover, or case, for anything respecting the land held in common, he may plead the tenancy in common in abatement. It is also true that as pleas in abatement delay the trial of the merits of the action, the greatest accuracy and precision are required in framing them.

A dam is not necessarily real estate. If built by one person on the land of another, with his consent, it would be personal estate. The plea in this case does not aver that the dam was real estate. It is not, therefore, certain to every intent. The defendant is not at liberty, in pleading, to leave the question in doubt whether the dam was or was not real estate, with an expectation that the plaintiff might open the way to remove that doubt by a replication instead of a demurrer to the plea. And even if it could be reasonably inferred from what is before us that the dam spoken of in the plea is real estate, we are not informed whether the trespass complained of by the plaintiff arose from acts of malfeasance, or from mere omission to perform a duty, or non-feasance. We think there is good reason for the distinction in this respect, adverted to in *Low* v. *Mumford*, 14 Johns. 426. One reason why the plaintiff in an action *ex delicto* should not be required to include all the tort-feasors is that he may not know them, or be able to find proof against them. But where the gist of the action is that the defendants are proprietors of the land, and have neglected a duty incident to their title, it is otherwise. We are not assured by what has been legally presented to us by the pleadings in this case that the title to the land on which the dam is erected does come directly in question.

Mr. Chitty says that many of the decisions in the books as to the form of the plea are no longer applicable, and now, in gen-

Digitized by Google

eral, a plea in abatement of the writ may be both of the writ and declaration; and it must be so where it is intended to plead in abatement only of a part of the writ, and the cause of the abatement arises only on some of the counts in the declaration: 1 Ch. Pl. 451. The insurmountable objection is, therefore, not so much to the form as to the substance of the plea. The plea in abatement is overruled.

Judgment that the defendant answer over.

JOINDER OF PARTIES IN PERSONAL ACTIONS OF TORT AND IN ACTIONS CONCERNING REAL PROPERTY.—As a general rule, in actions in form *ex delicto*, for a tort committed by several, the plaintiff may sue any of them, and the non-joinder of others cannot be pleaded in abatement; but where the action relates to real property, if it be such as to draw in question the title, all those jointly concerned should be made co-defendants: *Low* v. *Mumford*, 7 Am. Dec. 469.

TENANTS IN COMMON MUST JOIN IN ACTIONS EX DELICTO, and for injuries to their real property: *Bradley* v. *Boynton*, 39 Am. Dec. 582.

NON-JOINDER OF PARTIES IS MATTER FOR PLEA IN ABATEMENT: *Le Page* v. *McCrea*, 19 Am. Dec. 469; *Gilbert* v. *Dickerson*, 22 Id. 592; *Hilliker* v. *Loop*, 26 Id. 286; *Campbell* v. *Wallace*, 37 Id. 219; *State* v. *Woram*, 40 Id. 378.

WEBBER *v.* DAVIS.

[44 MAINE, 147.]

SALE WITHOUT DELIVERY IS VALID AGAINST VENDOR.

TITLE PASSES BY SALE WITHOUT DELIVERY FROM TRUE OWNER, though at the time of the sale the goods are in the tortious possession of a third person.

THERE WILL BE CONVERSION OF PROPERTY WITHOUT MANUAL TAKING OR REMOVAL, where one interferes with it, and without the owner's consent assumes to dispose of it as having title in his own name.

NO DEMAND IS NECESSARY BEFORE COMMENCING SUIT IN TROVER, where there has been an actual conversion, and it can be proved.

DEMAND AND REFUSAL ARE ONLY EVIDENCE OF CONVERSION.

TROVER for the value of a mare. The facts are in the opinion.

D. D. Stewart, for the plaintiff.

S. H. Blake, for the defendants.

By Court, GOODENOW, J. This is an action of trover to recover the value of a mare which Wentworth Davis, one of the defendants, formerly owned, and which it is supposed was stolen from him in February or March, 1852. The writ is dated December 17, 1853. Davis made search for the mare after she was

Digitized by Google

stolen, but could not find her. About one month after she was stolen the plaintiff and the said Wentworth Davis met, and the plaintiff offered him twenty dollars for the mare, and to run his own risk as to finding her. By the proposition, if the plaintiff found the mare, she was to be his property; if not, he lost the twenty dollars, and had no claim on Davis to recover it back. The mare was worth sixty dollars. The proposition was accepted, and the plaintiff paid said W. Davis the twenty dollars.

Within two or three weeks afterwards the plaintiff found said mare in the possession of one Ephraim Jones, in Massachusetts. Before he could succeed in getting her from Jones, the said W. Davis claimed her as his, but he did not before the commencement of this suit offer to rescind the contract with the plaintiff or pay back the twenty dollars.

The deposition of said Ephraim Jones makes a part of the case.

The title will pass by a sale without delivery from the true owner, though at the time of the sale the goods are in the tortious possession of a third person: *Cartland* v. *Morrison*, 32 Me. 190. And a sale without delivery is valid as against the vendor.

By the admitted facts in the case, we are of opinion that the property of the mare was in the plaintiff at the time he found her in the possession of the said Ephraim Jones.

Has there, since that time, and before the commencement of this action, been a conversion of the same by the defendants, or either of them? A demand and refusal are only evidence of a conversion. When there has been an actual conversion, and it can be proved, no demand is necessary before commencing a suit. It is not every interference with the property of another which constitutes a conversion. One person may remove the property of another person from one place to another place without being guilty of a conversion of it to his own use. He may do it without asserting any claim to it for the benefit of the owner, and admitting his title to it.

But if one person interferes with the goods of another, and without his consent undertakes to dispose of them as having the property, he does it at his peril; and there need be no manual taking or removal in order to constitute a conversion. It is sufficient if he exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling with them, or assumes upon himself the property and

Digitized by Google

right of disposing of them. This is abundantly established by the authorities cited by the counsel for the plaintiff: *Gibbs* v. *Chase*, 10 Mass. 128; *Miller* v. *Baker*, 1 Met. 31; *Bowlin* v. *Nash*, 10 Cush. 418; *Fernald* v. *Chase*, 37 Me. 290.

By the deposition of Jones, it appears that John Davis, as the agent of his father, did sell the mare in question to said Jones for the sum of sixty dollars, on the twenty-fourth of October, 1853, which was before this action was commenced. And it is fairly to be inferred that he signed the obligation at that time, which is annexed to said deposition. The obligation speaks of the mare as having been "supposed to have been stolen from us about the winter of 1851–2." It admits that they both received the sixty dollars paid by Jones for the mare, and both promised to indemnify Jones against the claim of any other person on said mare. Jones says the obligation was procured by him and was handed to John Davis, when he was at the house of the witness, in October, 1853, to take down to his father, to be signed by him, and to be brought back in the spring or summer of 1854, when he paid for the mare; and it was taken by John, because the witness wanted Wentworth Davis's name to the instrument. But whether signed by John Davis at that time or subsequently, it is proved to have been in his hands in October, 1853; it is to be presumed that he then knew the contents of it; and it is evidence of what he then undertook to do in relation to the property in said mare, although it might have been signed by him subsequently and at the same time it was signed by his father.

We find no foundation in the facts reported in the case for the argument of the defendant's counsel, that the sale of the mare from W. Davis to the plaintiff was fraudulent and void, on account of a fraudulent suppression of facts known to the plaintiff, and not known to W. Davis. The case states as a fact, that after said sale was made and the twenty dollars paid by the plaintiff to said W. Davis, "within two or three weeks afterwards the plaintiff found the mare in the possession of one Ephraim Jones, in Massachusetts." There is no evidence that the plaintiff had any knowledge that the mare could be found at that place or any other when he purchased the mare of W. Davis.

By agreement of the parties, the case having been submitted to the court upon the facts and evidence reported, with authority to draw such inferences as a jury might, and to enter judgment according to the law of the case, we have arrived at the conclusion that the defendants must be defaulted, and judgment

Digitized by Google

entered for the plaintiff for the sum of sixty dollars damages and interest on the same from the date of the writ, with costs.

SALE WITHOUT DELIVERY IS VALID AGAINST VENDOR: *Costar* v. *Davies*, 46 Am. Dec. 311; *Hooban* v. *Bidwell*, 47 Id. 386, and cases cited in note; *Danley* v. *Rector*, 50 Id. 248; *Griffin* v. *Chubb*, 58 Id. 85, and note 93; *Winslow* v. *Leonard*, 62 Id. 354, and note 359. But the goods sold must be specifically identified by the parties to the sale: *Golder* v. *Ogden*, 53 Id. 618; *Winslow* v. *Leonard*, 62 Id. 354, and cases cited in note thereto 359. And a change of possession of personal property upon a sale thereof is necessary in order to protect the rights of the vendee: *Wilson* v. *Hooper*, 36 Id. 366; and delivery is necessary to complete a sale so far as the rights of a second purchaser or judgment creditor without notice are concerned: *Ludwig* v. *Fuller*, 35 Id. 245, and note 247. Where the property is on land or in buildings in the exclusive possession and control of the vendee from the date of sale, no formal delivery is necessary: *Nichols* v. *Patten*, 36 Id. 713. As to delivery in sales within the statute of frauds, see extensive note to *Shindler* v. *Houston*, 49 Id. 325–340.

CONSTRUCTIVE POSSESSION OF GOODS BY ONE HAVING GENERAL PROPERTY IN THEM, and a right to reduce them to possession at pleasure, is sufficient to maintain either trespass or replevin: *Haythorn* v. *Rushforth*, 38 Am. Dec. 540, and notes thereto 546; *Edwards* v. *Edwards*, 34 Id. 711; but a wrongful conversion of property gives title thereto against all persons except the true owner: *Wincher* v. *Shrewsbury*, 35 Id. 108.

THERE IS TORTIOUS TAKING whenever there is an unlawful meddling with the property, or an exercise or claim of dominion over it, without any pretense of authority or right. This, without a manual seizing of the property, is sufficient, and an action of trespass or replevin will lie: *Haythorn* v. *Rushforth*, 38 Am. Dec. 540, and notes 546.

CONVERSION, WHAT CONSTITUTES: See *Hyde* v. *Noble*, 38 Am. Dec. 508, and collected cases in notes thereto on property necessary to maintain trover: *Hart* v. *Skinner*, 42 Id. 500; *Zachary* v. *Pace*, 47 Id. 744, and note 746; *Clark* v. *Whitaker*, 48 Id. 160; *Scott* v. *Perkins*, Id. 470; *Ragsdale* v. *Williams*, 49 Id. 406; *Maxwell* v. *Harrison*, 52 Id. 385; *Perminter* v. *Kelly*, 54 Id. 177; *Rogers* v. *Huie*, 56 Id. 363; *Woodman* v. *Hubbard*, 57 Id. 310.

DEMAND AND REFUSAL ARE ONLY EVIDENCE OF CONVERSION: *Houston* v. *Dyche*, 33 Am. Dec. 130; *Holbrook* v. *Wight*, 35 Id. 607; *Dezell* v. *Odell*, 38 Id. 628; *Thompson* v. *Rose*, 41 Id. 121; *Hawkins* v. *Hoffman*, 41 Id. 767; *Zachary* v. *Pace*, 47 Id. 744; *Magee* v. *Scott*, 55 Id. 49, and notes 51; *Bradley* v. *Spofford*, Id. 205; *Carr* v. *Clough*, 59 Id. 345; *Moody* v. *Whitney*, 61 Id. 239; they do not constitute a conversion if the party has not the power of compliance: *Carr* v. *Clough*, 59 Id. 345; and they are no evidence of conversion when the defendant makes no claim to the property himself, but has a sufficient and well-grounded doubt as to the plaintiff's title, and refuses to give up the property until he has ascertained to whom it belongs: *Zachary* v. *Pace*, 47 Id. 744; nor if the circumstances show that the refusal is caused by a reasonable apprehension of the consequences in a doubtful matter: See note to case last cited, 746. Other acts as evidence of conversion: See note to *Magee* v. *Scott*, 55 Id. 51; *Ragsdale* v. *Williams*, 49 Id. 406.

DEMAND AND REFUSAL NEED NOT BE PROVED IN ACTION OF TROVER where there has been an actual conversion: *Houston* v. *Dyche*, 33 Am. Dec. 130; *Porter* v. *Foster*, 37 Id. 59; *Hyde* v. *Noble*, 38 Id. 508; nor where there has been a tortious conversion: *Harker* v. *Dement*, 52 Id. 670; *Buel* v. *Pumphrey*, 56 Id. 714.

Digitized by Google

PILLSBURY v. MOORE.

[44 MAINE, 154.]

RIPARIAN PROPRIETORS HAVE RIGHT TO FLOW OF WATER in its natural current, without any obstructions injurious to them.

RIGHT TO USE OF WATER IS ACQUIRED IN PARTICULAR MANNER BY UNINTERRUPTED ADVERSE ENJOYMENT of such use for over twenty years.

ADVERSE ENJOYMENT BY ANOTHER IS WHAT DESTROYS OWNER'S RIGHT TO USE OF WATER.

OWNER'S NON-USER OF HIS RIGHT TO USE OF WATER DOES NOT IMPAIR HIS TITLE or confer any right thereto upon another.

ABANDONMENT OF MILL PRIVILEGE OR RIGHT OF WAY IS NOT CREATED BY MERE NON-USER for less than twenty years; nor will the sale of a mill privilege for its value, or an offer to sell, be regarded as an abandonment.

ONE TENANT IN COMMON MAY MAINTAIN ACTION AGAINST HIS CO-TENANT for diverting the water from their common mill for separate purposes.

ACTION MAY BE MAINTAINED AGAINST ONE FOR CONTINUING NUISANCE ERECTED BY ANOTHER, as well as for the original erection.

PURCHASER OF PROPERTY ON WHICH NUISANCE IS ERECTED IS NOT LIABLE FOR ITS CONTINUANCE unless he has been requested to remove it. The conveyance does not transfer the grantor's liability to the grantee.

ACTION on the case for the continuance of a dam, whereby plaintiffs' ancient mill site was flowed and destroyed. The facts are in the opinion.

G. W. Whitney and D. D. Stewart, for the plaintiffs.

Rowe and Bartlett, for the defendants.

By Court, APPLETON, J. The ancestor of the plaintiff was the part owner of a mill and privilege, which has been flowed out by a dam erected by those under whom the defendants derive their title. This action is brought for damage sustained by the continuance of the dam thus built, in consequence of backwater caused thereby.

At the time when the dam in question was erected, the ancestor of the plaintiff had acquired no prescriptive rights by reason of a continued occupation for over twenty years. The defendants, and those under whom they claim since its erection, have acquired no rights by lapse of time to have and maintain their dam at its present height. The respective rights of the parties remain, as at common law, unaffected by any question of prescription.

As riparian proprietors, the plaintiffs have a right to the flow of the water in its natural current, without any obstructions injurious to them. "No man," says Story, in *Wilkinson* v. *Tyler*,

Digitized by Google

4 Mass. 400, "has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above." In *Cowles* v. *Kidder*, 24 N. H. 365, it was held that every proprietor of land over or through which a stream of water flows is, in virtue of such ownership, entitled to the use of the water flowing over it in its natural current, without diminution or obstruction; and no proprietor below has any right to throw backwater upon a proprietor above: *Mason* v. *Hill*, 5 Barn. & Ald. 1; *Heath* v. *Williams*, 25 Me. 209 [43 Am. Dec. 265]; *Hatch* v. *Dwight*, 17 Mass. 289.

A party acquires a right to the use of water in a particular manner by an uninterrupted adverse enjoyment of such use over twenty years. But an omission by the owner to make use of his right does not impair his title or confer any right thereto upon another. It is not the non-user by the owner, but the adverse enjoyment by another, which destroys his right: *Townsend* v. *McDonald*, 12 N. Y. 381. Mere non-user for less than twenty years will not prove an abandonment of a mill privilege or right of way: *Williams* v. *Nelson*, 23 Pick. 141 [34 Am. Dec. 45]; *French* v. *Braintree Manufacturing Company*, Id. 216; *Hurd* v. *Curtis*, 7 Met. 94. The evidence fails to prove an intentional abandonment of the privilege by the plaintiff's ancestor. He might have been willing to sell his interest in the privilege, but a sale of a privilege for its value, or an offer to sell, is not to be regarded as an abandonment.

It was held in *Odiorne* v. *Lyford*, 9 N. H. 502 [32 Am. Dec. 387], that if one co-tenant of land upon which a mill is situated erects a dam below on the same stream on his private estate, and thereby flows the common property to the injury of his co-tenant, the latter may maintain an action of the case against him. In *Blanchard* v. *Baker*, 8 Me. 253 [23 Am. Dec. 504], the court held that one tenant in common might maintain case against his co-tenant for diverting the water from their common mill for separate purposes.

It would seem, therefore, that Edmund Pillsbury, in his lifetime, might well have maintained an action for the injury to his privilege caused by the dam erected by those from whom the defendants claimed title.

It is well settled that an action may be maintained as well for continuing a nuisance erected by another as for the original erection: *Staple* v. *Spring*, 10 Mass. 72.

This action is not against those by whom the dam was erected,

Digitized by Google

by which the mill privilege of the plaintiff's ancestor was flowed out. It is not for an original and wrongful erection, but for its continuance by those who derive title through various mesne conveyances from those by whom it was erected.

If this action is not brought against the original erector of the nuisance, but against feoffee, lessee, etc., it is necessary to prove a special request to the defendant to remove the nuisance: *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 99. In *Woodman* v. *Tufts*, 9 N. H. 88, it was held that when a dam was erected and land flowed by the grantor of an individual, the grantee will not be liable for damages in continuing the dam and flowing the land as before, except on notice of damage, and request to remove the nuisance or withdraw the water. "It may be considered as settled," says Upham, J., "that when he who erects a nuisance conveys the land he does not transfer the liability for the erection to the grantee, for the grantee is not liable till, upon request, he refuses to remove the nuisance for the reason that he cannot know until such request but the dam was rightfully erected." In *Johnson* v. *Lewis*, 13 Conn. 307 [33 Am. Dec. 405], Sherman, J., says: "The law is well settled that a purchaser of property on which a nuisance is erected is not liable for its continuance unless he has been requested to remove. This rule is very reasonable. The purchaser of property might be subjected to very great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known except to the party injured. A plaintiff ought not to rest in silence and presently surprise an unsuspecting purchaser by an action for damage, but should be presumed to acquiesce until he requests a removal of the nuisance:" Angell on Watercourses, 403; *Plumer* v. *Harper*, 3 N. H. 88 [14 Am. Dec. 333]; Gale & Whatley on Easements, 404. The defendants are not those who are responsible for the erection of the original nuisance—for as between the parties owning the dams when the lower one was built, that must be regarded as a nuisance to the upper—but have subsequently acquired their title. They have never been requested to remove their dam Until that is done, and they have neglected to comply with such request, they cannot be regarded as in fault.

Plaintiffs nonsuit.

RIGHT OF RIPARIAN OWNER TO FLOW OF WATER: *Stein* v. *Burden*, 60 Am. Dec. 453, and note 458, referring to prior cases collected; *Thurber* v. *Martin*, 61 Id. 468, and note 470; *Dilling* v. *Murray*, 63 Id. 385, and col

Digitized by Google

lected cases in note 389; *Tillotson* v. *Smith*, 64 Id. 355, and notes 357; *Wheatley* v. *Crisman*, Id. 657; *Burwell* v. *Hobson*, 65 Id. 247, and notes 253; *Stein* v. *Burden*, Id. 394.

UNDISTURBED USE OF WATER FOR TWENTY YEARS GIVES PARTICULAR RIGHT TO SUCH USE, as if acquired by prescription or grant: *Williams* v. *Nelson*, 34 Am. Dec. 45, and note 51; *Odiorne* v. *Lyford*, 32 Id. 387; *Cowell* v. *Thayer*, 38 Id. 400, and note 403; *Cary* v. *Daniels*, 41 Id. 532; *Stein* v. *Burden*, 60 Id. 453.

NON-USER OF WATER PRIVILEGE DOES NOT AFFECT OWNER'S RIGHT, nor confer any adverse rights upon another: See exhaustive note to *Heath* v. *Williams*, 43 Am. Dec. 274, on rights acquired by prior appropriation of water of stream; *Townsend* v. *McDonald*, 64 Id. 508.

ADVERSE ENJOYMENT FOR TWENTY YEARS OF WATERCOURSE, by one riparian owner to the prejudice of another, will establish a right: *Townsend* v. *McDonald*, 64 Am. Dec. 508.

ABANDONMENT IS NOT PRESUMED OR CREATED BY NON-USER: *Williams* v. *Nelson*, 34 Am. Dec. 45; and see exhaustive note to *Wyman* v. *Hurlburt*, 40 Id. 467, on abandonment.

LIABILITY OF ERECTOR OF NUISANCE: See extended note to *Plumer* v. *Harper*, 14 Am. Dec. 336, discussing the question, and showing his liability even after alienation. See also *Waggoner* v. *Jermaine*, 45 Id. 474, and notes 479; *Fish* v. *Dodge*, 47 Id. 254, and notes 257.

LIABILITY FOR CONTINUING NUISANCE ERECTED BY ANOTHER: See discussion of this subject in the extended note to *Plumer* v. *Harper*, 14 Am. Dec. 336.

PURCHASER IS NOT LIABLE FOR CONTINUANCE OF NUISANCE on the property purchased until after he has been asked to remove it: *Johnson* v. *Lewis*, 33 Am. Dec. 405; but notice to the erector is not necessary in an action against him: *Plumer* v. *Harper*, 14 Id. 338, note.

DWINEL *v.* VEAZIE.

[44 MAINE, 167.]

EVERY MILL-OWNER HAS RIGHT TO USE OF WATER ABOVE AND BELOW HIS MILL, to float logs to it, to float rafts and lumber to market, and to float away waste stuff from his mill, etc., so far as such use is reasonable and conformable to the usages and wants of the community.

OWNER OF MILL PRIVILEGE HAS NO RIGHT TO RAISE HEAD OF WATER SO HIGH AS TO INJURE the operations of an older mill above his mill site or dam, or to obstruct the public use of the stream as one navigable for boats, rafts, or lumber.

IF MILL-OWNER BELOW OBSTRUCTS FLOW OF WATERS OF STREAM OVER THEIR ACCUSTOMED BED, thereby destroying their former use by the owner of an older mill above for the purposes of boating or floating rafts or logs, and turns the water into a new channel, the latter has a right to use the water in its new channel; and if that becomes obstructed, he has the right to effect a suitable passage-way over the former channel, but to cause no unnecessary damage in doing so.

Digitized by Google

REASONABLE CARE AND UNNECESSARY DAMAGE ARE QUESTIONS OF FACT FOR JURY.

DEFENDANT IS NOT LIABLE FOR TORTIOUS ACTS OF HIS LESSEES, UNLESS AUTHORIZED BY HIM.

ALLEGATION OF SPECIAL INJURY IS SUFFICIENT TO MAINTAIN ACTION, if plaintiff shows that he has sustained a particular injury, different in its character from that which is common to all citizens, under the circumstances of the case.

ACTION on the case. The facts are stated in the opinion. The jury returned a verdict for six thousand dollars in favor of plaintiff; and defendant presented the case on exceptions, and motion for a new trial. Dwinel was plaintiff in the lower court, and Veazie was defendant.

J. A. Peters, for the plaintiff.

A. W. Paine and G. W. Ingersoll, for the defendant.

By Court, HATHAWAY, J. Penobscot river is navigable for boats, rafts, and lumber, above and below Old Town falls. In the river are sundry islands, which so divide the waters as to make an east and a west channel. Goat island is near to and next below the falls, and Webster's island next below that.

The defendant owned a mill privilege at those falls, on the west channel of the river, and he and those from whom he derived his title have owned and occupied it as such ever since 1801.

The plaintiff owned a mill privilege on the same channel, about half a mile below the defendant's mills, which privilege has been owned and occupied by the plaintiff and those from whom he derived his title since 1803. When the dam was built on the plaintiff's privilege, in 1803, no sluice or passage-way was made through it for running rafts, but instead thereof, the owner of it built a side dam from Webster's island to Goat island, and made a sluice through it, near its lower end, which dam and sluice were ever after kept in repair by the owners of the plaintiff's mill site, until 1854, and the sluice was always used by the owners and occupants of the mills on the defendant's privilege, for running rafts of lumber from their mills into the eastern channel of the river, where they could be floated to market.

"A bank of drift stuff, slabs, etc., accumulated in the river, between the plaintiff's and the defendant's mills, which bank extended down the stream from the western side of Goat island, narrowing the channel, and leaving a large basin on the east side of the bank, between said bank and the side dam, around

Digitized by Google

the lower end of which bank was the channel or passage for rafts to the sluice.

In the spring of 1854 a breach was made in the side dam, and a part thereof, near the upper end of it, carried away, by reason of which the floating of rafts through the sluice became impracticable or dangerous. The plaintiff had due notice of the breach in the side dam, but did not repair it. Whereupon the defendant made a cut through the "bank of drift stuff, edgings, and slabs," through which rafts could be run from his mills, and thence through the breach in the side dam to the eastern channel of the river.

The cut made by the defendant through the "bank of drift stuff," etc., diverted the water, or a considerable portion of it, from the plaintiff's mills, to his damage, for which this action was brought, and also for filling up and obstructing the channel of the river and the plaintiff's mill-pond. The case is presented on exceptions and a motion for a new trial.

The defendant contends "that no action can be maintained for any damages sustained by the plaintiff from the filling up of his mill-pond by edgings and drift stuff, even though the facts be as alleged by him," for "that the wrong done, if one, is of a public and general nature."

The allegation in the second count in the writ is that the defendant had "filled up and obstructed the said channel and mill-pond with slabs and edgings, etc., so that the channel of said river has been choked and finally diverted, and the said Dwinel's mill-pond has been filled up." We cannot doubt that this is a sufficient allegation of special injury to maintain an action, according to the authority of *Stetson* v. *Faxon*, 19 Pick. 147 [31 Am. Dec. 123], and other cases cited in argument by the defendant's counsel.

When the defendant's mill privilege was first occupied as such, in 1801, the owner thereof had a right to the use of the water for his mills, subject to the rights of the public to the use of the river as a stream navigable for boats, rafts, and lumber, and when the plaintiff's mill privilege was first occupied as such, in 1803, the rights of the owner thereof, and his duties to furnish facilities of passage to the public at his mill-dam, were the same as those of the owner of the upper privilege, neither of them having the right by his dam to raise a head of water so high as to injure the operations of an older mill above his mill site. The defendant had a right to the use of the water above his mills to float logs to them, and also to the use of the water below

Digitized by Google

them to float rafts and lumber to market, and also to float away the waste stuff from his mills, so far as such use was reasonable and conformable to the usages and wants of the community.

His right of way was in the waters, and the plaintiff had no authority to prevent its use. The owner of the plaintiff's privilege had a legal right to erect and continue his dam and mills, but he was bound to provide a way of passage for the defendant's rafts: *Brown* v. *Chadbourne*, 31 Me. 9 [50 Am. Dec. 641].

The plaintiff proved by Ebenezer Webster that there was no channel between the two islands when the side dam was built between them, and that rafts could run out between them only when the water was high.

The original erection of the dam on the plaintiff's privilege obstructed the flowing of the waters so that they could not be used there as formerly for floating rafts. The effect of the plaintiff's mill-dam, the side dam, and the sluice was to raise the waters to be used for floating rafts from the defendant's mills, and turn them into a new channel between Goat island and Webster's island.

It was held by the court in *Dwinel* v. *Barnard*, 28 Me. 554 [48 Am. Dec. 507], that "should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so that they could not be used as formerly for the purposes of boating or of floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to use them in the new channel as they had been accustomed to use them in their former channel."

The owners and occupants of the mills on the defendant's privilege had used the new channel between those islands over fifty years, running their rafts through the sluice until they could not safely use it longer by reason of the breach in the side dam above the sluice.

The defendant had a right to use the water for floating his rafts. The channel had been obstructed by the plaintiff's mill-dam, and the waters to be used for floating rafts had been turned into a new channel, which was in such a condition that it could not be safely used without expensive repairs, which it was the plaintiff's duty to make, or to provide some suitable passage-way, which he neglected to do after notice. The defendant had all the rights of passage for his rafts through the side dam which he would have had through the mill-dam, if the side dam and sluice had never been made and he had a lawful right, in the use of reasonable care, and causing no unnecessary damage

Digitized by Google

to the plaintiff, to effect a suitable passage for his rafts. And whether in doing it he used such care, or caused any unnecessary damage to the plaintiff is a question of fact which should have been submitted to the jury.

The defendant would not be liable for the tortious acts of his lessees, unless authorized by him: *Rich* v. *Barterfield*, 56 Eng. Com. L. 783; *Regina* v. *Watson*, 2 Ld. Raym. 856; *Earle* v. *Hall*, 2 Met. 353; *Hilliard* v. *Richardson*, 3 Gray, 349 [63 Am. Dec. 743]; *Wyman* v. *Farrar*, 35 Me. 64. And the case furnishes no evidence that they were authorized by him to do any unlawful act to the plaintiff's property. So far as the instructions given to the jury are conflicting with our views of the law upon the questions presented in the case and considered by the court, we think they were erroneous. The exceptions are sustained. The verdict is set aside, and a new trial granted.

It is not necessary to consider the other questions presented on the motion.

RIGHTS OF MILL-OWNERS AND ERECTION OF DAMS: *Hoy* v. *Sterrett*, 27 Am. Dec. 313, and notes 318; *Monongahela Nav. Co.* v. *Coon*, 47 Id. 474, and note 478; *Cowles* v. *Kidder*, 57 Id. 287, and notes 293; *McCoy* v. *Danley*, Id. 680, and exhaustive note thereto 684–693, on rights and liabilities of owners of dams; *Thurber* v. *Martin*, 61 Id. 468, and note 470.

THE PRINCIPAL CASE WAS CITED in *Veazie* v. *Dwinel*, 50 Me. 492, to the point that the defendant Veazie was not liable for the tortious acts of his lessees, unless authorized by him anterior to the time at which he was made liable by legislative enactment: See Act of April 2, 1859, c. 98. The principal case, as well as that of *Veazie* v. *Dwinel*, 50 Id. 479, was cited in *Davis* v. *Winslow*, 51 Id. 293, to the point: 1. That it was not lawful for a mill-owner to obstruct, with the waste from his mill, a channel made by another mill-owner as a passage-way for rafts, logs, and lumber, from the former's mill on the Penobscot river to and through the sluice in the latter's mill-dam; 2. That the latter had no right to permanently obstruct this channel by a boom across it, designed to guide his logs into a new channel made by the former, though he might lawfully use this new channel as a passage-way for his logs, and erect temporary guide-booms for that purpose. These cases were submitted to the court, who gave this construction to the rights of the respective parties, as a reasonable use of the Penobscot river as a public highway for running logs. The cases named were also cited again in *Davis* v. *Winslow*, Id. 296, to the point that highways, whether on land or water, are designed for the accommodation of the public, for travel or transportation, and any unauthorized or unreasonable obstruction thereof is a public nuisance in the eye of the law. They cannot be made the receptacles of waste materials, filth, or trash, nor the depositories of valuable property, so as unreasonably to obstruct their use as highways. In *Pearson* v. *Rolfe*, 76 Id. 386, the principal case was cited to the following language: A part of the public right is granted to the mill-owner for a supposed gain which the public obtains through the use of his mills. He is authorized to build dams and erect mills upon his privilege, and to raise a head of water for his use. His stores of water are his property; and a person who casts waste into his mill-pond to his injury is liable therefor.

Digitized by Google

DECKER v. GAMMON.

[44 MAINE, 322.]

OWNER OF BEASTS FERÆ NATURÆ IS, UNDER ALL CIRCUMSTANCES, LIABLE FOR INJURIES DONE BY THEM.

ALLEGATION OR PROOF THAT OWNER OF ANIMALS FERÆ NATURÆ KNEW THEM TO BE MISCHIEVOUS IS UNNECESSARY in actions for injuries by such beasts, for he is conclusively presumed to have such knowledge.

ALLEGATION OR PROOF THAT OWNER OF ANIMALS FERÆ NATURÆ WAS GUILTY OF NEGLIGENCE IN PERMITTING THEM TO BE AT LARGE IS UNNECESSARY in actions for injuries by such animals, for he is bound to keep them in at his peril.

OWNER OF DOMESTIC ANIMALS, SUCH AS OXEN, HORSES, ETC., IS NOT LIABLE FOR INJURIES DONE BY THEM, if they are rightfully in the place where they do the mischief, unless he knew that they were accustomed to do mischief.

KNOWLEDGE OF OWNER THAT BEAST WAS VICIOUS MUST BE ALLEGED AND PROVED IN SUITS FOR INJURIES BY DOMESTIC ANIMALS, if they were rightfully in the place where the mischief was done, for unless the owner knew that the beast was vicious, he is not liable; but if he did have such knowledge, he is liable. The gist of such actions is the keeping of the animal after knowledge of its vicious propensities.

OWNER OF DOMESTIC ANIMALS IS LIABLE FOR MISCHIEF DONE BY THEM, IF THEY ARE WRONGFULLY IN PLACE WHERE THEY DO ANY MISCHIEF, though he had no notice that they had been accustomed to do so before. In such cases, the ground of action is that the animals were wrongfully in the place where the injury was done.

IN ACTION AGAINST OWNER OF DOMESTIC ANIMAL, WRONGFULLY IN PLACE WHERE IT WAS DOING MISCHIEF, IT IS UNNECESSARY TO ALLEGE OR PROVE any knowledge on the part of the owner that it had previously been vicious.

DECLARATION IS SUFFICIENT TO SUSTAIN VERDICT THEREON, which alleges that defendant's horse, being unlawfully at large, broke and entered plaintiff's close, and injured plaintiff's horse, which was there peaceably and of right depasturing.

INSTRUCTION, IN ACTION ON CASE, THAT IF DEFENDANT'S HORSE, AT TIME OF INJURY TO PLAINTIFF'S HORSE, had escaped into plaintiff's close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be entitled to recover, is correct; and this being so, an instruction requested that the plaintiff must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that defendant had knowledge of such viciousness prior to the time of the injury, will be properly refused.

ACTION on the case to recover the value of a horse alleged to have been injured by the defendant's horse. Plaintiff introduced evidence tending to prove that on the night of September 13, 1855, he put his horse into his field well and uninjured. The next morning his horse and the defendant's were together

Digitized by Google

in plaintiff's close, defendant's horse having during the night escaped from defendant's inclosure, or from the highway, into the close of the plaintiff. The evidence also tended to prove that plaintiff's horse was so severely injured by defendant's horse, by his kicking, biting, or striking with his forefeet, or in some other way, that he died in a few days afterwards. Verdict for the plaintiff, and defendant excepted.

C. W. Walton and S. C. Andrews, for the defendant.

T. Ludden, for the plaintiff.

By Court, DAVIS, J. There are three classes of cases in which the owners of animals are liable for injuries done by them to the persons or the property of others. And in suits of such injuries, the allegations and proofs must be varied in each case, as the facts bring it within one or another of these classes.

1. The owner of wild beasts, or beasts that are in their nature vicious, is, under all circumstances, liable for injuries done by them. It is not necessary, in actions for injuries by such beasts, to allege or prove that the owner knew them to be mischievous, for he is conclusively presumed to have such knowledge; or that he was guilty of negligence in permitting them to be at large, for he is bound to keep them in at his peril.

"Though the owner have no particular notice that he did any such thing before, yet if he be a beast that is *feræ naturæ*, if he get loose and do harm to any person, the owner is liable to an action for the damage:" 1 Hale P. C. 430.

"If they are such as are naturally mischievous in their kind, in which the owner has no valuable property, he shall answer for hurt done by them, without any notice; but if they are of a tame nature, there must be notice of the ill quality:" Holt, C. J., in *Mason* v. *Keeling*, 12 Mod. 332.

"The owner of beasts that are *feræ naturæ* must always keep them up, at his peril; and an action lies without notice of the quality of the beasts:" *Rex* v. *Huggins*, 2 Ld. Raym. 1583.

2. If domestic animals, such as oxen and horses, injure any one, in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief. And in suits for such injuries, such knowledge must be alleged and proved. For unless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge, he is liable.

Digitized by Google

"The gist of the action is the keeping of the animal after knowledge of its vicious propensities:" *May* v. *Burdett*, 58 Eng. Com. L. 101.

"If the owner have knowledge of the quality of his beast, and it doth anybody hurt, he is chargeable in an action for it:" 1 Hale P. C. 430.

"An action lies not unless the owner knows of this quality:" *Buxendin* v. *Sharp*, 2 Salk. 662.

"If the owner puts a horse or an ox to grass in his field, and the horse or ox breaks the hedge and runs into the highway, and gores or kicks some passenger, an action will not lie against the owner unless he had notice that they had done such a thing before:" *Mason* v. *Keeling*, 12 Mod. 332.

"If damage be done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief:" *Vrooman* v. *Lawyer*, 13 Johns. 339.

3. The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind, the ground of the action is that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner that they had previously been vicious.

"If a bull break into an inclosure of a neighbor, and there gore a horse so that he die, his owner is liable in an action of trespass *quare clausum fregit*, in which the value of the horse would be the just measure of damages:" *Dolph* v. *Ferris*, 7 Watts & S. 367 [42 Am. Dec. 246].

"If the owner of a horse suffers it to go at large in the streets of a populous city, he is answerable in an action on the case for a personal injury done by it to an individual, without proof that he knew that the horse was vicious. The owner had no right to turn the horse loose in the streets:" *Goodman* v. *Gay*, 15 Pa. St. 188 [53 Am. Dec. 589]. In this case, the writ contained the allegation of knowledge on the part of the defendant; but the court held that it was not material, and need not be proved.

The case before us is clearly within this class of cases last described. It is alleged in the writ that "the plaintiff had a valuable horse which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where

Digitized by Google

of right he ought not to be; and being so unlawfully at large, broke into the plaintiff's close and injured the plaintiff's horse," etc. It is also alleged that "the vicious habits of the horse were well known to the defendant;" but this allegation was not necessary, and may well be treated as surplusage. If the defendant had had a right to turn his horse upon the plaintiff's close, it would have been otherwise; but if the horse was wrongfully there, the defendant was liable for any injury done by him, though he had no knowledge that the horse was vicious. The *gravamen* of the charge was that the horse was wrongfully upon the plaintiff's close; and this was what was put in issue by the plea of not guilty.

Nor are these principles in conflict with the decision in the case of *Van Leuven* v. *Lyke*, 1 N. Y. 515 [49 Am. Dec. 346]. In that case the action was not sustained, because the declaration was not for trespass *quare clausum*, with the other injuries alleged by way of aggravation. But in that case there was no allegation that the animal was wrongfully upon the plaintiff's close, or that the injury was committed upon the plaintiff's close: *Tifft* v. *Barton*, 4 Denio, 171. And in the court of appeals it was expressly held that "if the plaintiff had stated in his declaration that the swine broke and entered his close, and there committed the injury complained of, and sustained his declaration by evidence, he would have been entitled to recover all the damages thus sustained: *Van Leuven* v. *Lyke*, *supra*.

In the case before us, though the declaration is not technically for trespass *quare clausum*, it is distinctly alleged that the defendant's horse, "being so unlawfully at large, broke and entered the plaintiff's close, and injured the plaintiff's horse," which was there peaceably and of right depasturing. This was sufficient; and the instruction given to the jury, "that if the defendant's horse, at the time of the injury, had escaped into the close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be entitled to recover," was correct. And this being so, the instruction requested, "that the plaintiff must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the injury," was properly refused.

Exceptions overruled.

CUTTING, J., did not concur.

Digitized by Google

OWNER OF ANIMALS FERÆ NATURÆ, SUCH AS LIONS, TIGERS, ETC., IS LIABLE FOR ANY DAMAGE THEY MAY DO, without notice, on the ground that by nature such animals are fierce and dangerous: See *Van Leuven* v. *Lyke*, 49 Am. Dec. 347, and numerous cases there cited, also note to same Av.

OWNER OF VICIOUS OR MISCHIEVOUS DOMESTIC ANIMAL IS LIABLE FOR INJURIES COMMITTED ANYWHERE BY IT while running at large, after notice of its having such propensities: *Hinckley* v. *Emerson*, 15 Am. Dec. 383; *Loomis* v. *Terry*, 31 Id. 306, and note 310; *Pickering* v. *Orange*, 32 Id. 35; *Coggswell* v. *Baldwin*, 40 Id. 686; *Kittredge* v. *Elliott*, 41 Id. 717; *Van Leuven* v. *Lyke*, 49 Id. 346, and note 349; *Marsh* v. *Jones*, 52 Id. 67; *Goodman* v. *Gay*, 53 Id. 589; *McCaskill* v. *Elliott*, Id. 706.

OWNER OF ANIMALS MANSUETÆ NATURÆ, SUCH AS HORSES, OXEN, COWS, SHEEP, SWINE, ETC., MUST BE SHOWN TO HAVE NOTICE OF THEIR MISCHIEVOUS DISPOSITION or viciousness before he can be held liable for injuries committed by them, unless such mischief is done by the animals while committing a trespass upon the close of another: *Van Leuven* v. *Lyke*, 49 Am. Dec. 347. In the latter case the owner is conclusively presumed to have notice of the propensity of the animals to roam and do mischief, from the fact that such propensity is so notorious. Nor is it material that he is guilty of no actual negligence in permitting their escape from his premises; and the fact that they escape into another's lands against their owner's will does not relieve him from responsiblity: See note to *Tonawanda R. R. Co.* v. *Munger*, Id. 249.

SCIENTER OF VICIOUSNESS OR MISCHIEF MUST BE ALLEGED IN DECLARATION before owner of domestic animals, doing mischief on his own premises, can be charged: *Van Leuven* v. *Lyke*, 49 Am. Dec. 347, and note 349.

IT IS NOT NECESSARY TO ALLEGE OR PROVE SCIENTER ON PART OF OWNER of the vicious propensity of the animal when it appears that the animal doing the injury complained of was trespassing at the time the damage was occasioned: *Angus* v. *Radin*, 8 Am. Dec. 626; *Van Leuven* v. *Lyke*, 49 Id. 349; *Goodman* v. *Gay*, 53 Id. 590; *McCaskill* v. *Elliott*, 53 Id. 706.

GIST OF ACTION FOR PERSONAL INJURIES SUFFERED FROM ANIMALS is an act done by defendant, not sanctioned by law or custom, from which he must have known that injury might result: *Goodman* v. *Gay*, 53 Am. Dec. 589.

WHITNEY *v.* ATLANTIC & ST. LAWRENCE R. R. CO.

[44 MAINE, 362.]

RAILROAD COMPANY IS LIABLE FOR INJURIES OCCASIONED BY FAILURE TO ERECT AND MAINTAIN substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through inclosed and improved lands, if this is a duty imposed upon them by their charter.

LEASE AND ASSIGNMENT OF RAILROAD BY ITS OWNERS DOES NOT RELIEVE COMPANY themselves from any liability for losses or injuries imposed upon them by their charter and the laws of the state.

ACTION on the case, to recover the value of a horse which the plaintiff alleged was killed by a locomotive of the defendants,

Digitized by Google

in consequence of their neglect in keeping the fence in repair along the line of their road adjoining the plaintiff's improved and inclosed land, where his horse was rightfully put by the plaintiff. Plaintiff's horse was killed at the time mentioned by an engine and train running upon the railroad in the ordinary and usual manner. The horse escaped on to the railroad through the gate at the plaintiff's crossing, or through the fence. On each side of the railroad, as located, there were fences constructed by the defendants originally. Gates formed a part of the lines of the fences at the plaintiff's crossing, near his buildings, and were made and hung and fitted by the defendants when they constructed the fences for the convenience and accommodation of the crossing. The crossing, however, had no cattle-guards. There was evidence tending to show that the fence by the plaintiff's field, where his horse was kept, was defective by reason of a broken rail adjoining the railroad, and that the defect had existed during three months prior to and at the time of the alleged injury, and that the fastening of the gate referred to was insufficient, and must have been so for a considerable time. Plaintiff also introduced evidence of ordinary care on his part. The lease of defendants' road under act of March 29, 1853, was admitted. The facts of the lease are in the opinion. Defendants, however, had kept up their organization, having a president and board of directors. The jury were instructed that this action could be maintained against the defendants notwithstanding the lease, and although the lessees, at the time of the killing, were in possession of and operating the railroad. Verdict for the plaintiff.

Howard and Strout, for the defendants.

Fessenden and Butler, for the plaintiff.

By Court, CUTTING, J. The eleventh section of the defendant's charter provides that "said railroad corporation shall erect and maintain substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through inclosed and improved lands."

We refer to the decision of this court in *Norris* v. *Androscoggin Railroad Co.*, 39 Me. 273 [63 Am. Dec. 621], as decisive of the plaintiff's right to recover, unless the defendants' liability had been transferred to and assumed by another corporation before the cause of action had accrued. And in defense it is so contended, and to show that such was the fact, "the lease to trustees for the Grand Trunk Railway Company," of August 5, 1853, and

Digitized by Google

the "assignment to the company," of February 9, 1855, have been introduced. And indeed, those instruments seem to have transferred, as contended, to the Grand Trunk Railway Company, upon certain terms, conditions, restrictions, and limitations, the exclusive use and possession of the defendants' road and everything appertaining thereto, for and during the term of nine hundred and ninety-nine years; and the case finds that at the time the plaintiff sustained his injury the road was so possessed and occupied.

But the defendants are a corporation subject to the laws of this state, and within the jurisdiction of her legal tribunals. Its responsibilities, both as a corporation and its stockholders, are well defined by the provisions of its charter and the public laws of the state, by which provision is made for recovery of claims and for redress of private wrongs; first, by resort to and a judgment and execution against the corporation; and subsequently, in a certain event, against the stockholders themselves.

Now, under such circumstances, the defendants could not expect to relieve themselves of their numerous liabilities, as bailees or common carriers of merchandise, from the use of extraordinary care in the safety of passengers, and care and caution in preventing their engines from communicating fire to the forest, and to the habitations of residents along the line, and the destruction of life in various ways, by merely transferring such responsibilities to a foreign corporation, who are beyond the process of the courts of the state and of the Union, unless perchance it might be the possessor and owner of property within the jurisdiction.

The stockholders of the defendant company could never have conceived such an idea. If so, it was not for a moment entertained by the legislature, who, on application, permitted the transfer, but not without due regard to the responsibilities of the defendants, and the rights and remedies of the citizen, for they declare that "nothing contained in this act, or in any lease or contract that may be entered into under the authority of the same, shall exonerate the said company or the stockholders thereof from any duties or liabilities imposed upon them by the charter of said company, or by the general laws of the state.

According to the case of *Norris* v. *Androscoggin Railroad Co.*, 39 Me. 273 [63 Am. Dec. 621], before cited, the defendants had assumed the duty of fencing the road, and were liable for the consequences of any future neglect. And they must have so understood it. They plainly refer to, anticipate, and provide for such

Digitized by Google

contingencies in their lease, under the seventh class of covenants and obligations.

Exceptions overruled, and judgment on the verdict.

WHETHER RAILROAD CORPORATION HAS POWER TO ASSIGN ITS ROAD-and the franchise connected with it is a matter between the corporation and the state, with which third parties have nothing to do: *Arthur* v. *Commercial etc. Bank*, 48 Am. Dec. 719.

ASSIGNMENT OF ROAD OF RAILROAD CORPORATION does not carry the franchise with it, nor does it, of itself, work a dissolution of the corporation: *Arthur* v. *Commercial etc. Bank*, 48 Am. Dec. 719.

DUTY OF RAILROAD COMPANY TO KEEP ITS TRACK INCLOSED: See extended note to *Tonawanda R. R. Co.* v. *Munger*, 49 Am. Dec. 268, 269; *N. Y. & Erie R. R. Co.* v. *Skinner*, 57 Id. 654; *Trow* v. *Vermont Cent. R. R. Co.*, 58 Id. 191; *Louisville R. R. Co.* v. *Milton*, Id. 647; *Jackson* v. *Rutland & B. R. R. Co.*, 60 Id. 246; *Chicago & Mississippi R. R. Co.* v. *Patchin*, 61 Id. 65; *Kerwhacker* v. *Cleveland etc. R. R. Co.*, 62 Id. 246; *Norris* v. *Androscoggin R. R. Co.*, 63 Id. 621; *Perkins* v. *Eastern R. R. Co.*, 50 Id. 589.

RAILROAD COMPANY'S LIABILITY FOR INJURIES TO TRESPASSING ANIMALS, WHERE NO FENCE IS REQUIRED BY LAW: See extended note to *Tonawanda R. R. Co.* v. *Munger*, 49 Am. Dec. 261, discussing the question; *N. Y. & Erie R. R. Co.* v. *Skinner*, 57 Id. 654; *Louisville R. R. Co.* v. *Milton*, 58 Id. 647; *Chicago & Mississippi R. R. Co.* v. *Patchin*, 61 Id. 65, and note 71; *Kerwhacker* v. *Cleveland etc. R. R. Co.*, 62 Id. 246, and notes 270; *Perkins* v. *Eastern R. R. Co.*, 50 Id. 589.

RAILROAD COMPANY'S LIABILITY FOR INJURIES TO TRESPASSING ANIMALS WHERE COMPANY IS BOUND TO FENCE: See extended note to *Tonawanda R. R. Co.* v. *Munger*, 49 Am. Dec. 268, discussing the subject; *Trow* v. *Vermont Cent. R. R. Co.*, 58 Id. 191, and notes 198, 199; *Jackson* v. *Rutland & B. R. R. Co.*, 60 Id. 246; *Norris* v. *Androscoggin R. R. Co.*, 63 Id. 621, and notes 625.

RAILROAD COMPANIES MUST OBEY THEIR CHARTER: *Commonwealth* v. *Pittsburgh etc. R. R. Co.*, 62 Am. Dec. 375.

RAILROAD COMPANY IS LIABLE FOR NEGLIGENCE OF ITS LESSEES, who are running its road under a long lease: *Nelson* v. *Vermont & C. R. R. Co.*, 62 Id. 614, and numerous cases cited in note to same 617. But in *Linfield* v. *Old Colony R. R.*, 57 Id. 124, and the note thereto 128, it is said that the lessee of a railroad takes it subject to duties imposed by law for the protection of the public, such, for instance, as the duty of fencing the track, and must answer for any injury resulting from the neglect of that duty. This is to be understood that a lessee in possession of the road incurs the same liability as the company.

THE PRINCIPAL CASE WAS CITED in *Stearns* v. *Atlantic & St. L. R. R. Co.*, 46 Me. 117, 120, in which it was held that the defendant railroad company was liable for the act of its lessees who were in possession, controlling, and managing the leased road at the time of the injury, in communicating fire to plaintiff's property by a locomotive-engine, which the lessees had themselves furnished. The court could find nothing in the facts of the case to take it out of the rule established in the principal one. In *Wyman* v. *Penobscot & K. R. R. Co.*, Id. 166, it was cited to the point that where the direction and control of a railroad are in defendants, they are justly responsible for any injuries occurring in consequence of their neglect. And in *Bean* v. *Atlantic & St. L. R. R.*

Digitized by Google

Co., 63 Id. 294, it was cited to the point that the defendants could not relieve themselves from liabilities imposed upon them by the charter of their company or the general laws of the state, by merely transferring their responsibilities to a foreign corporation.

BERRY v. BILLINGS.

[44 MAINE, 416.]

WORD "PREMISES" IN DEED OF CONVEYANCE, TECHNICALLY MEANS everything which precedes the *habendum*.

OFFICE OF HABENDUM IS TO NAME GRANTEE, AND TO LIMIT CERTAINTY OF ESTATE.

HABENDUM BECOMES EFFICIENT TO DECLARE INTENTION, where the premises in a deed are merely descriptive, and no particular estate is mentioned.

DEED OF LAND "TO HAVE AND TO HOLD," TO B AND HIS HEIRS, IS GOOD, although the grantee is not named in the premises.

DEED IS GOOD AND EFFECTUAL WHERE HABENDUM IS NOT REPUGNANT TO PREMISES.

WORDS "PRIVILEGES AND APPURTENANCES" ARE UNNECESSARY IN DEED; as a grant of the land passes them without their being mentioned. A right to flow land will so pass.

COMPLAINT for flowage. Respondents pleaded the right to flow. To maintain the issue on his part, the plaintiff put in evidence a deed from Joseph Hazeltine and others, dated April 25, 1815; Nathaniel Fellows, February 20, 1818; Charles T. Hazeltine and others, April 24, 1819; Moses Fellows, April 13, 1822; A. Dexter, April 27, 1836; and all of them made to himself. Plaintiff also introduced evidence tending to show that his lands were overflowed and damaged by the respondents' mill-dam, and to what extent. The defense was the right to flow the land described in the deeds named; and to prove this, respondents put in evidence a deed from the complainant to John Chandler, dated September 29, 1821, and from him, through several mesne conveyances, to the defendants. They then introduced evidence tending to show that they had flowed the complainant's land only so far as they were authorized to do by the above-named deeds. The case at this point was withdrawn from the jury in order to obtain a judicial construction of the deeds named above, and to settle the legal rights of the parties under them, and to have the point determined whether respondents had the right to flow the lands of complainant, or any portion thereof, and what portion and to what extent. The other facts are in the opinion.

Digitized by Google

J. M. Meserve, for the complainant.

R. H. Vose, for the respondents.

By Court, HATHAWAY, J. The respondents allege that they have the right to maintain their dam and flow the complainant's land, without compensation for damages. They derive their title, by mesne conveyances, from John Chandler, through Isaac Dexter and others, to whom Chandler conveyed by deed of April 23, A. D. 1832.

While Chandler owned the mills, and the complainant owned a part of lot No. 152, Chandler maintained a mill-dam where the respondents now maintain one, and overflowed the complainant's land, and settled with him September 29, 1821, and paid him "full satisfaction for all past flowage on said land by said John Chandler's mill-dam," as expressed in the complainant's deed of that date, by which he sold "and conveyed to the said John Chandler full right and lawful authority to flow all the land on eighty acres of land, on lot numbered 152, in Winthrop aforesaid, being all of eighty acres off of the east end of said lot, excepting thirty acres set off to the widow, Elizabeth Hazeltine, as her thirds in the estate of Joseph Hazeltine. To have and to hold the same, with full right to flow to him, the said John Chandler, his heirs and assigns, forever, provided that he, the said Chandler, shall not flow higher than his present mill-dam will now flow." By this deed Chandler acquired a right to flow the complainant's land.

The complainant insists, in argument, that as there were no words of inheritance in the premises of his deed to Chandler, the words "heirs and assigns" in the *habendum* are void and of no effect, and that Chandler took only the right to flow during his life. The technical meaning of the word "premises" in a deed of conveyance is everything which precedes the *habendum*. The office of the *habendum* is to name the grantee, and to limit the certainty of the estate. If the premises in a deed are merely descriptive, and no particular estate be mentioned, then the *habendum* becomes efficient to declare the intention.

By legal construction, a deed of land to have and to hold, to B and his heirs, is good, although the grantee is not named in the premises: Inst. 6, 7, 298, 299, Hargrave's note, 33; *Sumner* v. *Williams*, 8 Mass. 174 [5 Am. Dec. 83]; 4 Kent's Com. 468.

In the complainant's deed to Chandler the *habendum* is not repugnant to the premises, and it is therefore good and effectual: Vin. Abr., tit. Grant, K, sec. 1. Hence when Chandler con-

Digitized by Google

veyed his mills, etc., to Isaac Dexter and others by his deed of April 23, 1832, he owned the right to flow the complainant's land by virtue of his deed to him, and to his heirs and assigns forever, subject only to the proviso in the deed concerning the height of the flowing, and that right passed by Chandler's deed to Dexter and others as appurtenant to the mills, and thence by mesne conveyances to the respondents. The case is not different in principle from that of the owner of a mill and dam, and certain lands overflowed by the dam, who sells the mill with all its privileges and appurtenances. In which case the purchaser may continue the dam with the same head of water, without payment of damages to the owner of the land flowed: 4 Kent's Com. 467; *Hathorn* v. *Stinson*, 10 Me. 224 [25 Am. Dec. 228]. Nor does it make any difference that the deed from Nathaniel Dexter does not contain the words "privileges" and "appurtenances;" those words were not necessary: 2 Greenl. Cru. on Real Prop. 384, note; *Kent* v. *Waite*, 10 Pick. 141; *Blake* v. *Clark*, 6 Me. 436; *Brown* v. *Thissell*, 6 Cush. 257, cited by counsel in argument.

On the twenty-ninth of September, 1821, when the complainant conveyed to Chandler the right to flow his land, he owned no part of the lot No. 152, except the eighty acres which had been conveyed to him April 25, 1815, by Joseph Hazeltine and others, by this description, to wit: "Beginning at the north-east corner of lot numbered 152; thence a west-north-west course between said lots No. 152 and lot No. 153, one half mile and ten rods; thence southerly seventy-six rods; thence keeping the said width of seventy-six rods back to the east end of said lot; thence northerly to the first-mentioned bounds, it being eighty acres, more or less. That part of the said premises which is set off as the widow's dower is hereby reserved in this deed."

The complainant did not acquire title to the residue of lot No. 152 until by deed from Amasa Dexter of April 27, 1836; the eighty acres conveyed to him by Hazeltine and others were conveyed by metes and boundaries; and their location is certain and unquestioned. His deed to Chandler conveyed the right to flow all of eighty acres off of the full width of the east end of said lot, excepting thirty acres set off to the widow, Elizabeth Hazeltine, as her thirds.

The ambiguity, if there be any, in the description of the land in the complainant's deed to Chandler arises from the improper use therein of the words "east end of said lot." There is no east end of the lot. The course of the line which is marked on

Digitized by Google

the plan as its east line is south-south-west, and that of the line marked as the north line is west-north-west. There is no reasonable doubt that the description in the deed from Hazeltine and others to the complainant, and in that from him to Chandler, were of the same lot. In both deeds the description is of eighty acres, excepting the widow's dower—a part of lot No. 152, three of the exterior boundary lines of which are also boundary lines of the lot described, and the complainant had a deed covering eighty acres, and no more, and his deed was recorded.

We do not consider the question whether or not Berry's deed to Chandler would estop him from claiming damages for flowing that part of lot No. 152 to which he has subsequently acquired title, because we are satisfied that he did not convey, or attempt to convey, any interest in the land which he did not then own.

The respondents have the right to flow the eighty acres of land, more or less, except the widow's dower, which was conveyed to the complainant by Joseph Hazeltine and others by deed of April 25, 1815, subject to the proviso in the deed of Berry to Chandler concerning the height of the dam and flowing; and they have no right to flow any other part of said lot No. 152, except according to the statutory proceedings, and as agreed by the parties, the respondents must be defaulted, and commissioners appointed to assess the damages.

MAY, J., having been counsel in this case, did not sit at the hearing.

PREMISES OF DEED INCLUDE EVERYTHING THAT PRECEDES HABENDUM; and it is in the premises of a deed that the thing is really granted: *Budd* v. *Brooke*, 43 Am. Dec. 321; *Brown* v. *Manter*, 53 Id. 223.

OFFICE OF HABENDUM IS NOT TO GRANT ESTATE, BUT TO LIMIT ITS CERTAINTY: *Brown* v. *Manter*, 53 Am. Dec. 223.

HABENDUM OF DEED IS VOID IF REPUGNANT TO ESTATE GRANTED IN PREMISES; but an estate conveyed in the premises is not divested by the fact that another and different grantee is named in the *habendum*: *Hafner* v. *Irwin*, 34 Am. Dec. 390.

ESTATE GIVEN IN PREMISES MUST PREVAIL when the limitation in the *habendum* conflicts with the estate given in the premises of a deed, and the former must be rejected: *Budd* v. *Brooke*, 43 Am. Dec. 321.

GRANT OF PRINCIPAL THING CARRIES WITH IT INCIDENTS, PRIVILEGES, AND APPURTENANCES ESSENTIAL TO ITS USE: *Prescott* v. *Williams*, 39 Am. Dec. 688; *Morgan* v. *Mason*, 55 Id. 464.

Digitized by Google

CHILDS v. WYMAN.

[44 MAINE, 433.]

ONE WHO WRITES HIS NAME ON BACK OF PROMISSORY NOTE IS LIABLE AS ORIGINAL PROMISOR, where he is not otherwise a party to the note, and makes such signature the day after the date and execution of the note by other parties, but in pursuance of an agreement to do so at the time it was made.

WHERE ONE, NOT PAYEE OF NOTE, SIGNED HIS NAME ON BACK, NO DATE BUT THAT OF NOTE APPEARING ANYWHERE, PRESUMPTION IS that he signed it when the maker did, or agreed to sign it, and that he subsequently did so in pursuance of such agreement.

WORDS "WITHOUT RECOURSE" ARE APPLICABLE TO INDORSER, AND NOT TO ORIGINAL PROMISOR.

WORDS "WITHOUT RECOURSE" WRITTEN UNDER SIGNATURE OF ONE NOT PAYEE, UPON BACK OF NOTE, HAVE NO LEGAL EFFECT, and are mere surplusage; because such signature has the same effect to make the signer an original promisor as if he had signed it on the face with the maker.

ASSUMPSIT on a promissory note. The facts concerning it are in the opinion. The defendant was declared against as maker of the note. A. A. Child indorsed the note to his firm, the plaintiffs. A general verdict for plaintiffs was returned, with a special verdict against the defendant, as an original promisor upon the note declared on. The case was presented on exceptions by the defendant.

H. Ingalls, for the plaintiffs.

W. Hubbard, for the defendant.

By Court, HATHAWAY, J. *Assumpsit* on a joint and several promissory note, signed by Richards & Barker and the defendant, payable to A. A. Childs or order, and by him indorsed to the plaintiffs. The defendant signed the note on its back, and wrote under his signature the words "without recourse." The law is settled in this state that the defendant's signature on the back of the note had the same effect to make him an original promisor as if he had signed on its face with Richards & Barker, and there being no other date than the date of the note, the presumption is that he signed it when they did, or agreed to sign it, and subsequently did so in pursuance of such agreement.

The words "without recourse" can have no legal effect, touching the defendant's liability; they are words applicable to an indorser, not to an original promisor, and are therefore mere surplusage: *Lowell* v. *Gage*, 38 Me. 35.

If the defendant intended, by writing those words under his name, to avoid the liability incurred by his signature, that

Digitized by Google

would not avail him. In a case where a note was written thus: "Borrowed of J. S. fifty pounds, which I promise not to pay," it was rightly held that "the word 'not' shall be rejected, for a man shall never say I am a cheat and have defrauded:" Bayley on Bills, 6, and cases cited by the plaintiffs' counsel.

The case finds that the defendant did not sign the note till the next day after it was signed by Richards & Barker, and the plaintiff contends that the evidence shows that he did it then, in pursuance of an agreement to do so at its inception, and the jury found specially that he was liable as an original promisor.

Considering the fact that by the defendant's signature to the note the presumption is that he was an original promisor, in connection with the evidence in the case, we are of opinion that he was not aggrieved by the instructions given the jury upon that question. This case does not appear to be essentially distinguishable from *Moies* v. *Bird*, 11 Mass. 436; see also *Samson* v. *Thornton*, 3 Met. 275 [37 Am. Dec. 135].

Exceptions overruled.

ONE WRITING HIS NAME ON BACK OF NOTE BEFORE DELIVERY TO PAYEE IS ORIGINAL PARTY TO NOTE: *Lewis* v. *Harvey*, 59 Am. Dec. 286, and note 292, referring to prior cases; *Cook* v. *Southwick*, 60 Id. 181.

INDORSEMENT BY THIRD PARTY, TO RENDER HIM LIABLE AS MAKER, need not be made contemporaneously with the execution of the note; if made before the note was completed and put into circulation, it is sufficient: *Lewis* v. *Harvey*, 59 Am. Dec. 286; *Sampson* v. *Thornton*, 37 Id. 135.

INDORSEMENT WITHOUT DATE IS PRESUMED TO HAVE BEEN MADE BEFORE MATURITY OF NOTE: *McDowell* v. *Goldsmith*, 61 Am. Dec. 305, and note 317, referring to other cases.

SMALLEY v. WIGHT.

[44 MAINE, 442.]

MAKER OF PROMISSORY NOTE OR DRAWER OF BILL MAY LEGALLY MAKE IT PAYABLE TO ORDER OF HIMSELF.

NEGOTIABILITY OF BILLS AND PROMISSORY NOTES PAYABLE TO ORDER OF ANY OTHER THAN FICTITIOUS PAYEE does not exist by the common law; but depends entirely upon the custom of merchants, which custom has directed that the assignment should be made by a writing on the bill, called an indorsement, appointing the contents of the bill to be paid to some third person.

NOTES AND BILLS PAYABLE TO ORDER CANNOT BE NEGOTIATED IN FIRST INSTANCE EXCEPT BY INDORSEMENT of the payee or his legal representative, so as to enable the holder to maintain an action thereon in his own name.

Digitized by Google

NOTE OR BILL PAYABLE TO ORDER OF MAKER IS INVALID AS CONTRACT UNTIL IT IS INDORSED BY HIM. Such paper will not pass the legal title in the first instance by a mere delivery. It is the indorsement alone which gives it efficacy.

MAKER OF NOTE OR BILL PAYABLE TO HIS OWN ORDER MAY LIMIT ITS NEGOTIABILITY OR MAKE IT GENERAL, just as he chooses.

ASSUMPSIT on two promissory notes, and upon an agreed state of facts. The notes were given by defendant to one who sold them to the plaintiffs for a full consideration. The first one was drawn by J. B. Wight, and made payable to the order of himself at the Thomaston bank. On this note the defendant had indorsed his name. The other note was drawn in the same manner, but was not indorsed by Wight. After the second note came into plaintiffs' hands they indorsed it, "Pay to Smalley, Weed, & Bartlett." Demand, etc., was admitted. The question submitted to the court was whether the action could be maintained for the second note declared upon. If not, it was to be stricken from the writ, and default entered for one note only and interest.

A. P. Gould, for the plaintiffs.

E. Wilson, for the defendant.

By Court, MAY, J. It is competent for the maker of a promissory note or the drawer of a bill to make it payable to the order of himself. This mode of creating negotiable paper is found to be convenient, especially in our commercial cities, because when such paper has been properly issued it may be transferred by the holder by delivery, and it does not require his indorsement to make it further negotiable. The practice of issuing such paper has now become very common, and its validity, when indorsed by the maker or drawer, is not questioned.

It is well settled that notes and bills payable to order cannot be negotiated in the first instance, except by the indorsement of the payee or his legal representative, so as to enable the holder to maintain an action thereon in his own name. The negotiability of such paper does not exist by the common law; it depends entirely upon the custom of merchants; and this custom, says Eyre, C. J., in *Gibson* v. *Minet*, 1 H. Black. 605, "has directed that the assignment should be made by a writing on the bill, called an indorsement, appointing the contents of the bill to be paid to some third person;" and such is now the well, if not universally, established law in relation to bills and promissory notes, when made payable to the order of any other

Digitized by Google

than a fictitious payee: *Bolles* v. *Stearns*, 11 Cush. 320; *Foster* v. *Shattuck*, 2 N. H. 446; *Cock* v. *Fellows*, 1 Johns. 143.

It is contended that the rule above stated does not apply to a bill or note which is payable upon its face to the order of the drawer or promisor. No case has been cited to establish such a proposition; and we are aware of no principle upon which such paper can be treated as payable to the bearer, so as to pass the legal title in the first instance, by a mere delivery. It is no better than blank paper, so long as it remains in the hands of the maker; and although it has the form, it has not the legal vitality of a contract. It becomes a contract only by being negotiated. Its very language indicates the intention of the maker to determine the extent of its negotiability; and if he chooses, he may limit or restrict it, or he may make it general. The fact that it is payable to his own order manifestly shows the purpose of appointing for himself, by his own order, the person to whom it shall be paid, and of fixing the extent of the power of negotiation with which his appointee shall be clothed. If it had been his intention to make the paper in itself negotiable by delivery, without any order or indorsement of his own, the insertion of the word "bearer" would have been the natural and appropriate mode of doing it. We cannot doubt, for the reasons already stated, that such paper is invalid as a contract until it is indorsed. It is the indorsement alone which gives it efficacy. The plaintiff, therefore, cannot recover upon the note declared upon in the second count, the same not having been indorsed by the payee; and being void, it will not sustain the action upon the money count: *Sherman* v. *Globe*, 4 Conn. 246; *Taylor* v. *Benney*, 7 Mass. 479.

According to the agreement of the parties, the second count in the writ is to be stricken out, and the defendant is to be defaulted for the amount of the note and interest described in the first count.

Defendant defaulted.

TENNEY, C. J., and RICE, HATHAWAY, APPLETON, and DAVIS, JJ., concurred.

NOTE PAYABLE TO ONE'S OWN ORDER IS NOT COMPLETE PROMISSORY NOTE UNTIL INDORSED BY HIM: See note to *Pitcher* v. *Barrows*, 28 Am. Dec. 309, citing *Roby* v. *Phelon*, 118 Mass. 542. As to liability of parties where bill is made payable to drawer's own order, see *Parks* v. *Ingram*, 55 Am. Dec. 153.

INDORSEMENT IS NECESSARY TO TRANSFER BILL OR NOTE payable to order, so as to enable the holder to sue thereon: *Lancaster* v. *Baltzell*, 28 Am. Dec. 233.

Digitized by Google

NEGOTIABILITY OF BILL OR NOTE MAY BE RESTRAINED BY INDORSEMENT or by special words in the body of the instrument: *Smith* v. *Lawrence*, 1 Am. Dec. 556.

PROMISSORY NOTES WERE NEGOTIABLE AT COMMON LAW: *Dunn* v. *Adams*, 35 Am. Dec. 42; but this is probably to be understood with the qualification that the law merchant was a part of the common law of England: See *Nash* v. *Harrington*, 16 Id. 672

STATE *v.* LIBBY.

[44 MAINE, 469.]

MARRIAGE MAY BE PROVED BY CONFESSION of one on trial for adultery that he had a wife, and that the woman with whom he lived was his wife.

INSTRUCTION TO JURY, WHERE DEFENDANT IS ON TRIAL FOR ADULTERY, "that if from all the testimony in the case, introduced for the purpose of proving the marriage of the defendant, they were satisfied beyond a reasonable doubt that he was legally married, and his wife, to whom he was legally married, was living at the time the crime was alleged to have been committed, they were authorized to find the fact of marriage," is correct.

INSTRUCTION TO JURY, "THAT IF PERSON WITH WHOM ADULTERY WAS ALLEGED TO BE COMMITTED was as well known by the name of Vesta Brown as by that of Vesta A. Brown, they would be warranted in finding that the offense, if committed, was committed with Vesta Brown," is correct.

INDICTMENT for adultery with one Vesta Brown. The nature of the evidence offered to prove the marriage is given in the opinion. There was testimony tending to prove the commission of the offense charged. The instructions given and the one refused appear in the opinion. The jury returned a verdict of guilty.

A. Sanborn, for the defendant.

N. D. Appleton, attorney-general, for the state.

By Court, APPLETON, J. This was an indictment for adultery. To prove the marriage, the prosecuting officer introduced several witnesses, who testified that they "had heard the defendant say he had a wife and family, and that he had sent for them;" that after their arrival "he introduced Mrs. Libby as his wife, or as Mrs. Libby;" "that they occupied one bed-chamber;" "that he had three daughters;" and in one case he said he "wanted board for his wife and youngest child;" that "he boarded at the house of the witness with his supposed wife and child;" and that he usually called the person whom he introduced as his wife or Mrs. Libby by her christian name. This evidence was objected

Digitized by Google

to, and after being received, the counsel for the accused requested the court to instruct the jury that it was insufficient to prove the fact of marriage.

The request of the counsel was denied, and the court instructed the jury that "if from all the testimony in the case, introduced for the purpose of proving the marriage of the defendant, they were satisfied beyond a reasonable doubt that he was legally married, and his wife, to whom he was legally married, was living at the time of the crime alleged to have been committed, they were authorized to find the fact of marriage."

The instruction given was clearly correct, and the evidence to which objections were taken was properly admissible. If confessions are admissible to prove the commission of a crime, they are equally so to prove a portion of the facts which enter into and constitute the crime. If they are admissible to prove sexual intercourse—a fact essential to sustain the charge—they must be to prove the marriage. It would be absurd to admit a confession of sexual intercourse and refuse the confession of a marriage, without proof of which the offense would be differently classified, though belonging to the same general description of delinquency.

Accordingly, it was held in *Damon's Case*, 6 Me. 148, that proof by witnesses who saw the marriage is *prima facie* sufficient on an indictment for bigamy. In *Cayford's Case*, 7 Id. 57, this court decided that the prisoner's confession of the marriage if it took place in another state was sufficient, and gave a strong intimation that such evidence might be received if the marriage was in this state. In *Ham's Case*, 11 Id. 391, the same question arose in the case of a domestic marriage, and it was determined that the marriage to be proved, wherever solemnized, might be shown by the confessions of the prisoner, deliberately and voluntarily made.

This question again arose in *State* v. *Hodgskins*, 19 Me. 155 [36 Am. Dec. 742], and it was there held that a marriage in fact, as distinguishable from one inferable from circumstances, must be proved; but the principle of law, that the confession of an adulterer of his marriage, deliberately and understandingly made, is receivable in evidence, was not denied, much less overruled. But the confessions once made, and under circumstances which render them admissible, it is for the jury to determine the just degree of confidence which they may place in them. The weight to be given to the testimony is especially for their consideration.

Digitized by Google

It was held in *State* v. *Winkley*, 14 N. H. 481, that a marriage in fact must be proved, and that it might be proved by any one present, but if provable by any one present, it is not readily perceived why the confessions of the person married are not equally satisfactory proof of the fact in proceedings against him. *Habes reum confidentem.*

It is urged that the confessions may have been improvidently made, and that the prisoner, not married, may yet have confessed to a marriage. If so, still the possibility of the untruth of confessions affords no reason for their exclusion. Such possibility would exclude all proof of this nature. If so, the defendant has little cause of complaint, as he is convicted because the jury placed too much reliance upon statements made by him.

Any regrets which naturally arise from the contingent, though possible, infliction of a misplaced punishment will be somewhat lessened by the fact that if the woman introduced by the defendant as his wife, and with whom he had lived as such for years, and by whom he had become the father of children whom he recognized as his own, was not in fact his wife, that she was a competent, though she may be reasonably supposed to be a reluctant, witness, by whom he could have disproved the *prima facie* case made out against him by his confessions.

No evidence of reputation appears to have been offered. The confessions of the defendant, and his acts corresponding to those confessions, were properly received in evidence.

The instruction, that if the person with whom the adultery was alleged to be committed was as well known by the name of Vesta Brown, as by that of Vesta A. Brown, they would be warranted in finding that the offense, if committed, was committed with Vesta Brown, was correct. By the testimony it appeared that she was known by different names. The jury found she was as well known by one as by the other name.

Exceptions overruled.

TENNEY, C. J., and CUTTING and HATHAWAY, JJ., concurred.

RICE and GOODENOW, JJ., concurred in the result.

CONFESSIONS OF PARTY OF PREVIOUS MARRIAGE ARE ADMISSIBLE, in an indictment for living in adultery, to prove the fact of such marriage: *Cameron* v. *State*, 48 Am. Dec. 111; *Cook* v. *State*, 56 Id. 410, and cases cited in note to same 418. As to proof of marriage by declarations and admissions, generally, see note to *Taylor* v. *Sweet*, 22 Id. 161, discussing the question at some length; note to *Jones* v. *State*, 62 Id. 562.

Digitized by Google

MISNOMER IN INDICTMENT, EFFECT OF: *Lynes* v. *State*, 30 Am. Dec. 557; *Donnel* v. *United States*, 39 Id. 457; *May* v. *State*, 45 Id. 548. Even in an indictment for murder, an error in the middle name of the deceased has been held not material: *People* v. *Lockwood*, 6 Cal. 205.

THE PRINCIPAL CASE WAS CITED in *Camden* v. *Belgrade*, 75 Me. 131, to the point that in Maine, even in criminal prosecutions, while common reputation and the like are not competent to prove marriage, other circumstantial evidence, such as cohabitation, birth of children, and contemporaneous recognition of the fact by the parties to the marriage contract, is admissible; and on page 133 of the same case, that the court would not lightly disregard the evidence of circumstances, but on the contrary, would give it attention as fit to be weighed against the presumption of innocence in criminal cases.

CROCKER *v.* GULLIFER.

[44 MAINE, 491.]

BAILEE IS GUILTY OF CONVERSION IF HE USES PROPERTY BAILED TO HIM IN DIFFERENT MANNER or for other purposes than those designated in the contract of bailment, and trover is maintainable therefor.

BAILEE INTRUSTED WITH BAILED PROPERTY, TO BE USED IN HIS SERVICE AND IN HIS BUSINESS, has no right to lease such property to another to be used by the latter. The contract of bailment confers on him no general right to dispose of its use or enjoyment as he may see fit.

SALE.—DELIVERY OF ARTICLE AT FIXED PRICE, UNDER ALTERNATIVE AGREEMENT that the article is to be paid for or returned at the option of the party receiving it, constitutes a sale.

CONDITIONAL SALE.—WHERE PROPERTY IS SOLD AND DELIVERED BY ONE TO ANOTHER, and the vendee admits the title to be in the vendor, and to remain there until such property is fully paid for, the transaction amounts to a conditional sale.

VENDOR'S RIGHT TO PROPERTY SOLD UNDER CONDITIONAL SALE.—The vendor, if guilty of no laches, may reclaim the property even from a vendee in good faith and without notice.

CHATTEL SOLD UNDER CONDITIONAL SALE IS IN CONSTRUCTIVE POSSESSION OF SELLER, and an action may be maintained without a demand in case of a conversion by the purchaser.

TROVER. The facts are in the opinion

C. P. Brown, for the plaintiff.

J. A. Peters, for the defendants.

By Court, APPLETON, J. On the ninth of November, 1855, the plaintiff agreed with the defendants that Richard Moors and two other good teamsters should go into the woods, with sixteen horses belonging to the plaintiff, but then in the possession of Moors, and work for the defendants during the coming lumbering season, on certain terms and conditions specified

Digitized by Google

in the contracts between the parties. The defendants being unable to lumber, as they had intended, and consequently having no use for the horses, leased the same to Fiske & Dale, to be by them employed in lumbering, for the same period of time in which they were entitled to their use. The horses continued in the service of Fiske & Dale until they were accidentally burned, without neglect or fault on the part of any one, and this action is brought for their loss.

The plaintiff had the May previous contracted to sell the horses in dispute to the Richard Moors named in his contract with the defendants, who, when he received them into his possession, gave back a receipt, in and by which he admitted the title to the horses to be in the plaintiff, and further stipulated that they were to continue to be his property "until he is fully paid for them, both principal and interest," and after promising to employ them in his service, in hauling slate during the ensuing hauling season, he agreed at the end of the same "to pay said Crocker for said horses, or deliver them to him."

To the maintenance of this action, which is trover for the conversion by the defendants, in leasing the property to Fiske & Dale without authority, the counsel for the defendants interpose various grounds of defense.

1. As the plaintiff is bailor and the defendant is bailee, it is insisted that the action should have been *assumpsit* upon the written contract between the parties.

Though an action of *assumpsit* might have been successfully maintained, still it does not follow that the present form of action is misconceived. No principle of law is better settled than if the bailee uses the property bailed for purposes variant from those for which, by the contract of bailment, they were to be used, that this constitutes a conversion, and that trover is maintainable therefor. As, for instance, if one hires a horse to ride to Hampden, and goes beyond that place, or in an opposite direction, he would be liable in trover: *Wheelock* v. *Wheelwright*, 5 Mass. 104. So if the stipulation be that the thing bailed is to be employed in the service of A, and in his business, the bailee would have no right to lease the property to another, to be by him used. The bailor intrusts his property to the care and custody of the person with whom he contracts for its hire, but he confers upon him no general right of disposing of its use or enjoyment as he may see fit.

2. As the contract between the plaintiff and Moors is in the alternative to pay for the horses or return the same, it is urged

Digitized by Google

that this constitutes a sale to Moors, and vests the title to the horses in him.

The general proposition, that a delivery of an article at a fixed price, to be paid for or returned, constitutes a sale, is not questioned. When the option is with the party receiving, to pay for or return the goods received, the uniform current of authorities is that such alternative agreement is a sale.

But in the present case there are other elements which modify and control the general principle. Moors not merely agreed to pay for or return the horses, but at the very instant of the bailment he admitted the title to the same to be in the plaintiff, and agreed that they should continue be his until they should be fully paid for. It is obvious that Moors could not contest the plaintiff's title, and these defendants are certainly in no better condition.

This case is most clearly distinguishable from those which have been cited as bearing upon this point. In *Holbrook* v. *Armstrong*, 10 Me. 31, there was a parol agreement to pay for the property in dispute, or return the same at the end of two years, but it was no part of the contract that the title should be and remain in the plaintiff during that period. In *Dearborn* v. *Turner*, 16 Id. 17 [33 Am. Dec. 630], it was held that Nason, who received the property, "having the alternative to return or pay, the property passed to him, and he was at liberty to sell;" but in that case the plaintiff had not reserved the title in himself till payment. In *Baswell* v. *Bicknall*, 17 Id. 344, the party receiving the article in dispute verbally agreed to pay a certain price therefor or to return the same in a given time. "The property," remarked Weston, C. J., "in the thing delivered passes, and the remedy of the former owner rests in contract. It is the option conceded to the party receiving which produces this effect." But the option in the present case was qualified by the special agreement that the title was to remain in the plaintiff till payment. In *Perkins* v. *Douglas*, 20 Id. 317, the written promise was to return the chattel or to pay therefor, and nothing more. "Such a contract," says Shepley, J., "does not reserve to the seller any right in the property for the security of the purchase money." But here that right was reserved in most clear and explicit terms. In *Southwick* v. *Smith*, 29 Id. 228, there were notes given for the hides, and a further agreement to return the leather made from the same, if the notes should not be paid at maturity, and the proceeds to be applied to their payment, but no language is found in the contract by which the plaintiff re-

Digitized by Google

served any ownership in the property delivered; if there had been, the decision would have been otherwise.

3. The plaintiff had the right of immediate possession for the summer, which is the season for hauling slate. His contract with the defendants described them as his, but in the possession of his servant. The sale being conditional—that no title shall pass till the vendee shall pay the price of the articles sold and delivered—the vendor, if guilty of no laches, may reclaim the property, even from a vendee in good faith and without notice: *Coggill* v. *New Haven Railroad Company*, 3 Gray, 545. The chattel in such case is in the constructive possession of the seller, and an action may be maintained without a demand, in case of a conversion by the purchaser: *Hill* v. *Freeman*, 3 Cush. 257.

4. Moors had no authority to lease, either express or implied; and that the defendants so regarded it, is apparent from their telegraphic dispatch requesting leave to lease the horses to Fiske & Dale.

5. The defendants hired the horses to be used in their employ, and they had no right to transfer their control and use. The contract was specific—to be used by them.

The evidence offered was immaterial. The liability of the defendants arose when, by their consent, Fiske & Dale assumed the control of the horses leased to them. That act was a conversion, if the plaintiff deemed it expedient so to regard it. Whether they were afterwards lost by carelessness or not is an inquiry of no concern to the plaintiff. The risk was henceforth on the defendants.

Defendants defaulted.

TENNEY, C. J., and RICE, HATHAWAY, CUTTING, and GOODENOW, JJ., concurred.

BAILEE IS GUILTY OF CONVERSION IF HE USES BAILED PROPERTY FOR OTHER PURPOSES, or in a different manner from that designated in the contract of bailment, and trover is maintainable therefor: *Chism* v. *Woods*, 3 Am. Dec. 740; *De Tollenere* v. *Fuller*, 12 Id. 616, and extensive note thereto 619–623, on liability of bailee for misuser, and treating therein of misuser as conversion; *Swift* v. *Moseley*, 33 Id. 197, and note 199; *Hart* v. *Skinner*, 42 Id. 500; *Whitlock* v. *Heard*, 48 Id. 73; *Woodman* v. *Hubbard*, 57 Id. 310; and replevin may be maintained: *Emerson* v. *Fisk*, 19 Id. 206. Bailee's possession is the bailor's: *Philips* v. *Harriss*, Id. 166.

BAILEE HAS NO RIGHT TO INTRUST BAILED PROPERTY TO ANOTHER: *Agnew* v. *Johnson*, 62 Am. Dec. 303.

DISTINCTION BETWEEN BAILMENT AND CONDITIONAL SALE: *Bryant* v. *Crosby*, 58 Am. Dec. 767.

Digitized by Google

TRANSFER OF CHATTELS, BY WHICH OPTION IS GIVEN TO TRANSFEREE either to return or pay for the same by a certain day, is a valid sale, and vests the property in the transferee: *Buswell* v. *Bicknell*, 35 Am. Dec. 262.

IN CONDITIONAL SALES, TITLE TO GOODS SOLD REMAINS IN VENDOR until the performance of the condition: See note to *Mount* v. *Harris*, 40 Am. Dec. 91; *Rose* v. *Story*, 44 Id. 121, and cases cited in note to same 124; *Luey* v. *Rundy*, 32 Id. 359, and note 362. In *Luckett* v. *Townsend*, 49 Id. 723, it is held that a conditional sale passes the title to the vendee, with a reservation to the vendor of a right to repurchase the property at a fixed price and specified time. Such a sale is absolute where the vendee, during the time for payment, has disabled himself from performing the condition by substantially injuring the chattel: *Ray* v. *Thompson*, 59 Id. 187, and note 188.

THE PRINCIPAL CASE WAS CITED in *Badger* v. *Hatch*, 71 Me. 585, to the first point in the syllabus, *supra*.

Digitized by Google

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

BERRY *v.* GRIFFIN.

[10 MARYLAND, 27.]

RECEIPT BY CREDITOR FROM DEBTOR OF PROMISSORY NOTE OF THIRD PERSON IN PAYMENT OF ACCOUNT DUE DOES NOT EXTINGUISH ORIGINAL CLAIM, unless there is an express agreement to receive the note as payment and run the risk of its being paid.

REFUSAL OF INSTRUCTION IN ALTERNATIVE IS RIGHT, when one of the alternatives is erroneous, although the other may be correct.

INSTRUCTION IS ERRONEOUS when the jury is instructed that if the creditor received a note "in settlement for or in payment of the account sued on," the debtor was entitled to a credit for the amount of the note, although the maker and first indorser became applicants for the benefit of the insolvent laws and were finally discharged.

ASSUMPSIT on an open account, commencing May 8, 1845, and ending October 10, 1846. On May 8, 1845, the defendant, for the amount of a bill of goods that day purchased of the plaintiffs, delivered to them his own note and certain collateral securities, and on July 27, 1846, delivered to them a note of James B. Brooks to himself, indorsed by William B. Brooks, both of whom were subsequently discharged under the insolvent laws. The court refused to give the instruction asked by the defendant, and the verdict and judgment being against him, he appealed. The other facts are stated in the opinion.

Samuel H. Berry and Thomas G. Pratt, for the appellant.

R. B. B. Chew, S. B. Hance, and C. C. Magruder, for the appellees.

By Court, ECCLESTON, J. This appeal has been taken for the purpose of reversing the judgment below, upon the ground

Digitized by Google

that the court erred in refusing to give the following instruction, at the instance of the defendant: "That if the jury find, from the evidence in this cause, that the plaintiffs accepted or received the note of said James B. Brooks in settlement for or in payment of said account sued on, that then the said defendant is entitled to a credit for the amount thereof, although the drawer and first indorser were applicants for the benefit of the insolvent laws, the first on the ninth day of November, 1847, and the latter on the thirty-first of December, 1846, after the said note matured, and obtained final discharges."

It is not at all necessary to decide whether there is or is not sufficient evidence to sustain the position set forth in the prayer, because there was no error in refusing it, no matter how strong the proof may be. The legal proposition asserted is, that if the jury believe the plaintiffs either accepted or received the note of Brooks, either in settlement for or in payment of said account sued on, then the defendant is entitled to a credit for the amount of the note, notwithstanding the subsequent insolvency of the maker and first indorser. The alternative form of the prayer clearly assumes it to be sufficient to discharge the defendant from responsibility on the account to the amount of Brooks's note, provided the jury should believe the plaintiffs received the note in payment of the account. Now, suppose the evidence shows, beyond doubt, that the plaintiffs did so receive it, would that exonerate the defendant, to the extent of the note, from his original liability upon the account, notwithstanding the insolvency of the parties, upon the note? It surely would not, if the decisions in *Glenn* v. *Smith*, 2 Gill & J. 493 [20 Am. Dec. 452], *Crawford* v. *Berry*, 6 Id. 71, 72, and *Yates* v. *Donaldson*, 5 Md. 396 [61 Am. Dec. 283], are to be considered as good law. In the first of those cases it will be seen that at the foot of an account is the following receipt: "Received of Mrs. Ann Haslett, executrix of William W. Haslett, two promissory notes, signed by herself and indorsed by John W. Glenn & Co., in payment of the above account." And yet, on page 512, we find the court, whilst speaking of this receipt, saying: "To give to the acceptance of a note the effect of an absolute payment or extinguishment of a debt, a contract that it should be so must be shown; an express agreement to receive it as payment and to run the risk of its being paid, which is not sufficiently done by the receipt in this case to justify us in saying that the claims of John Heslip against the estate of William Haslett was extinguished

Digitized by Google

by his acceptance of Ann Haslett's notes." Prior to this remark Chief Justice Buchanan has referred to several cases showing that an acknowledgment of having accepted or received a note in payment of a prior indebtedness will not extinguish the prior claim, unless such accepting or receiving is under an agreement to take the note as payment, and to run the risk of its being paid. In one of those cases, *Putnam* v. *Lewis*, 8 Johns. 389, the plaintiff, having a claim against the estate of the defendant's intestate, received the defendant's note for the amount and gave him a receipt in these terms: "Received of George R. Lewis fifty-three dollars and ninety-six cents, it being in full of all demands which I have against the estate of Eller Lewis, deceased." And although the note was not mentioned in the receipt, and therefore might seem to be treated as money, still it was decided that the note did not extinguish the debt.

In *Crawford* v. *Berry*, 6 Gill & J. 71, 72, the court say: "If the appellee sold the oxen to the appellant, and received the single bill of Magruder on that account, without an agreement to receive it as payment for the oxen, and to run the risk of its being paid or not, it was not an extinguishment of the debt due for the oxen, which continued liable to be enforced if the assigned bill, without laches on the part of the appellee, should not be paid."

In *Yates* v. *Donaldson*, 5 Md. 396 [61 Am. Dec. 283], it is said: "The principle is well settled that the acceptance of a security or undertaking of equal degree does not extinguish the former debt, unless it be received in satisfaction, or be intended as an abandonment of the remedy on the first contract."

If any legal principle can be well settled by repeated uniform decisions, the cases which have been referred to must be sufficient to show that where an account is due, and the creditor receives from his debtor a promissory note "in payment of the account," giving a receipt in those terms, the note is not a satisfaction or extinguishment of the original claim unless there be evidence, in addition to the receipt, for the purpose of proving an agreement that the creditor was to receive the note as payment, and to run the risk of its being paid. The prayer before us is not consistent with the principle above stated. Had it been granted in its altenative form, one of those alternatives would have instructed the jury that if they should find the plaintiffs received Brooks's note in payment of the account sued upon, then the defendant is entitled to a credit for the amount of the note, although after its maturity the maker and

Digitized by Google

first indorser became applicants for the insolvent laws, and were finally discharged as such.

The proposition submitted in the prayer is not that if the jury believed the note was received in payment, although the maker and first indorser might afterwards become insolvent, then the defendant is entitled to a credit for the note, but that if the note was received in payment, then it should be a credit for the defendant, although the parties mentioned did afterwards become insolvent.

It is unnecessary to decide whether the instruction is right or not in regard to the note having been accepted or received in settlement for the account, because even if the view of the defendant in that respect is correct, still, as the other alternative of the prayer is erroneous, the court were right in refusing it. The judgment will therefore be affirmed.

Judgment affirmed.

NEGOTIABLE PAPER GIVEN IN LIEU OF PRE-EXISTING DEBT, WHEN DISCHARGE: See *Barnet* v. *Smith*, 64 Am. Dec. 290; *Hatch* v. *Barnum*, 56 Id. 59; *Ralston* v. *Wood*, 58 Id. 604, and other cases in this series cited in the notes thereto. In order to extinguish the original obligation, there must be an express agreement to receive it in satisfaction of, or an intent to abandon the remedy on, the original obligation: *Baltimore & Ohio R. R. Co.* v. *Green*, 25 Md. 105; *Haines* v. *Pearce*, 41 Id. 231; and if a person receives the note of a third person with an express agreement to receive it absolutely as payment of another's debt, and to run the risk of its being paid, the original debt will thereby be extinguished: *Hoopes* v. *Strasburger*, 37 Id. 401; but the taking from the same party of a security of no higher grade or dignity does not work an extinguishment or amount to a payment, but leaves the original obligation in full force, the creditor being at liberty to sue either on the original or on the substituted obligation: *Hopkins* v. *Boyd*, 11 Id. 118; and a charge to the jury which implies that, as matter of law, the receipt of a note in payment of a debt is *per se* an absolute satisfaction thereof is erroneous: *In re Hurst*, 1 Flipp. 467; S. C., 13 Nat. Bank. Reg. 460; and in all the foregoing cases, other than those from the American Decisions, the principal case is cited.

SASSCER *v.* WHITELY.

[10 MARYLAND, 98.]

PRESUMPTION IS THAT MAKER OF PROMISSORY NOTE RESIDES AT PLACE WHERE NOTE IS DATED, when no other place is designated as that of its negotiation and payment; but this presumption may be overcome by proof that the maker resides elsewhere and the holder was aware of his place of residence.

DEMAND OF PAYMENT AND PROTEST OF PROMISSORY NOTE MUST BE MADE AT RESIDENCE OR PLACE OF BUSINESS OF MAKER, in order to charge an

Digitized by Google

indorser; but where residence and place of business are unknown and cannot be learned by reasonable inquiry, demand and protest at the place at which the note is dated is sufficient.

ASSUMPSIT by the appellees against the appellant upon a promissory note made by one George Calvert, dated "Baltimore, February 16, 1854," and payable six months after date to the order of the defendant, and indorsed by him to the appellees. The other facts are stated in the opinion.

Daniel C. Digges and John M. S. Causin, for the appellant.

C. C. Magruder, for the appellees.

By Court, LE GRAND, C. J. This was an action instituted by the appellees against the appellant as indorser of a promissory note made by George Calvert, dated Baltimore, sixteenth of February, 1854, and payable six months after date. The defendant pleaded the general issue. The note matured on the nineteenth of August, 1854, and was placed in the hands of a notary to demand payment. The record states that the notary, having ascertained that the maker of the note had no residence in the city of Baltimore, and no place of business there, and being unable to ascertain where he resided, went to the post-office, exchange, and court-house, in the city of Baltimore, and inquired for the residence of the maker, and for the residence and post-office of the appellant, and not being able to ascertain the residence or post-office of either of said parties, protested the note for non-payment. A notice of protest was, on the same day, directed to the appellant at Baltimore, and put in the post-office of that place. There was no question made at the trial as to the making and indorsement of the note. The defendant gave evidence that for the last forty years he has resided near Upper Marlborough, Prince George's county, and that his post-office during all that time has been at the last-mentioned place. He also gave in evidence that for the last thirty years he has had extensive business transactions in the city of Baltimore, both with commission houses and banking institutions, and that the notary could have easily ascertained his post-office and residence had he made inquiries at the said banking institutions and commission houses. Upon the whole of the evidence the defendant prayed the court to instruct the jury that there was no sufficient evidence of notice to bind the indorser in this action, and that the said notarial protest, so as aforesaid offered in evidence, was insufficient for that purpose; but the court overruled the prayer of the defendant's counsel,

Digitized by Google

and permitted the said notarial protest to go to the jury, notwithstanding the evidence of the defendant, as sufficient evidence to bind the defendant, provided they should find that the said defendant indorsed said note after it was signed by the drawer. To which opinion the appellant excepted.

It is the correctness of this ruling of the circuit court that is now before us for review. The question presented by the prayer of the defendant is simply this: What kind of notice is required to bind an indorser who indorses a promissory note dated at a place different from the county of his residence, and other than that of the maker? The proof in the cause shows the note was dated Baltimore, and that both the maker and indorser resided in Prince George's county in this state. The notary went to the court-house, exchange, and post-office—having ascertained that the maker of said promissory note had no residence or place of business in the city—and "could find no person at either of said places who would pay the same for honor or on account of the maker of said note." He protested the note for non-payment, and "addressed written notices to the said indorsers of the said promissory note, and informed them that it had not been paid, payment, therefore, having been demanded and refused, and that they would be held responsible for the payment thereof." The notice for the appellant was addressed to him at Baltimore and put in the post-office, the notary "having made diligent inquiry at the court-house, post-office, and exchange, and not being able to find any person at any of said places who could inform him where the indorser [the appellant] resided, or of the post-office nearest to his residence."

There is no evidence in the record of any custom existing in the city of Baltimore in regard to the usual mode of making demand and giving notice of non-payment, and therefore this case must be determined on the generally recognized principles of commercial law applicable to negotiable paper. What are these principles? It may be stated, as one of universal application, that when a note is dated at a particular place, and no other place designated as that of its negotiation and payment, "the presumption is," says Chancellor Kent, "that the maker resides where the note is dated, and that he contemplated payment at that place:" 3 Kent's Com. 96. "But," continues he, "it is presumption only, and if the maker resides elsewhere within the state where the note falls due, and that be known to the holder, demand must be made at the maker's place of residence" or place of business. This principle is recognized and

Digitized by Google

adopted in *Nailor* v. *Bowie*, 3 Md. 256, 257, and is conclusive of the case now before us. The note was dated Baltimore, and the presumption was, therefore, that it was there payable; and although this presumption is not so absolute as to prevent contradiction, yet, in this case, no evidence was adduced on the part of the defendant to show that the "holder" of the note was aware that the maker and indorser did not reside in the city of Baltimore. As to diligence and thoroughness of inquiry, the notary says he made diligent inquiry, but could not find any one to give him information of the residence of the parties. It may not be gratuitous to remark that when persons give and indorse notes, they should take care to see they provide for the place of demand and of notice to the indorsers. By omitting this precaution, and in the absence of the knowledge of the holder to be shown in proof, the place of the date of the note is to be taken as the place of residence of the maker and indorser: See the case of *Bank of Columbia* v. *Fitzhugh*, 1 Har. & G. 248.

Judgment affirmed.

DEMAND ON NOTE AT PLACE WHERE IT IS DATED is not sufficient if the residence of the maker is known: *Taylor* v. *Snyder*, 45 Am. Dec. 457, and cases cited in the note; but where no particular place is designated as that of negotiation and payment, the presumption is that the maker resides at the place where the note is dated, but this presumption may be rebutted by proof that the holder knew of the place of residence of the maker: *Selden* v. *Washington's Adm'rs*, 17 Md. 379; see also *Staylor* v. *Ball*, 24 Id. 197; and the diligence required of the holder in seeking for the place of residence of the maker should be such as business men ordinarily employ when their interests depend on obtaining correct information, and he must act in good faith, and not give credit to doubtful information: *Whitridge* v. *Rider*, 22 Id. 559; and if he has used reasonable diligence, a mistake as to the residence or nearest post-office of the maker and indorser does not deprive him of his remedy: *Moore* v. *Hardcastle*, 11 Id. 490, the principal case being cited in the above Maryland cases.

BUCKEY *v.* SNOUFFER.

[10 MARYLAND, 149.]

PROPERTY OF APPLICANT FOR BENEFIT OF INSOLVENT LAW IS IN CUSTODY OF LAW for the benefit of the creditors, and while in such custody cannot be distrained for rent.

DEMAND FOR RENT IS NOT PER SE LIEN ON GOODS ON LEASED PREMISES but becomes a lien only after the right of distress has been exercised.

DEMAND FOR RENT DUE AT TIME OF APPLICATION FOR DISCHARGE UNDER INSOLVENT LAW, accompanied by a subsequent distress, does not follow the property as an incumbrance or lien into the hands of the trustee, under the Maryland act of 1805, when there is no levy of *fieri facias* prior to the application.

Digitized by Google

INSOLVENCY. John B. Snouffer, on the third of August, 1852, petitioned for the benefit of the insolvent laws, and A. F. Snouffer, having been duly appointed his trustee, was ordered by the circuit court to sell the insolvent's property, consisting of growing corn and wheat in the straw situated on the farm rented by the insolvent from Charles C. Tucker; and the trustee accordingly duly sold the same to Miller & Snouffer on August 30, 1852, but none of the property was removed from the farm, or from the possession of the trustee. On the first of September, 1852, Tucker seized the same property under a warrant of distress for a year's rent of the farm, due July 1, 1852, and sold the same to pay the rent while it was yet in the possession of the trustee. In his account the trustee claimed a deduction from the amount of the assets that came into his hands, the amount of the property thus sold by Tucker, and also his costs and expenses. Buckey, a creditor of the insolvent, resisted the claim, on the ground that the sale by Tucker was illegal. The case was referred by agreement to a special auditor, who reported two accounts, No. 1 disallowing the trustee's claim, and No. 2 allowing it, the latter of which audits the court ratified, and Buckey appealed.

Joseph M. Palmer, for the appellant.

R. H. Marshall, for the appellee.

By Court, TUCK, J. Whatever may be the law elsewhere, in this state when a debtor applied for the benefit of the insolvent laws under the act of 1805, c. 110, and its supplements, his property came under the custody of the law, for the benefit of his creditors: *Alexander* v. *Ghilselin*, 5 Gill, 138; *Waters* v. *Dashiell*, 1 Md. 455. And it being well settled that goods in the custody of the law are not liable to be distrained, it follows that the distress relied upon by the appellee cannot be sustained, the property at the time having been beyond its reach.

That a claim for rent is of peculiar character, and may be recovered in full, when other creditors of the tenant will be allowed a dividend only of his estate, cannot be denied. But we do not understand this to be in consequence of the rent being *per se* a lien on goods found on the premises. It is because the law allows the landlord to collect his rent by seizing the property as a pledge, to be dealt with according to its requirements. That it binds as a lien only when this legal right of distress has been exercised is conceded by the appellee's argument, and the cases referred to show this to be the law: Eden, 304; Bouvier's

Digitized by Google

Bac. Abr. 695. In England the doctrine in cases of bankruptcy is different from the law in this state in cases under the insolvent system. According to their decisions, the landlord is allowed a preference, although he distrains after the bankruptcy; but it is upon the ground that the proceedings do not place the property *in custodia legis*, as we hold the acts of insolvency to do here. It follows, therefore, that if we are right in saying that under our acts of assembly the insolvent's estate is placed in the hands of the law, the reason of the English rule is against allowing the appellee a preference: Rule as to Landlords, F; *Anonymous*, 1 Atk. 102; *Ex parte Descharmes*, Id. 103; *Ex parte Plummer*, Id. 103; *Ex parte Grove*, Id. 104.

The legislation upon the subject indicates that rent was never considered as possessing the attributes of a lien. If so, why was it declared by the statute of Anne that sheriffs levying executions should satisfy one year's rent? If rent was a lien before the statute, the property passed to the sheriff incumbered with the landlord's claim; and the plaintiff in the execution could have had satisfaction only after payment of the rent. Again, by our act of 1836, c. 192, such demands, under certain limitations, are allowed priority in the administration of decedents' estates without a distress. Surely, this act would not have been passed if it had been supposed that rent was already a lien or incumbrance. The act of 1826, c. 266, does not, as we think, support the appellee's claim. It relates to removals of property "by the tenant, or by his order and direction," declaring certain removals to be clandestine, and does not in terms or by intendment affect titles acquired by insolvent trustees.

But we think the act of 1805, c. 110, sec. 7, is decisive of the question. It gives priority to judgments, incumbrances, and liens; but it declares also that no process against the property shall have any effect thereon, "except writs of *fi. fa.*, actually and *bona fide* laid before the time of the application." Whether a distress for rent levied before that time is process within the intent of the act does not arise on this appeal; nor would such a construction aid the appellee, because he made no such distress. The point is whether, without a previous levy, the demand for rent, due at the time of the application, accompanied by a subsequent distress, followed the property as an incumbrance or lien into the hands of the trustee. The design of the law was to prevent creditors from acquiring liens after the application, and to deny preference to claims which had not become liens before. If a distress warrant be regarded as process,

Digitized by Google

it is excluded by the last words of the section, having been levied too late; and if rent is not a lien or incumbrance, the present claim is not protected by the previous clause. We consider this section as equivalent to a denial of the preference asserted on the part of the appellee.

We do not think that this view of the subject deprives the landlord of any peculiar right. The law has granted him a remedy enjoyed by no other class of creditors. If he fails, when entitled, to avail himself of it, he has no more reason to complain if loss results than has a judgment creditor who neglects to sue out his *fi. fa.*, and have it laid before his debtor, becomes an insolvent petitioner. As happens in other cases, the landlord here has lost his preference by delay, and we cannot relieve him without disregarding what we take to be well-settled principles of law.

The order ratifying audit No. 2 must be reversed, and audit No. 1 ratified and confirmed, according to the case stated; but costs will not be allowed in this court.

Order reversed.

MR. JUSTICE MASON, in dissenting from the order of reversal, while conceding that the insolvent's property was in the custody of the law, and that the distress, and all proceedings under it were illegal and void, was of the opinion that rent due at the time of the tenant's application for the benefit of the insolvent laws constituted such a lien or incumbrance, within the meaning of the seventh section of the act of 1805, as attached to and passed with the insolvent's property to his trustee, as a preferred debt, and that the policy of the law invested the claim for rent with a peculiar and superior dignity and importance; and inasmuch as this right to distrain for rent due had been preserved from the earliest time, even superior to the rights of judgment and execution creditors, and the public had acted upon the assumption that the claim for rent was a preferred one, the tenant's mere application for the benefit of the insolvent laws should not have the effect of defeating the claim for rent, which has always been regarded as resting upon such high grounds; and that while the landlord has no longer the right to distrain for the rent due, still he has a right, by reason of the nature of his claim, after proving it against the insolvent's estate in the same manner as any other creditor, to have it paid in preference to any other claim, his remedy by distress having been suspended by operation of law.

DISTRESS FOR RENT AFTER BANKRUPTCY MAY BE MADE on the demised premises, even after the messenger is in possession, but not after the goods have been removed: *Martin* v. *Black*, 38 Am. Dec. 574.

THE PRINCIPAL CASE IS REFERRED TO in *Meyers* v. *Smith*, 27 Md. 110, in a discussion of the effect of a distress for rent that became due after a sale of the goods by the tenant to a third party, by whom a suit is brought against the tenant for damages by reason of the distress; and in *Dowler* v. *Cushwa*, Id. 366, in which it is held that the goods become *in custodia legis* only upon the filing of the petition in insolvency, and that any claim that had become a lien upon the goods prior to the petition remained thereon while they were in the possession of the receiver.

Digitized by Google

KOECHLEPT v. HOOK'S LESSEE.

[10 MARYLAND, 173.]

PAROL EVIDENCE IS ADMISSIBLE TO SHOW AGAINST WHICH OF TWO DEFENDANTS JUDGMENT OF JUSTICE OF PEACE WAS RENDERED, when the action was against two, and it appeared that the judgment was confessed by "one of the defendants."

JUDGMENT OF JUSTICE OF PEACE UPON CONFESSION OF ONE OF TWO DEFENDANTS IS VOID as to the defendant who did not confess judgment, and a sale of his property thereunder conveys no title to the purchaser, when the judgment does not specify against which defendant it was rendered, and shows that it was rendered against one only.

MARYLAND ACT OF 1831 RESTS UPON ASSUMPTION THAT THERE IS ACTUAL JUDGMENT against the party whose estate is sought to be divested; and it is unnecessary for such a party to appear and resist proceedings in the county court for the ratification of a sale, as they cannot create a judgment where none existed.

RATIFICATION, UNDER MARYLAND ACT OF 1831, OF SALE UNDER JUDGMENT IS CONCLUSIVE ONLY of the notice required to be given and of the manner of sale, and is not conclusive as to the question of fraud or surprise in rendering the judgment.

EJECTMENT for a lot in the town of Cumberland. The appellee having shown a *prima facie* valid title to the lot, the appellant, for the purpose of showing title out of the appellee, introduced in evidence a judgment of a justice of the peace in a case in which Rezin V. Hook and John L. Hook were defendants, and which showed on its face that the judgment had been confessed by "one of the defendants," without showing by which one. The court admitted evidence, against the appellant's objection, to show that the judgment was confessed by John L. Hook against himself only, and that the appellee was not present and had no knowledge of it. The judgment was for the plaintiff, and the defendant appealed. The other facts are stated in the opinion.

William Walsh, for the appellant.

Thomas Devecmon, for the appellee.

By Court, MASON, J. It seems that a judgment had been rendered against one only, without specifying which of two defendants, in a suit before a justice of the peace; that an execution was subsequently issued against both, and the real estate of one only, namely, the present appellee, was seized and sold. The constable returned the proceedings to the county court, under the act of 1831, c. 290, and notice was duly served upon the appellee to show cause why the sale should not be ratified. This

Digitized by Google

he did not do, but suffered the sale to be ratified and confirmed without objection.

Upon this state of facts, the appellant prayed the court, in substance, to instruct the jury that if they should find that the proceedings upon the petition for the ratification of the sale were had, and that R. V. Hook had notice of such proceedings, then he was concluded by the ratification, etc. This instruction was refused, and hence the appeal.

If the judgment in question was absolutely void, it could not of course bind the appellee; but if it was not void *ab initio*, it would certainly have been competent for the defendant against whom it was not rendered to show that fact by parol evidence, as the judgment discloses upon its face that it was rendered only against one. In either case, it would appear that there was no judgment in fact against the appellee. The question, then, which arises is, whether the proceedings in the county court for the ratification of the sale, in which ratification the appellee is supposed to have acquiesced, could have the effect, not to make valid a defective or voidable judgment, but to create a judgment where none existed before.

The act of 1831 rests throughout upon the assumption that there must be an actual judgment against the party, though it be even voidable for inherent or patent defects, in order to base a proceeding by which he is to be divested of his real estate. The second section says "any judgment rendered by a justice of the peace" will authorize the sale of the real estate of the defendant, etc. Under the third section, which authorizes the court to "examine into any allegations of fraud or surprise as to the obtaining and rendering of the judgment under which said sale shall have been made, and if said court shall deem the judgment aforesaid to have been obtained or had by fraud or surprise, it shall vacate and annul the same," it is supposed that any objection to the sale was inquirable into by the court and concluded by the ratification. This position is not correct. The alleged judgment never having had any existence, or being absolutely void as against the present appellee, all the proceedings under it were *coram non*, and therefore also void, and it was not necessary for the defendant, though he had notice, to appear and resist them. The basis of the whole proceeding being absent, namely, a judgment *prima facie* valid at least, it was not in the power of the court to supply this vital omission, by any action it might have taken in the matter, without the positive assent of the defendant.

Digitized by Google

The only office of the court was to inquire whether the judgment had been "obtained or had by fraud or surprise." Surely, under this authority, it was not competent for the court to create a judgment where none existed, or to make a good and valid judgment out of one absolutely void upon its face.

It will be observed further that the act of 1831 does not make the ratification conclusive as to the question of fraud and surprise in rendering the judgment, but it simply declares "that said ratification and confirmation shall be deemed and taken as conclusive evidence of the sufficiency and regularity of the notice required as aforesaid [of the sale], and manner of making such sale." The ratification, therefore, is only conclusive of the notice required to be given and the manner of the sale.

Judgment affirmed.

RATIFICATION UNDER MARYLAND ACT OF 1831, OF SALE UNDER JUDGMENT, IS CONCLUSIVE only of the notice of sale required to be given, and of the manner of making the sale: *Dorsey's Lessee* v. *Dorsey*, 28 Md. 394, citing the principal case.

RIDER *v.* GRAY.

[10 MARYLAND, 282.]

SPECIFIC PERFORMANCE WILL NOT BE DECREED OF CONTRACT NOT FAIR, JUST, CERTAIN, REASONABLE, AND MUTUALLY BINDING on each of the parties to it, and when it appears doubtful whether the party meant to contract to the extent to which he is sought to be charged; and the payment of the consideration does not change the rule.

PRELIMINARY AGREEMENT CANNOT BE ENFORCED IN EQUITY if it contains no words designed to make it mutually binding upon the respective parties.

UNQUALIFIED SUBMISSION TO CONDITIONAL DECREE IN EQUITY IS NOT REQUIRED, and when the court orders a case reserved for determining compensation to a party, and orders the contract upon which suit is brought to be delivered up and canceled, and on failure so to deliver it up his case to be absolutely dismissed, the party against whom the decree is made may deliver up the contract and prosecute an appeal from that portion of the decree, and retain the benefit of the other portion of the decree.

EQUITY HAS JURISDICTION TO GRANT COMPENSATION in all cases of bills for specific performance, though denying the relief sought by the bill, but should exercise it only under special circumstances and upon peculiar equities.

MEASURE OF COMPENSATION UPON DENYING BILL FOR SPECIFIC PERFORMANCE is the amount paid on the contract, with interest, when there is no defense made on the merits.

BILL in equity to specifically enforce an agreement substantially as follows: "Memorandum of an agreement made this

Digitized by Google

sixteenth day of April, 1850, by and between John B. Gray, etc., owner of the Abrego cinnabar-ore mine in California, of the first part, and William Rider and Jonathan Trotter, etc., of the second part, witnesseth, that the said Gray, in consideration of ten thousand dollars to him in hand paid by said Rider and Trotter, the receipt whereof is thereby acknowledged, hath agreed to give, and doth hereby give, said Rider and Trotter full power and authority to take from said mine one thousand tons of cinnabar ore, etc., upon their agreement to give me, the said Gray," a certain percentage of the net proceeds of the ore, and also giving to said second parties the right to occupy his lands at the mine for any purpose they desired, and also the privilege of taking necessary timber and wood therefrom, "upon condition that they give me their obligation to pay over to me thirty-three per cent of the net proceeds as aforesaid. Proper and legal papers to be drawn up as soon as may be, and signed by the parties hereto, when this is to be canceled. (Signed) John B. Gray." The bill averred this to be a grant of one thousand tons of ore to be taken from the mine upon the conditions mentioned, but whenever said second parties desired to avail themselves of the privilege, which they had not yet done to any great extent; that, with a design to defraud complainants of this grant, Gray had organized a corporation, called the "Santa Clara Mining Association," and had transferred to it all of said mining property, reserving to himself a greater portion of the stock in the corporation, and had transferred to the other defendants the remainder of the stock, for which they had subscribed, but for which they had paid only a small portion of their subscription; the bill further averred that Gray, in his conveyance to the corporation, had made no reservation of the complainant's rights under the agreement above mentioned. Gray and the trustees and stockholders of the corporation are made defendants, and the bill asks a discovery of the respective interests held by defendants in the corporation, and of the amount paid therefor, and asks for a specific performance of the agreement against all of the defendants, and that they be enjoined from transferring their interests in the mine, and from interfering with the complainants in taking out the ore, and also asks for general relief. All of the defendants uniting in a demurrer, the court sustained it on the ground that the agreement was not mutually binding on the parties to it, and that it was a mere memorandum, or preliminary agreement for a contract thereafter to be executed, and as such could not be specifi-

Digitized by Google

cally enforced by the court, and the bill was dismissed as to the specific relief asked, but was reserved for the purpose of allowing a trial as to the right to a return of the money paid to Gray by the complainants, "upon the condition that Rider and Trotter, within thirty days from the date of the decree, shall file in this court, to be canceled, the original agreement between them and Gray, otherwise said bill to stand and be absolutely dismissed against all of the defendants." The complainants, expressly reserving all rights belonging to them in case of not filing the agreement as ordered, filed the original within the time allowed and appealed from the decree.

Charles F. Mayer, for the appellants.

Charles Marshall and Grafton L. Dulany, for the appellees.

By Court, TUCK, J. We have considered this case with every disposition to grant to the complainants the benefit of the agreement which they seek to have performed. Having in good faith paid ten thousand dollars in part execution on their side, it is reasonable and just that the other party should comply on his part, if such relief can be enforced consistently with established rules of equity. But we have not been able to discover such stipulations in the agreement as exempt it from the operation of the principles laid down in the cases of *Geiger* v. *Green*, 4 Gill, 472, and *Tyson* v. *Watts*, 7 Id. 124. The chief difference between them is that here there was a substantial price advanced by the complainants, whereas no such consideration was paid by the parties claiming execution of the contracts in the two cases referred to. That circumstance, however, cannot vary the construction of the instrument, or supply essentials in which it may be deficient, although it is entitled to weight in the final disposition of the case.

The learned judge below has very clearly shown the similarity between these cases, and indicated the particulars wherein the contract now under consideration is defective in qualities entitling the complainants to a specific performance. And concurring with him, that it is not such a one as the parties can call upon a court of equity to execute, we are relieved from the necessity of inquiring whether the bill was filed within a reasonable time, and contains a sufficient offer by the appellants to execute the contract on their part.

The appellees insist that the decree is erroneous in so far as it makes provision for compensation to the complainants as to the amount paid by them to Gray; and that if correct in this

Digitized by Google

respect, the appellants did not comply with the condition of the decree by an unqualified submission to its terms. As to the first objection, it may be observed that the defendants have not appealed, and cannot complain here of this provision in the decree, yet the complainants may, if, being entitled to compensation, the decree does not go far enough in that behalf; and as to the second, that the terms imposed on the complainants did not take away their right of appeal. The bill was dismissed as to the material relief sought, and under their appeal the complainants may claim a reversal or modification of the decree to suit the equity of the case, and if they had filed the original agreement without any protest whatever, the appeal might have been prosecuted. This part of the decree, we suppose, was not designed to cut off the appeal, but merely to secure the defendant Gray against another litigation on the same cause of action, after the complainants had accepted compensation in this case.

We must remember that the record is before us on demurrer, which admits the case made by the bill, averring that, though true, it constitutes no ground for relief: *Carroll* v. *Waring*, 3 Gill & J. 497; *Salmon* v. *Clagett*, 3 Bland, 135. If it be true, as we must assume, that these parties were prevented from availing of the profits of their agreement by the fraudulent contrivances of the defendant Gray, in transferring large portions or shares of this property to others, in the manner stated in the bill, it would be a great failure of justice to discharge him altogether from performing the contract without any compensation to them for the large amount advanced, especially as he has not defended the case on the merits, and offered to show that the complainants have suffered, if at all, by their own unreasonable delay, which, we may remark, is the only default imputed to them. The decree allowed him the benefit of the demurrer as well as of an answer to be filed litigating the question of compensation. We think in such a case a party should be held to the confession made by his pleading, and that having received the price agreed to be advanced on the contract, he should comply or refund the money. If, waiving special defenses, the defendants had contested the bill on the merits, the case might have been governed by principles applicable to a state of facts not appearing on this record, showing that the complainants were not entitled to any relief.

We are aware that the power to grant compensation is not exercised in all cases of bills for specific performance; but that such jurisdiction exists we have no doubt, though it should

Digitized by Google

be exercised "under special circumstances, and upon peculiar equities; as, for instance, in cases of fraud; or where the party has disabled himself by matters *ex post facto* from a specific performance; or where there is no adequate remedy at law:" 2 Story's Eq. Jur., secs. 796–799; and it has been granted in cases for the transfer of stock: *Forrest* v. *Elwes*, 4 Ves. 493; *Cud* v. *Rutter*, 1 P. Wms. 572, notes; in which class of contracts specific performance is not generally decreed. The mode of ascertaining the compensation is not uniform. In some cases it has been by an issue *quantum damnificatus;* in others by reference to the master. But where, as here, the case is confessed, and no defense set up, we perceive no necessity for an inquiry on the point. The measure ought to be the amount paid with interest. This principle was acted upon in *Cud* v. *Rutter*, 1 P. Wms. 572, note, and *Forrest* v. *Elwes*, 4 Ves. 497. In the latter case it was said by the master of the rolls to be a moderate compensation for a breach of contract by a party with his eyes open to give back the money with interest; that a jury could not adopt a better rule. And in the case of *Pratt* v. *Law*, 9 Cranch, 494, the court said: "An issue *quantum damnificatus* is certainly competent to the court to order in this case, but it is not consistent with the equity practice to order it in any case in which the court can lay hold of a simple, equitable, and precise rule to ascertain the amount which it ought to decree." Accordingly, the party was required to refund, with interest, at the rate of the original purchase, for the quantity of land as to which performance could not be decreed. It is shown by the bill that the defendants, other than Gray, have paid but a small, if any, portion of the consideration agreed to be paid by them to Gray, and that he has still a large interest in the property, or in reserved stock of the company. Without deciding how far the interests of the other parties can, under the case made by the pleadings, be made answerable for the advance by the complainants to Gray, we are of opinion that his entire interest should be held as security for the repayment, with interest from the date of the agreement, and shall remand the cause, under the act of 1832, c. 302, sec. 6, that a decree may be passed accordingly; as to the specific performance, the prayer of the bill will be denied.

Cause remanded.

AFTER REFUSING SPECIFIC PERFORMANCE, BILL MAY BE RETAINED for the purpose of granting compensation: *Aday* v. *Echols*, 52 Am. Dec. 225; *Pinnock* v. *Clough*, 42 Am. Dec. 521, and the cases cited in the notes; but com-

Digitized by Google

pensation will be awarded only under special circumstances and upon peculiar equities: *Busey* v. *McCurley*, 61 Md. 448, citing the principal case.

CONTRACT MUST BE MUTUAL TO ENTITLE PARTY TO DECREE FOR SPECIFIC PERFORMANCE: *Bodine* v. *Glading*, 59 Am. Dec. 749; *De Cordova* v. *Smith's Adm'x*, 58 Id. 136; *Old Colony R. R. Corp.* v. *Evans*, 66 Id. 394, and note; and must be fair, just, and reasonable: *Seymour* v. *Delancy*, 15 Id. 270.

THE PRINCIPAL CASE IS CITED in *Powell* v. *Young*, 45 Md. 496, to the point that a decree dissolving an injunction, and dismissing a bill, will not be reviewed on an appeal by the defendants from an order awarding compensation.

EICHELBERGER *v.* MURDOCK.

[10 MARYLAND, 373.]

NEITHER TROVER NOR ACTION FOR MONEY HAD AND RECEIVED CAN BE MAINTAINED against consignee of goods, or money received for a third party, with instructions to deliver them to him, until the consignee does some act by which he binds himself to such third party; without such act there is no privity of contract between them, and the title still remained in the consignor. *Per* Le Grand, C. J.

APPLICATION OF SURPLUS ARISING FROM SALE OF SECURITIES MAY BE MADE *pro rata* to all liabilities mentioned in a letter by the debtor to the pledgee, directing him to hold the stock as a general collateral security for all the pledgor's liability to the pledgee at present existing or which may hereafter be incurred by him.

ASSUMPSIT brought by W. F. & A. Murdock, the appellees, to recover the amount of certain drafts drawn, and a promissory note made by Lake & Co. and indorsed by appellants. The first prayer of appellees referred to in the opinion asked the court to instruct the jury that the plaintiffs were entitled to recover the full amount of the drafts and note, without any deduction for the amount paid to them, as recited in the opinion, under the letter of June 14, 1843, if at the time of the payment of the surplus to them the bank held liabilities of the plaintiffs for the accommodation of Lake & Co. upon which Lake & Co. were liable to the bank. The other facts are stated in the opinion.

T. Yates Walsh and John Nelson, for the appellants.

Reverdy Johnson and Reverdy Johnson, jun., for the appellees.

By Court, LE GRAND, C. J. This was an action brought by the appellees against the appellants to recover the amount of certain drafts, and a promissory note, drawn and made by Lake & Co. of New Orleans, and by the appellants indorsed. The drafts and notes were discounted at the Union Bank of Baltimore for the accommodation of Lake & Co. There is no ques-

Digitized by Google

tion of sufficiency of demand and notice, nor of the genuineness of the paper. The dispute arises out of a state of facts which may be thus indicated: It appears from the record that on the thirteenth day of February, 1843, the Union Bank of Maryland, as collateral security for the payment of a specific liability of Lake & Co., held one hundred and fifty shares of the stock of the Farmers' and Merchants' Bank of Memphis, Tennessee, and on that day received from Lake & Co. the following letter:

"BALTIMORE, February, 1843.

"The president and directors of the Union Bank of Maryland are hereby authorized to hold the one hundred and fifty shares of the stock of the Farmers' and Merchants' Bank of Memphis, now standing in their name, as a general collateral security for all our liability to the said bank at present existing, or which may hereafter be incurred by us. LAKE & Co."

On the fourteenth day of June the bank received the following note:

"BALTIMORE, June 14, 1843.

"In conformity with the original understanding between Messrs. W. F. & A. Murdock and ourselves in regard to their paper discounted for our use, by and now held by your bank, we beg to inform you that any surplus arising either from sale or otherwise of the F. and M. Bank of Memphis stock, now held by your bank, and for any other paper of ours your bank deems itself insecure in, is to go towards the liquidation with your bank of any of our said paper drawn or indorsed by W. F. & A. Murdock. With great respect, etc., LAKE & Co."

On the eighth day of September, 1843, Lake & Co. authorized the bank to sell the stock which had been hypothecated, and which was accordingly done on the ninth of the same month, realizing therefor sixty-nine dollars and fifty cents per share, making in the aggregate ten thousand four hundred and twenty-five dollars. In notifying Lake & Co. of the sale, Mr. Mickle, the cashier of the Union Bank of Baltimore, after stating the amount of sale, says, leaving "a surplus, according to the statement of account herewith submitted, of two thousand two hundred and forty-three dollars and forty-four cents, which surplus has been paid over to Messrs. W. F. & A. Murdock, under your letter to the bank of the fourteenth of June last." On the same day the amount (two thousand two hundred and forty-three dollars and forty-four cents) was paid to the Messrs. Murdock, and receipted for by them. In the receipt given by them is the following: "We hereby, in consideration of the receipt of the above-men-

Digitized by Google

tioned sum of money, guaranteeing the said Union Bank of Maryland from all loss or damage they may sustain by reason of the said payment." After these facts were given in evidence, it was proved that the bill of exchange, promissory note, and draft, to recover the amount of which this suit was brought, were assigned on the twenty-sixth day of August, 1843, to the appellees, the bank receiving therefor from them the full amount thereof. It was shown by the receipt of Lake & Co., dated the fifteenth day of April, 1841, that the appellees' notes in their favor, or indorsements of Lake & Co.'s own paper of various dates and sums, in the aggregate amounted to nearly twenty-two thousand dollars, all of which notes and indorsements were granted for Lake & Co.'s sole use and accommodation; and proved that the notes, or the renewals of such as were stated in the receipt as being in the hands of the Union Bank of Baltimore, continued to be so held at the time of the sale of the Memphis bank stock. The appellants then proved that they had stopped payment some time prior to the sale of the stock; and also, that prior to and up to the time of the trial, one of the appellees was a director of the Union bank, and knew and approved of every step taken by the bank in regard to the liabilities of Lake & Co., and especially of the arrangement of the fourteenth of June, 1843, and the sale of the ninth of September following.

On this state of case, the appellants submitted two prayers to the court, both of which were rejected. The appellees also offered two prayers, the first of which was rejected, and the second granted. Both parties appealed; but inasmuch as the appeal of the appellees in this case has since been dismissed, it is not necessary we should review the action of the court below in regard to the first prayer of the appellees.

The theory of the prayer, granted by the court on behalf of the appellees, is that if the jury should believe the facts which we have cited from the record, then the appellees were entitled to recover the amount of the note and acceptances sued on, with interest, less the proportion to which the same would be entitled of the sum of two thousand two hundred and forty-three dollars, proceeds of the sale of the Memphis bank stock, having regard to the entire debt due the bank by Lake & Co. at the time when such surplus was paid by the Union bank to the appellees, and the note and acceptances transferred to the latter.

The first prayer of the appellants is based upon the ground

Digitized by Google

that if the jury should believe that when the bank received the instructions of Lake & Co., of June, 1843, Erskine and Eichelberger's liabilities to the bank were insecure, and in concert with the appellees, adopted the arrangement of the twenty-sixth of August, 1843, as a means whereby the said bank should be saved harmless in regard to said liabilities, and that Erskine and Eichelberger received no advantage from the sale of the Memphis bank stock, then there could be no recovery in this action. The second prayer of the appellants declares that if the jury should find from all the evidence that the arrangement of August, 1843, between the appellees and the Union Bank of Baltimore, was adopted to avoid and evade the contract of the thirteenth day of February, 1843, and that of June of the same year, then such arrangement was tortious and wrong, and conferred no title on the appellees to the note and acceptances sued upon.

The ruling of the court in regard to the first prayer of the appellees, the appeal from it having been dismissed, is not now before us; but if it were, we would have no hesitation in saying it was erroneous. The cases cited at the bar are explicit, and direct to the point contained in that prayer. They clearly establish this principle, that where a consignee or remittee receives goods or money, with instructions to hand them or pay it over to a third party, such third party cannot maintain either trover or an action for money had and received, until the consignee or remittee does some act by which he binds himself to such third party; without such act there is no privity of contract between him and the third party, the title still remaining in the consignor or remittor. The cases we refer to on this point are the following: *Williams* v. *Everett*, 14 East, 582; *Grant* v. *Austen*, 3 Price, 58; *Brind* v. *Hampshire*, 1 Mee. & W. 365; *Tiernan* v. *Jackson*, 5 Pet. 580.

It is impossible for us to perceive any well-founded objection to the instruction which the court did give. If the appellants have any ground whatever of defense, it is derived from the letters of Lake & Co. to the Union Bank of Baltimore, of dates the thirteenth of February, 1843, and June 14th of the same year. The Memphis bank stock was pledged specifically for an obligation of Lake & Co.'s for eight thousand one hundred dollars. The letters of February and June can bear no other construction than that after that debt was paid the surplus should be applied to other liabilities of Lake & Co. The appellants cannot contend that it was to be applied exclusively to their

Digitized by Google

liabilities The letter of June clearly confines the application of the surplus to any paper "drawn or indorsed by W. F. & A. Murdock." But it was said at the bar this note ought to be construed in connection with the one of February. If this be done, the appellants have no right to complain of the court's instruction. What does that note say? It does not appropriate the stock as a security exclusively for the liabilities of Erskine and Eichlberger; on the contrary, it appropriates it "as a general collateral security for all our liability" to the bank at present existing, or which may be hereafter incurred." The instruction of the court is in strict conformity with this direction; it allowed the appellants an abatement in the proportion which their indebtedness to the bank stood to the fund to be applied, and the whole amount of liability of Lake & Co.

The first prayer of the appellants, which the court rejected, only denied the right of the plaintiffs to recover, provided the jury found they did not derive "any advantage" from the arrangements made between the Union bank and Lake & Co. The instruction given by the court did allow them as great an advantage as that given to any other person or persons who had become liable to the bank for Lake & Co.; and they realized this advantage in the verdict of the jury. It follows necessarily, if these views be correct, the prayers on behalf of the appellants were properly rejected. We affirm the judgment.

Judgment affirmed.

TUCK, J., dissented.

CREDITOR CANNOT RECOVER MONEY DEPOSITED WITH THIRD PERSON for the payment of his debt, in an action for money had and received, unless there has been some act done by the third person, by which he binds himself to the creditor: *Seaman* v. *Whitney*, 35 Am. Dec. 618, and note; *Strayhorn* v. *Webb*, 64 Id. 580; and a consignment or remittance for account of another remains the property of the remittor until the party receiving it has done some act recognizing the appropriation of it to the particular purpose specified, and the person claiming has signified his acceptance of it in such a way as to create a privity between the consignee and claimant: *Wilson* v. *Carson*, 12 Md. 75, citing the principal case.

THE PRINCIPAL CASE IS CITED, among others, in *First National Bank* v. *Kimberlands*, 16 W. Va. 589, as holding, in effect, that an order on a particular fund for less than the whole amount of the fund was not an equitable assignment *pro tanto;* but see the decision in this case.

Digitized by Google

ROBERTSON v. AMERICAN HOMESTEAD ASSOCIATION.

[10 MARYLAND, 397.]

APPEAL LIES FROM DECREE PASSED UNDER MARYLAND ACT of 1833, c. 181, and its supplements, concerning the summary foreclosure and sale of mortgages, and on such appeal the appellate court will review the proceedings as presented by the record, examine the terms and conditions of the mortgage, and determine whether the decree is in conformity therewith.

DECREE NOT IN CONFORMITY WITH CONDITIONS OF MORTGAGE, and embraced in the terms of assent to the decree contained in the mortgage itself, cannot be passed under the Maryland act of 1833, c. 181.

AMOUNT DUE ON MORTGAGE CANNOT BE DETERMINED JUDICIALLY BY DECREE OF COURT under the act of 1833, c. 181.

MORTGAGES TO BUILDING ASSOCIATIONS ARE NOT WITHIN PROVISIONS OF MARYLAND ACT of 1825, c, 50, requiring mortgages to specify on their faces the principal sums intended to be secured; or if they are, that act is repealed *pro tanto* by the act of 1852, c. 148, and the latter act, by fair implication, brings such mortgages within the act of 1833, c. 181, and its supplements.

RULE FOR ASCERTAINING AMOUNT BUILDING ASSOCIATION IS ENTITLED TO RECEIVE IN PRÆSENTI ON MORTGAGE given to it to secure interest on a loan, dues, fines, and charges on the property during the existence of the association, is to ascertain the probable duration of the association, then to estimate the aggregate amount of the interest and dues for that time, rebating from that sum a just sum for interest, and adding thereto the arrearages due, after allowing for payments made to the association.

MORTGAGES TO BUILDING ASSOCIATIONS ARE FREE FROM OBJECTION ON GROUND OF USURY, if executed in conformity with the Maryland act of 1852, c. 148.

PETITION praying for a decree of foreclosure and sale of premises mortgaged by Robertson to the association, alleging that Robertson had neglected to make the payments of interest and dues, as specified in the mortgage. The mortgage and the decree of the court below are sufficiently set forth in the opinion.

Richard R. Battee and Levin Gale, for the appellant.

John Carson, for the appellee.

By COURT, BARTOL, J. It has been decided by this court that from a decree passed under the act of 1833, c. 181, and its supplements, an appeal lies: *Williams* v. *Williams*, 7 Gill, 302; *Hays* v. *Dorsey*, 5 Md. 99. On such appeal, this court will review the proceedings as presented by the record, examine the terms and conditions of the mortgage, and determine whether the decree is in conformity therewith. In a proceeding under that act the court has no power to pass any decree which is not in conformity with the conditions of the mortgage, and embraced

Digitized by Google

in the terms of assent to the decree, contained in the mortgage itself.

In this case the decree ascertains the sum of three hundred and thirty-six dollars and nine cents to be due from the appellant to the appellee, and directs "that unless the mortgagor shall, on or before the twenty-seventh day of August, 1855, pay to the mortgagee, or bring into court to be paid to him, the sum of three hundred and sixty-six dollars and nine cents, together with the costs of this proceeding," that the mortgaged property be sold.

That sum is the amount stated to be due in "the statement of claim" filed by the appellee under the third section of the act of 1833. But upon looking at the mortgage, it is obvious that no such sum could be due at the time of the decree. The mortgage contains no covenant or engagement for the payment of any such sum. It provides for the payment of: "1. Interest monthly on four hundred and sixty dollars; 2. One dollar weekly, payable every Friday; 3. All ground-rent, taxes, and public dues for which the mortgaged property may be liable; 4. All fines imposed by the articles of association of the said body corporate, for neglect to make the said payments, or any of them; 5. To keep the mortgaged property fully insured from loss by fire, for the benefit of the mortgagee, during the continuance of the mortgage."

It is also stipulated that these obligations are to continue "until the time arrives when each unredeemed share of the said body corporate's stock shall be worth in cash, above all losses and liabilities, the sum of two hundred dollars, and the said body corporate shall have sufficient funds on hand to pay to the holders of every unredeemed share of its stock the said sum of two hundred dollars, clear of all losses and liabilities."

There is no provision in the mortgage for the payment of the sum of four hundred and sixty dollars, named therein as the consideration for which it was executed, nor any part of it, as a mortgage debt.

The petition of the appellee alleges a default by the mortgagor for more than three months "in not paying the weekly installments and the interest secured by the mortgage."

Upon the face of the mortgage, therefore, and on the allegations in the appellee's petition, the circuit court had no power to decree the sum of three hundred and sixty-six dollars and nine cents to be due; and in so far as the decree directs the mortgagor to pay that sum to the mortgagee, or to bring it into court to be paid to him, it is erroneous.

Digitized by Google

The second section of the act of 1833 simply empowers the court "to decree that the mortgaged premises be sold at any one of the periods limited for the default of the mortgagor." The proceedings contemplated by the act are *ex parte*, and the court is not authorized, by its decree, to determine judicially the amount due upon the mortgage. Before a sale can be made under the decree, the mortgagee is required to file a statement of his mortgage claim verified by oath; that may be done either before or after the decree: See *Hays* v. *Dorsey*, 5 Md. 101. But such statement is not conclusive, and the amount actually due is open to examination on proof either before the sale, or after the order of ratification *nisi*.

For the reasons above stated, we must reverse the decree of the circuit court; but considering that the appellee is entitled to a decree of sale, under his petition, and the mortgage exhibited, our duty, under the act of 1832, c. 302, sec. 6, is to remand the cause to the circuit court, in order that the decree may be corrected, and such further proceedings may be had as are contemplated by the act 1833, and as may be necessary for "determining the cause upon its merits."

The act of 1832 imposes on this court the further duty of "determining and declaring the opinion of this court on all points which may have been made before it, or which may be presented by the record." And in conformity with its requirements, we proceed to the consideration of the several questions presented.

It has been objected that this mortgage is inoperative for want of compliance with the provisions of the act of 1825, c. 50, in not specifying on its face the principal sum it is intended to secure, or the length of time during which the several sums thereby secured are required to be paid.

A conclusive answer to this objection is to be found in the provisions of the act of 1852, c. 148, which, in express terms, authorizes such mortgages as this, and makes them valid. This mortgage is not within the provisions of the act of 1825, or, if it be, that act is repealed *pro tanto* by the act of 1852, c. 148, whereby building associations incorporated under its provisions are empowered to take such mortgages as the one before us, the very terms of the mortgage being prescribed by the seventh section of that act. The same act of 1852, by fair implication, brings such a mortgage as the present within the provisions of the act of 1833, c. 181, and its supplements.

In the ninth section it is provided "that the oath of the treas-

Digitized by Google

urer or other financial officer of any such corporation, whose duty it may be to keep the books of accounts of any such corporation, shall be so taken, and deemed to be a full compliance with the provisions of the act of assembly of 1833, c. 181, and its supplements."

The objection that the several sums secured to be paid are each too small to be within the jurisdiction of the chancery court cannot apply to this case; because it appears by the petition filed that there was due at the time of the decree an amount sufficient to bring the case within the jurisdiction of the court.

In the further progress of the case the duty will devolve on the circuit court to ascertain the amount which the appellee is entitled to claim under the mortgage. It is obvious that the sum actually due according to the covenants in the mortgage cannot be ascertained by estimating the sum of four hundred and sixty dollars named in the mortgage, as if it were a debt secured or money to be repaid, there being no covenant in the mortgage, or any obligation on the mortgagor requiring him to repay that sum, or any part of it, as such. The mortgage debt can consist only of the several items above enumerated, that is to say, for money due to the corporation on account of the monthly interest, the weekly installments for fines imposed by the articles of the association, if any, and for ground-rent, taxes, and costs of insurance, if any have been paid by the corporation, which may be in arrear, after allowing to the appellant the credits to which he may be entitled for payments made by him; and the balance due on said several items constitutes the whole mortgage debt *in præsenti;* and if the same be paid, a sale of the property will be prevented, and the decree will stand as a security for future installments and liabilities.

In case of a sale of the mortgage property in entirety, it will be the duty of the circuit court to ascertain by proof the amount of the present value, in gross, of the sums secured by the mortgage, payable in future. To prescribe a precise rule for such ascertainment is not free from difficulty; because the period of time during which they are to be paid is not specified in the mortgage. In ascertaining that sum, the court cannot look beyond the mortgage itself; there is no such reference made in the mortgage to the "rules and articles" of the association as to make them part of the mortgage, or to authorize the court to consider them, in construing the mortgage or ascertaining the amount which the mortgagee is entitled to receive *in præsenti* out of the proceeds of sale. It has been determined,

Digitized by Google

that under a mortgage similar to the one under consideration the mortgagor is not entitled to redeem on payment of the money advanced to him by the society, with interest: *Seagrave* v. *Pope*, 15 Eng. L. & Eq. 477. But although the time during which the payments are to be made is not specified, there is a contingency stated in the mortgage, on the happening of which the payments are to cease; and its duration may be ascertained by proof or approximate with as much certainty and exactness as the duration of a mortgage securing an annuity for the life of a person. It is true that there are no tables or precedents for such ascertainment as is required in the present case, because such mortgages are of comparatively recent origin, and we are without judicial decisions fixing the rule of ascertainment. We are of opinion, however, that the true rule is to ascertain by proof the probable duration of the society, then to estimate the aggregate amount of the weekly and monthly installments payable during that time, from that sum rebate a just amount for interest, and add thereto the arrearages due, after allowing for payments made to the society, and the sum thus ascertained is the amount which the mortgagee is entitled to receive *in præsenti* in satisfaction of the mortgage.

To illustrate the view of the court, let it be supposed that on proof taken in the cause it should be determined that the association will continue for four years longer; then the ascertainment would be as follows:

Weekly dues for four years (208 weeks) at $1.....	$208 00
Interest on $460, four years.....	110 40
	$318 40
From this rebate interest thereon for half the time (two years).....	38 20
	$280 20

To this add arrearages due after allowing payments made.

The sum in the case supposed would be the amount which the mortgagee is entitled to be paid out of the proceeds of sale.

The only remaining question to be considered is the objection to the decree urged by the appellant, on the ground that the mortgage is usurious in its terms. To this it is sufficient to say that the contract, so far as it is disclosed upon the record, contains no proof or element of usury. The only proof of the contract is to be found in the mortgage, which appears to be in all respects such an instrument as is contemplated by the act of 1852, the consideration for which was not a loan of money to be

Digitized by Google

repaid, but the sum of four hundred and sixty dollars, paid to the mortgagor by the society as the ascertained value in advance of his shares of stock in the corporation. And although, in the preliminary part of the mortgage, it is recited to be "a condition precedent to the money below being loaned to him that these presents should be executed," yet the consideration is stated to be four hundred and sixty dollars, "in hand paid by the corporation to the mortgagor," while the mortgage contains no covenant or obligation whatever for the repayment of said sum or any part of it. This court cannot regard the principal sum named in the mortgage as in any sense a loan, nor the contract, as it appears in the record, usurious.

We have carefully considered the question of the legal operation and effect of mortgages to "building associations," such as are contemplated and provided for by the act of 1852, and have no hesitation in pronouncing them, if executed in conformity with the provisions of that act, free from all objection on the ground of usury.

We adopt the views expressed by the court of queen's bench in *Silver* v. *Barnes*, 6 Bing. N. C. 180, and by the courts of chancery in England, in *Burbidge* v. *Cotton*, 8 Eng. L. & Eq. 57, and *Seagrave* v. *Pope*, 15 Id. 477. This last case involved the construction of a mortgage, executed in conformity with the statute of 6 & 7 Wm. IV., c. 32, almost identical in its terms with the mortgage before us. In construing this contract, this court confines itself entirely to the terms of the mortgage, there being no other proof in the cause; and considering that there is no evidence of usury to be found in the record, we are not called upon to express any opinion as to the effect of usury in a contract under our constitution and laws.

For the reasons above stated, the decree below will be reversed with costs in this court to the appellant, and the cause remanded for further proceedings.

Decree reversed and cause remanded.

---

[1] BUILDING AND LOAN ASSOCIATIONS—HISTORY AND OBJECTS.—Building and loan associations are institutions of a comparatively late day. Their origin is generally ascribed to the Earl of Selkirk, in Scotland, in the year 1815: See *Bibb County L. Assoc.* v. *Richards*, 21 Ga. 592, *per* Lumpkin, J.; but there appears to have been one in existence in England a few years earlier: See *Pratt* v. *Hutchinson*, 15 East, 511. The first association of this kind in this country was established in Brooklyn, New York, in 1836: See *Bibb County L. Assoc.* v. *Richards*, *supra;* and since that time they have continued to spread until at the present day they are found existing in, and recognized by the statutes of, a majority of the states, and controlling an immense amount of capital. In some of the states, for example, in Maryland and Pennsylvania,

Digitized by Google

they seem to be peculiarly favored, and Sharswood, J.. in *Becket* v. *Uniontown B. & L. Assoc.*, 88 Pa. St. 211, 216, says: "However it may be elsewhere, Philadelphia has become emphatically a city of comfortable homes for the poor by means of these organizations;" while in a few of the states they are discouraged, and in some where they formerly existed they seem to have disappeared entirely. Their object is to aid those whose earnings are small in obtaining homes. This is done, according to the scheme in general use, in something like the following manner: A corporation or society is organized, with a fixed number of shares, having a certain paid-up value. Upon each share periodical sums, generally known as "subscriptions," or "dues," are paid by the owner and member. These payments are to continue as long as the association is to exist, and the idea being to continue the same until each member can be paid a certain sum per share, fixed by the charter or articles. Generally the period of existence is prescribed. Although a person may go on paying his subscriptions or dues simply, until the association terminates, when he receives a sum of money for each share that he owns, he may wish to "anticipate" this dividend, and obtain an "advance," or "loan," from the association; and to make these advances or loans to its members is the primary purpose of the association. Whenever, therefore, it has a sum of money on hand equal to the full value of a share, the association is ready to make a loan, and this it does by putting the money up at auction, the members desiring a loan bidding the amount they are willing to give as a "premium" or "bonus." Several of these sums of money may, perhaps, be thus put up at one time and each bid in by the holder of a sufficient corresponding number of shares. The premium, or bonus, is included in the obligation which the borrower gives, but is deducted from the total amount, and is retained by the association. This obligation is then secured by mortgage, and the stock is usually assigned to the association as collateral security. When the association is wound up the stock is set off against the debt, which it equals. A member thus borrowing and keeping up his payments of interest, dues, and otherwise performing his obligation, becomes the owner of a piece of land. Some associations make the loans by "redeeming," or purchasing the shares of stock of members, that member who offers his shares at the lowest figure being the successful bidder. The payments made by the borrower, however, are the same in both cases.

WHO ARE MEMBERS.—Membership in building and loan associations is acquired by becoming the owner of stock, as in other corporations; and in general, any person capable of contracting may become a member by subscribing to its stock. It would seem that one association, independent of statutory authorization, cannot become a shareholder in another: See *North America B. Assoc.* v. *Sutton*, 35 Pa. St. 463, 467; and in England it is held that a joint-stock company cannot hold shares in a building association established under 6 & 7 Wm. IV.: *Dobinson* v. *Hawks*, 16 Sim. 407. Where the charter of an association provides that in the event of the death of a stockholder who has obtained an advance, his heirs or legal representatives may continue the membership, the death of a member operates a dissolution of his membership; and if the privilege is exercised, such persons become members, not in a representative capacity, but in their own right: *Montgomery Mut. B. & L. Assoc.* v. *Robinson*, 69 Ala. 413; and see further on the point whether or not the personal representatives of a deceased member become *ipso facto* members of the corporation: *Kelsall* v. *Tyler*, 11 Exch. 513; S. C., 25 L. J. Exch. 153; 26 L. T. 226; *Knox* v. *Shepherd*, 2 L. T., N. S., 351. But where land is purchased subject to a deed of trust to an association, which the purchaser

Digitized by Google

agreed to discharge by monthly payments equal in amount to those agreed to be paid by the stockholder, the association cannot treat the purchaser as a stockholder, and credit the monthly payments accordingly: *Capitol Hill B. Assoc.* v. *Hilton*, 1 Mackey, 107.

In dealings generally between an association and its members the stock-book is *prima facie* evidence of membership: *Dobinson* v. *Hawks*, 16 Sim. 407; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Germantown Union B. etc. Assoc.* v. *Sendmeyer*, 50 Id. 67.

A person may be estopped from denying that he is a member of an association. Thus one who gives a bond and mortgage to an association, reciting in the bond that he is a member thereof, and recognizing the obligation of the by-laws, is estopped to deny that he is a member, in an action to foreclose the mortgage, from the fact that he never signed the by-laws as required: *Howard Mut. L. etc. Assoc.* v. *McIntyre*, 3 Allen, 571; and the general principle is asserted that a person is estopped from denying membership, for like reasons, after he has acted for years as a member, claiming and enjoying all the privileges of such: *Parker* v. *U. S. B. etc. Assoc.*, 19 W. Va. 744, 768. On the other hand, the association may also be estopped from denying that a person is a member. Thus the receipt of payments on account of installments due on the plaintiff's shares of stock, after a recovery on a mortgage given by him, will estop the company from denying the existence of the stock: *North America B. Assoc.* v. *Sutton*, 35 Pa. St. 463; but this acceptance must be in such a manner as to bind the association: *Card* v. *Carr*, 1 C. B., N. S., 197; S. C., 26 L. J. C. P. 113.

If an association should refuse to transfer shares on their books to a purchaser, he is not entitled to a *mandamus* to compel a transfer: *State ex rel. Galbraith* v. *People's B. & L. Assoc.*, 43 N. J. L. 389; he has an adequate remedy in a suit for damages; and the measure of damages is the actual value of the stock at the time of the refusal: *Germantown Union B. etc. Assoc.* v. *Sendmeyer*, 50 Pa. St. 67; *North America B. Assoc.* v. *Sutton*, 35 Id. 463; that is, the plaintiff is entitled to recover the amount paid on the stock as dues, with interest thereon from the time of the several payments: *North America B. Assoc.* v. *Sutton*, *supra*.

OBLIGATIONS AND LIABILITIES OF MEMBERS.—1. *Dues, Subscriptions, or Stock Payments.*—The success of a building and loan association obviously depends upon the promptness with which the members pay their dues. This obligation begins with membership, and ends only when the membership ends, or the association ceases to exist. A member is not excused from non-payment by the failure of other members of the association to pay their dues: *Hoboken B. Assoc.* v. *Martin*, 13 N. J. Eq. 427. The association may maintain *assumpsit* for the dues against a member: *Building Assoc.* v. *Kribs*, 7 Leg. & Ins. Rep. 21; and it is not necessary that it should give notice to the member of his delinquency: *Morrison* v. *Dorsey*, 48 Md. 461. Generally a lien is allowed by statute.

Where a member obtains a loan, it is customary to make his mortgage or deed of trust also secure the payment of dues, fines, and other charges. This it may properly do: *Parker* v. *U. S. B. etc. Assoc.*, 19 W. Va. 769; see also *Pfeister* v. *Wheeling B. Assoc.*, Id. 676; and payment of principal and interest on such a mortgage does not extinguish the mortgage, but it remains as security for future subscriptions as they fall due: *Everham* v. *Oriental S. & L. Assoc.*, 47 Pa. St. 352; S. C., 5 Phila. 62. So in *Farmer* v. *Smith*, 4 H. & N. 196; S. C., 5 Jur., N. S., 533, note; 28 L. J. Exch. 226, it was held, under the facts of the case, that a member was entitled to redeem his property, but notwith-

Digitized by Google

standing such redemption, his liability to the payment of monthly subscriptions continued.

The obligation to pay dues ends with the existence of the association. And where the constitution of an association provides that "the association shall continue until the unsold stock is worth fifty per cent premium, and shall then proceed to close," if the value of the real estate and other assets of the association aggregate the fifty per cent profit contemplated by this provision, the association cannot make the stockholders keep on paying dues, while it holds its real estate for some further advance, but it must close up: *Burns* v. *Metropolitan B. Assoc.*, 2 Mackey, 7. If the affairs of an association are placed in the hands of a receiver, upon its becoming incapable of performing its obligations to its stockholders, the obligation upon a member to pay dues ceases: *Low Street B. Assoc.* v. *Zucker*, 48 Md. 448; *Peter's B. Assoc.* v. *Jaecksch*, 51 Id. 198. The obligation to pay dues likewise ends when the membership ends by a withdrawal, and the stock is canceled: *Miller* v. *Second Jefferson B. Assoc.*, 50 Pa. St. 32. See also, further, on the question when the liability to pay dues and fines ceases, *Cook* v. *Kent*, 105 Mass. 246. Where a bill is filed for the purpose of selling property, it would seem that a prior incumbrancer, whose debt is not due, is not a necessary party; and the same rule applies to a building-association mortgage, conditioned for the payment of dues, where no default has been made in the condition: *Walter* v. *Riehl*, 38 Md. 211.

2. *Fines and Forfeitures.*—To secure the prompt payment of dues, fines are imposed upon delinquent members, and the members may even be made liable to forfeiture of stock. If a member obtains a loan from the association, not only may his mortgage or deed of trust be made to secure the payment of future dues, but fines also: *Hagerman* v. *Ohio B. & S. Assoc.*, 25 Ohio St. 186; *Parker* v. *U. S. B. Assoc.*, 19 W. Va. 769; see also *Pfeister* v. *Wheeling B. Assoc.*, Id. 676; *Juniata B. & L. Assoc.* v. *Mixell*, 84 Pa. St. 313. These fines must be reasonable: *McGannon* v. *Central B. Assoc.*, 19 W. Va. 726; *Hagerman* v. *Ohio B. & S. Assoc.*, *supra;* but a fine of ten cents a share where the par value is one hundred and fifty dollars, and the dues twenty-five cents a week, is reasonable: *McGannon* v. *Central B. Assoc.*, *supra;* so fines at the rate of a shilling per pound per month are reasonable: *Parker* v. *Butcher*, L. R. 3 Eq. 762; S. C., 16 L. J. Ch. 552. And a second fine for non-payment of the same dues cannot be imposed: *McGannon* v. *Central B. Assoc.*, *supra;* *Hagerman* v. *Ohio B. & S. Assoc.*, *supra;* *Monumental etc. Soc.* v. *Lewin*, 38 Md. 445; *Forest City etc. B. Assoc.* v. *Gallagher*, 25 Ohio St. 208. So, although fines for non-payment of dues may be authorized, they cannot without special mention be imposed for default in payment of interest on loans: *Hagerman* v. *Ohio B. & S. Assoc.*, *supra;* *Forest City etc. B. Assoc.* v. *Gallagher*, *supra;* *Shannon* v. *Howard Mut. B. Assoc.*, 36 Md. 383; *Occidental B. & L. Assoc.* v. *Sullivan*, 62 Cal. 394; and under the code of West Virginia an association has no right to impose such a fine: *Parker* v. *U. S. B. etc. Assoc.*, 19 W. Va. 744. Interest is likewise not chargeable upon fines: *Ingoldby* v. *Riley*, 28 L. T. 55. These fines are not within the equitable doctrines concerning penalties; they are more in the nature of liquidated damages. A member seeking to redeem a mortgage will be compelled to pay them, and they will be included in a decree of foreclosure: *Parker* v. *Butcher*, L. R. 3 Eq. 762; S. C., 16 L. J. Ch. 552; *Provident Permanent B. Soc.* v. *Greenhill*, L. R. 9 Ch. Div. 122; S. C., 38 L. T. 140; 27 Week. Rep. 110; *Shannon* v. *Howard Mut. B. Assoc.*, 36 Md. 383. The supreme court of California seems, however, to consider them as penalties: *Occidental B. & L. Assoc.* v. *Sullivan*, 62 Cal. 394;

Digitized by Google

and in *Ocmulgee B. & L. Assoc.* v. *Thomson*, 52 Ga. 427, it is said that the law will not enforce fines as such, but where they are only slightly in excess of real damages they are recoverable as stipulated damages. In *Mulloy* v. *Fifth Ward B. Assoc.*, 2 McArthur, 594, also, unreasonable fines were considered as penalties, which would be relieved against in equity. The obligation to pay fines in case of default does not cease on filing a bill of foreclosure, but they are recoverable for the time which has elapsed since the filing of the bill: *Union B. etc. Assoc.* v. *Masonic Hall Assoc.*, 29 N. J. Eq. 389.

A rule of an association forfeiting shares of members for non-payment of subscriptions is not unreasonable: *Card* v. *Carr*, 1 C. B., N. S., 197; S. C., 26 L. J. C. P. 113. But where stock is under the charter or by-laws forfeitable, it will not be deemed as having been forfeited until action to that effect has been taken by the corporation: *Watkins* v. *Workingmen's B. & L. Assoc.*, 97 Pa. St. 514. A forfeiture may consequently be waived: *North America B. Assoc.* v. *Sutton*, 35 Id. 463; and its enforcement is at the option of the directors of the association: *Moore* v. *Rawlins*, 6 C. B., N. S., 289. When stock is forfeited, a forfeiture of membership necessarily takes place, and the obligation to pay dues ends: *McCahan* v. *Columbian B. Assoc.*, 40 Md. 226. An association has no power to retire or cancel any part of the stock of a member against his will, and without any default on his part, if no power is reserved so to do in the articles of incorporation: *Bergman* v. *St. Paul Mut. B. Assoc.*, 29 Minn. 275.

Intimately connected with the matter of forfeitures of stock on default of members is the question of accelerating payments for a like cause. A provision in a mortgage to secure an advance that in case of failure to pay the prescribed contributions, interest, dues, or fines, for a time specified, the whole sum advanced, together with all dues and fines owing by the mortgagor, shall be deemed due, and may be collected, is lawful, and may be enforced, and a court of equity will not relieve against the consequences: *Concordia Sav. & Aid Assoc.* v. *Read*, 93 N. Y. 474; and where the mortgage contains a provision that in case of default the association might sell under the statute, and invest the overplus, if any, and draw for and apply it from time to time as required to the payment of all accruing dues, fines, etc., until the determination of the association, the association is entitled, on judgment of foreclosure, to have a provision inserted directing the surplus to be invested accordingly: *Franklin B. Assoc.* v. *Mather*, 4 Abb. Pr. 274. But a provision in a mortgage given to secure monthly installments, that if default should be made "in the said monthly payments for the space of six months after they, or any of them, should become due," it should be lawful for the association to advertise and sell the mortgaged premises at public auction, according to statute, precludes the association from suing to foreclose the mortgage within the six months, as well as from proceeding under the statute: *Second American B. Assoc.* v. *Platt*, 5 Duer, 675.

3. *Liability to Contribute to Losses and Expenses of Association, and Personal Liability for Debts.*—The members of a building and loan association are equally entitled to share in its gains; and it would seem to be a consequence that each member is under an obligation to contribute his share of its necessary losses and expenses: *McGrath* v. *Hamilton Sav. & L. Assoc.*, 44 Pa. St. 383; and a member cannot evade this liability by a transfer of his stock, without the consent of the association: See *Everhart* v. *West Chester R. R.*, 28 Id. 339; nor by withdrawing from the association: *McGrath* v. *Hamilton Sav. & L. Assoc.*, *supra;* and see *United States B. & L. Assoc.* v. *Silverman*, 85 Id. 394; S. C., 4 Week. Not. Cas. 546; *Wittman* v. *Concordia B. Assoc.*, 13

Digitized by Google

Phila. 95; S. C., 7 Week. Not. Cas. 80; and the liability is not affected by the fact that the member has become a borrower: *Pattison* v. *Albany B. & L. Assoc.*, 63 Ga. 373; but it is otherwise if, on becoming a borrower, his membership is relinquished: *Bowker* v. *Mill River etc. Assoc.*, 7 Allen, 100; since he bears to the association thereafter the relation of debtor simply; and the same result obtains where a borrower withdraws, in accordance with the rules of the association, pays off his loans, and his stock is marked on the books "canceled" and "withdrawn:" *Miller* v. *Jefferson B. Assoc.*, 50 Pa. St. 32. So after a shareholder has redeemed his stock he cannot participate in the profits of the business thereafter: *Overby* v. *Fayetteville B. & L. Assoc.*, 81 N. C. 56.

The personal liability of members of a building and loan association, when incorporated, for its debts is obviously governed by the same statutes and rules which apply to corporations generally, in the absence of any special statutory or charter provisions applying to the associations. When unincorporated, the members are liable as partners. As a general proposition, the extent of the liability of a member of a building and loan corporation is his stock interest: *State Sav. Assoc.* v. *Kellogg*, 63 Mo. 540; and if he is himself a creditor of the corporation, he may set off his debt when sued by a creditor of the association to enforce his statutory liability: *Remington* v. *King*, 11 Abb. Pr. 278.

RIGHTS OF MEMBERS.—The important and peculiar rights of members of building and loan associations are their rights to loans and their rights of withdrawal. The consideration of the first of these will be postponed until the subject of loans is considered.

Withdrawal.—The privilege of withdrawal by a member of a building and loan association, upon proper notice, without incurring a forfeiture of the money he has paid in, but instead thereof receiving that amount, together with a just share of the profits, after deducting fines, charges, and a proportionate share of expenses, is universally protected by charters and by-laws, and it obviously constitutes a strong inducement to become a member of the association. To obtain the advantages of a withdrawal, a notice required must be given: *Hartford* v. *Co-operative Mut. Homestead Co.*, 128 Mass. 494. But a board of trustees or directors who are to pass upon the grounds of withdrawal given by a member have no right to withhold their consent arbitrarily: *Wo[illegible]ulgh* v. *Knickerbocker B. Assoc.*, 2 Bosw. 381; and if a by-law provides that any person wishing to withdraw, "and who shall have been a member of the association two years, and be clear of the books," shall receive a certain per cent on the amount paid by him into the funds of the association, such member may withdraw without leave of the directors: *Fuller* v. *Salem etc. Assoc.*, 10 Gray, 94. Under section 3410, Ind. R. S. 1881, a stockholder who is a borrower, and whose stock is held by the association in pledge, is not entitled to withdraw, nor to any of the rights of a withdrawing member, until he redeems his stock: *Anderson B. etc. Assoc.* v. *Thompson*, 88 Ind. 405; but a member is entitled to withdraw on paying up any balance due by him on a settlement of his account, where the constitution of an association provides that no stockholder shall be permitted to withdraw who has received any portion of his stock in advance until the same has been fully repaid: *Pabst* v. *Trustees etc. of Economical B. Assoc.*, 1 McArthur, 385; and a member who complies with the constitution and by-laws of an association, and under their provisions withdraws, can recover the amount due him by *assumpsit*, using the common counts: *Haigh* v. *U. S. B. etc. Assoc.*, 19 W. Va. 792. See further as the power of a retiring member, who has perfected his rights against the

Digitized by Google

association, to enforce them by legal process: *O'Rourke* v. *West Pennsylvania L. & B. Assoc.*, 93 Pa. St. 308; S. C., 8 Week. Not. Cas. 176; *United States B. & L. Assoc.* v. *Silverman*, 85 Pa. St. 394; S. C., 4 Week. Not. Cas. 546; *In re Estate of National etc. B. Assoc.*, 9 Id. 79. Where it is provided that a stockholder wishing to withdraw shall have power to do so by giving notice of intention, when he shall be entitled to receive the amount paid in by him, and such proportion of the profits as the by-laws may determine, less all fines and other charges, a proviso that at no time shall more than one half the funds in the treasury be applied to the demands of withdrawing stockholders, does not estop a withdrawing member from legal process for the recovery of the money until the treasury has funds sufficient to meet his claim: *United States B. & L. Assoc.* v. *Silverman, supra;* see also *National etc. Assoc.* v. *Hubley*, 24 Leg. Int. 6. A withdrawing stockholder must bear his proportion of losses sustained prior to notice of withdrawal: *Wittman* v. *Concordia B. Assoc.*, 13 Phila. 95; S. C., 7 Week. Not. Cas. 80; and see the cases cited *supra*, under the head of "Liability of Members to Contribute." Where a stockholder, under a resolution of the association permitting borrowers to withdraw on payment of a stipulated amount, the stock to be then "withdrawn and canceled," withdrew, paid off his loans and stock, which was then marked on the books "canceled" and "withdrawn," the association cannot afterwards recover for dues which subsequently accrued thereon: *Miller* v. *Jefferson B. Assoc.* 50 Pa. St. 32. Nor is a member bound by new rules made after he has given notice of an intention to withdraw: *Armitage* v. *Walker*, 2 Kay & J. 211; S. C., 2 Jur., N. S., 13; 26 L. T. 182. If the charter provides that on the death of a stockholder his legal representatives might receive the net value of the shares, a statement in the bank-book of the deceased, of the computed value of his stock, made by the treasurer of the association, is not conclusive upon it: *Babcock* v. *Middlesex etc. B. Assoc.*, 28 Conn. 302; the proper mode of determining the value of the stock is by ascertaining the market value of the shares themselves. An important question concerned with the right of a borrowing member to withdraw is the ascertaining of how much he is to pay. This amount is obviously ascertained in the same way that the amount is ascertained upon a foreclosure by the association upon default, and the consideration of the matter will be postponed until the subject of loans is taken up.

Shareholder cannot Sue at Law Qua Shareholder for the value of his paid-up stock: *O'Rourke* v. *West Pennsylvania L. & B. Assoc.*, 93 Pa. St. 308; S. C., 8 Week. Not. Cas. 176. Building associations are not exceptions to the general law governing corporations in this regard. If a shareholder wishes to participate in all the profits of the concern, he must wait until the association winds up the series to which he belongs. If he is not content to await its action, his only remedy is to withdraw and bring an action at law as a withdrawing stockholder. There may, however, be cases where he can invoke the aid of a court of equity.

OFFICERS.—The powers, duties, and liabilities of officers of building and loan associations are those which usually appertain to the officers of corporations generally, and it is beyond the scope of the present note to enter upon their full discussion. A few decisions, illustrating the application of general principles to these associations in this regard, will, however, be noticed. A director who gives to the association an ordinary bond and mortgage for a loan cannot set up as a defense to its foreclosure that by a secret parol agreement between him and the other directors the loan was to be, and had been, repaid, and the mortgage satisfied, by his shares of stock having been fully

Digitized by Google

paid up after the loan was made: *Pangborn* v. *Citizens' B. Assoc.*, 35 N. J. Eq. 341. Managers are not personally liable for losses resulting from an honest mistake in estimating the value of stockholder's lands on which they loaned money, nor for a defect in the acknowledgment of a mortgage which rendered it worthless; but they are liable for losses from loans made on the personal security of stockholders, in violation of a by-law limiting the amount of such loans: *Citizens' B. Assoc.* v. *Coriell*, 34 Id. 383; and officers distributing the assets of the association, on its expiration, among the stockholders shown by the books, are not liable to a bank to whom shares of stock have been assigned and the certificate thereof delivered, when the stock was not transferred to the bank upon the books of the association, and no notice given to the association by the bank of the assignment: *Bank of Commerce's Appeal*, 73 Pa. St. 59. See, as to the liability of directors of corporations generally, note to *Hodges* v. *New England Screw Co.*, 53 Am. Dec. 637.

The monthly dues and fines of members of an association being payable in cash, the presence and acquiescence of the executive officers, when promises to pay are given by members, or others for them, and accepted by the treasurer, will not discharge sureties on the treasurer's official bond from liability for credit thus given and loss: *People's B. & L. Assoc.* v. *Wroth*, 43 N. J. L. 70; *Mutual B. & L. Assoc.* v. *Hammell*, Id. 78. The treasurer of a building society is only a bailee of moneys which he receives on account of the society, and does not become a debtor of the society, and consequently, if he is robbed of the society's moneys, he is discharged from liability to repay the amount of the robbery: *Walker* v. *British Guarantee Assoc.*, 18 Q. B. 277; S. C., 16 Jur. 885; 21 L. J. Q. B. 257. The secretary of an association, having received and willfully appropriated its funds and property, cannot be heard, upon a criminal prosecution therefor, to contradict its legal existence: *Shinn* v. *Commonwealth*, 32 Gratt. 899.

GENERAL POWERS OF ASSOCIATIONS.—It is not our purpose to enter upon an extended discussion of the powers of building and loan associations. These are, in general, governed by the same rules and principles which control the powers of other corporations. The attributes of existence as a legal entity, continuity of existence, and the like, and the power to have and use a corporate seal, to enact by-laws, to sue and be sued, to hold property reasonably necessary and to convey the same, to enter into contracts, etc., plainly belong to all corporations, and among them building and loan associations. And of course these powers are alike controlled by charters and statutes.

1. *Contracts—Borrowing Powers.*—The general rule that corporations may make any contract fairly within the purposes and objects of their incorporation, except where prohibited by their charters or by other statutes, applies to building and loan corporations; as also does the converse of this rule, that contracts of a corporation which are not within any of the powers expressly or impliedly conferred upon it are *ultra vires*. Therefore an executory contract between a building association and one of its members, in respect to shares claimed by him in his own right, and in excess of the maximum number which, under the statute, a member may hold in his own right, is *ultra vires*, and cannot be enforced: *Simpson* v. *Greenfield B. etc. Assoc.*, 38 Ohio St. 349; but the fact that a member holds a greater number of shares than is allowed by the by-laws of the association, but not in excess of the number limited by statute, is no defense against any claim which the association may have against him on account of such shares: *Hagerman* v. *Ohio B. & S. Assoc.*, 25 Id. 186.

Digitized by Google

Whether or not building and loan associations may borrow money has given rise to some discussion. In Pennsylvania it seems to be considered that under the act of 1859 they have no power to borrow money from banks and others, for the purpose of loans: *Stiles's Appeal*, 95 Pa. St. 122; S. C., 9 Week. Not. Cas. 83; and in Ohio it is held, also, that they have no power to borrow money for the purpose of lending it: *State* v. *Oberlin B. & L. Assoc.*, 35 Ohio St. 258; but in Maryland an association may borrow money and execute a note therefor to meet an antecedent obligation incurred to one of its members to whom it had made a loan: *Davis* v. *West Saratoga B. Union*, 32 Md. 285. As to the borrowing powers of building societies in England, see *In re National Permanent Benefit B. Soc.*, L. R. 5 Ch. 309; S. C., 22 L. T. 284; 18 Week. Rep. 388; *Moye* v. *Sparrow*, 22 L. T. 154; S. C., 18 Week. Rep. 400; *In Re Victoria etc. Soc.*, L. R. 9 Eq. 605; S. C., 39 L. J. Ch. 628; 22 L. T. 777; 18 Week. Rep. 967; *In re Durham County etc. B. Soc.*, L. R. 12 Eq. 516; S. C., 41 L. J. Ch. 124; 25 L. T. 83. The power may, of course, be given by charter or statute: See Cal. Civ. Code, sec. 640. The powers of building and loan associations to lend money are considered *post*.

2. *Investing in Real Estate.*—In England, under an existing act, it was held that a building society was not precluded from investing its funds in the purchase of real estate: *Mullock* v. *Jenkins*, 14 Beav. 628; S. C., 21 L. J. Ch. 65; and where a rule of a building society directed that unemployed money should be invested "in such a manner and upon such legal security" as the board of directors should deem necessary, it may be invested in the purchase of freeholds: *Grimes* v. *Harrison*, 26 Beav. 435; S. C., 5 Jur., N. S., 528; 28 L. J. Ch. 823; compare *In re Kent Benefit B. Soc.*, 1 Drew. & Sm. 417; S. C., 7 Jur., N. S., 1045; 30 L. J. Ch. 785; 4 L. T., N. S., 610; 9 Week. Rep. 686. In Pennsylvania, building and loan associations have no power to take or hold real estate beyond the limits fixed by statute: *Miller's Estate*, 2 Pearson, 348; *Rhoads* v. *Hoernerstown B. Assoc.*, 82 Pa. St. 180; and debts contracted by them in purchasing real estate cannot be enforced against them: *Faulkner's Appeal*, 11 Week. Not. Cas. 48. See further, on this question, *Cahall* v. *Citizens' Mut. B. Assoc.*, 61 Ala. 232. Such associations may, of course, acquire real estate, through mortgages given to secure loans which it is their object to make. They may also be given express powers to acquire and hold real property by charter or statute: See Cal. Civ. Code, sec. 643.

3. *By-laws.*—The power to make by-laws is held by every corporation. These by-laws of course must conform to the constitutions of the United States and of the state. They must likewise conform to the purposes for which the corporation is created: *Martin* v. *Nashville B. Assoc.*, 2 Coldw. 418. They must also be reasonable, and this has particular application to fines imposed by building and loan associations, as seen above. They cannot be made to have a retroactive effect as against rights under subsisting contracts: *In re Norwich etc. Provident B. Soc.*, L. R. 1 Ch. D. 481; 45 L. J. Ch. 143; 24 Week. Rep. 103; and see *Occidental B. & L. Assoc.* v. *Sullivan*, 62 Cal. 394, holding that a by-law in no way affected or changed the terms of any contract of loan between an association and a stockholder.

A member, having admitted and recognized the validity of the by-laws of an association, is estopped to question the mode in which they were adopted: *Morrison* v. *Dorsey*, 48 Md. 461; and the payment of stated dues and fines cannot be resisted by a member on the ground that the by-laws have not been adopted by a vote of the directors, where it appears that they have been recorded, acted upon, and enforced as the by-laws of the association: *Hagerman* v. *Ohio B. & L. Assoc.*, 25 Ohio St. 186.

Digitized by Google

LOANS AND THEIR INCIDENTS.—1. *How Made—Premiums.*—The peculiar manner in which building and loan associations make loans or advances has already been sufficiently explained. The mode, and the only mode, by which the premiums on loans are fixed, when the money is to be put up at auction, is by the bidding of members for the right of precedence: *State* v. *Greenville B. & S. Assoc.*, 29 Ohio St. 92; *State* v. *Oberlin B. & L. Assoc.*, 35 Id. 258; *Stiles's Appeal*, 95 Pa. St. 122; S. C., 9 Week. Not. Cas. 83; and the association or its directors cannot fix a minimum premium below which no bid will be accepted: Id.

2. *To Whom Made.*—In England the power of building societies to lend money on mortgages to strangers is recognized: *Cutbill* v. *Kingdom*, 1 Exch. 494; S. C., 17 L. J. Exch. 177; *Morrison* v. *Glover*, 4 Exch. 430; S. C., 19 L. J. Exch. 20; but in this country, based no doubt upon the idea that the primary object of building and loan associations is to aid members in securing homes by making advances or loans to them, the authority to make loans to strangers seems to be generally denied: *Wolbach* v. *Lehigh B. Assoc.*, 84 Pa. St. 211, 217; *State* v. *Oberlin B. & L. Assoc.*, 35 Ohio St. 258, 263; *Poock* v. *Lafayette B. Assoc.*, 71 Ind. 357; *St. Joseph etc. B. Assoc.* v. *Thompson*, 19 Kan. 321; and see *Mechanics' etc. B. Assoc.* v. *Meriden Agency Co.*, 24 Conn. 159; but it is held that a borrower who was a stranger is estopped to plead the *ultra vires* transaction: *Poock* v. *Lafayette etc. B. Assoc.*, *supra;* and the association may recover from a borrower, not a member, the amount loaned, and interest: *Wolbach* v. *Lehigh B. Assoc.*, *supra; St. Joseph etc. B. Assoc.* v. *Thompson*, *supra.*

An association having funds cannot refuse to loan them to its members in good standing: *State* v. *Oberlin B. & L. Assoc.*, 35 Ohio St. 258; *Bergman* v. *St. Paul Mut. B. Assoc.*, 29 Minn. 282. And where the object of an association is stated to be for "the accumulation of a fund by small monthly installments, to enable members of the association to purchase real estate, erect buildings, redeem mortgages, satisfy ground-rent, loan money, pay taxes, and effect other similar purposes," the power is conferred to loan money from such accumulated fund to its members: *Massey* v. *Citizens' B. etc. Assoc.*, 22 Kan. 624. In *Kelly* v. *Mobile B. & L. Assoc.*, 64 Ala. 501, it was held that the lending of money to shareholders on mortgages, on such terms and conditions as may be prescribed by the by-laws, being one of the express powers conferred on building and loan associations by the code, such a loan was not *ultra vires*, although in contravention of the by-laws.

3. *Purpose or Application of Loans, Duty of Associations to Inquire into.*—If building and loan associations are under obligations to make loans to their members, it would seem to necessarily follow that they are not bound to inquire into the purposes for which they are obtained, nor look to the application of the money. In England they are not required to look to the application: *Cutbill* v. *Kingdom*, 1 Exch. 494; S. C., 17 L. J. Exch. 177. So in Pennsylvania it is held that no duty is imposed upon them to inquire for what purpose loans are being obtained, or to require any stipulation from a borrower as to the use he shall make of the money, or in any manner to supervise or control its disbursement: *Juniata B. & L. Assoc.* v. *Mixell*, 84 Pa. St. 313; *Johnston* v. *Elizabeth B. & L. Assoc.*, 14 Week. Not. Cas. 247; and in Ohio, also, building corporations are not required to ascertain the use to which a borrowing member intends to apply the money, the statute contemplating loans to be used "in buying lots or houses, or in building or repairing houses, or other purposes:" *Hagerman* v. *Ohio B. & S. Assoc.*, 25 Ohio St. 186; but in West Virginia, under the law as to homestead and

Digitized by Google

building associations, it is their duty to see that money paid to their members on loans advanced is used by such members in buying lots or houses, or in building or repairing houses: *Pfeister* v. *Wheeling B. Assoc.*, 19 W. Va. 676.

4. *Kind of Security.*—Building and loan associations have power to loan money on the same security as individuals, notwithstanding their usual mode is to require the borrower to assign their own stock as collateral to his mortgage: *Union B. etc. Assoc.* v. *Masonic Hall Assoc.*, 29 N. J. Eq. 389; and where an association is authorized to loan money, but its charter does not expressly authorize it to take a mortgage or other security, it will nevertheless have power by implication to take a mortgage: *Massey* v. *Citizens' B. etc. Assoc.*, 22 Kan. 624. So where the by-laws of an association provide that borrowers from it "shall secure the repayment of said loan, with legal interest, by satisfactory bond or mortgage upon real estate," the officers of the association have power to take both securities: *Juniata B. & L. Assoc.* v. *Hetzel*, 103 Pa. St. 507; S. C., 14 Week. Not. Cas. 431. For a case where the instrument was held to be in legal effect a mortgage, although in the form of a lease, see *Mobile B. & L. Assoc.* v. *Robertson*, 65 Ala. 382.

The mortgage or deed of trust of a third person may also be taken by an association to secure a loan to a member: *Massey* v. *Citizens' B. etc. Assoc.*, 22 Kan. 624; *Relief etc. Assoc.* v. *Longshore*, 8 Luz. Leg. Reg. 199; *Pfeister* v. *Wheeling B. Assoc.*, 19 W. Va. 676; including interest, fines, dues, and other charges: *Pfeister* v. *Wheeling B. Assoc.*, *supra;* and in such a case the association is under no obligation to notify the third person of the default of the member in paying interest, fines, dues, etc.: Id. It is competent, also, for a married woman to unite with her husband in executing a valid mortgage on her separate property to secure a loan to her husband, and to cover premiums, fines, etc.: *Juniata B. & L. Assoc.* v. *Mizell*, 84 Pa. St. 313. Where, however, the member also assigns to the association stock therein as additional security, the third person has the right, when sued for the debt, to have such stock first sold to satisfy the debt: *Massey* v. *Citizens' B. etc. Assoc.*, *supra.* And if third persons give a deed of trust to secure a loan to a member, their responsibility as sureties is not to be extended by implication or construction, but the measure of their liability is to be found in the instrument which creates it: *Forsyth* v. *Hibernia B. Assoc.*, 1 Mackey, 205. Where stock is pledged and a mortgage given for the same debt, the mortgagor has the right to insist, as against his assignee in bankruptcy and an assignee of the mortgage, that the stock be first sold to reduce the amount of the mortgage lien and of the mortgagor's personal liability: *Wittenbrock* v. *Bellmer*, 62 Cal. 560.

A building society, having authority to make loans and provide for the security of the same on real estate, has, as an incident thereto, the right to provide for insuring property taken as security: *Chicago B. Soc.* v. *Crowell*, 65 Ill. 453.

5. *Usury.*—Whether the transactions between building and loan associations and their borrowing members are within the usury laws, is a question which has often arisen, and upon which there is a diversity of opinion. These transactions contain both the elements of a loan and a dealing with partnership funds, and it is owing to the prominence given to the one or the other of these elements that causes this difference of opinion. In the leading English case of *Silver* v. *Barnes*, 6 Bing. N. C. 180; S. C., 8 Scott, 300, where a premium was to be paid in addition to interest on a loan, for which a member bid and gave his note, Tindal, C. J., said: "The question was, whether the transaction was a loan of money or a dealing with the partnership fund. If

Digitized by Google

it was a loan, it was usurious. We think it was a dealing with the partnership fund, in which the defendant had an interest in common with the other members of the society, and that it was not a loan. The defendant was interested in the fund when the money was advanced, and when it was repaid." The doctrine of this case has been followed by subsequent English decisions: *Burbidge* v. *Cotton*, 5 De G. & Sm. 17; S. C., 8 Eng. L. & Eq. 57; 15 Jur. 1070; 21 L. J. Ch. 201; *Seagrave* v. *Pope*, 1 De G. M. & G. 783; S. C., 15 Eng. L. & Eq. 477; 16 Jur. 1099; 22 L. J. Ch. 258; *Cutbill* v. *Kingdom*, 1 Exch. 494; S. C., 17 L. J. Exch. 177; *In re Durham County etc. B. Society*, L. R. 12 Eq. 516; S. C., 25 L. T., N. S., 83. In America the taking of premiums is generally considered unobjectionable: *Montgomery Mut. B. & L. Assoc.* v. *Robinson*, 69 Ala. 413; *West Winsted etc. Assoc.* v. *Ford*, 27 Conn. 282; *West Winsted etc. Assoc.* v. *Rice*, Id. 293; *People's etc. B. Assoc.* v. *Collins*, Id. 145; *Mechanics' etc. B. Assoc.* v. *Wilcox*, 24 Id. 147; *Pabst* v. *Trustees etc. of Economical B. Assoc.*, 1 McArthur, 385; *Mulloy* v. *Fifth Ward B. Assoc.*, 2 Id. 594; *McLaughlin* v. *Citizens' B. etc. Assoc.*, 62 Ind. 264; *Shaffrey* v. *Workingmen's S. etc. Assoc.*, 64 Id. 600; *Hawkeye Ben. & L. Assoc.* v. *Blackburn*, 48 Iowa, 385; *Burlington Mut. L. Assoc.* v. *Heider*, 55 Id. 424; *Massey* v. *Citizens' B. etc. Assoc.*, 22 Kan. 624; *Salina B. etc. Assoc.* v. *Nelson*, Id. 751; *Shannon* v. *Howard Mut. B. Assoc.*, 36 Md. 383; *Merrill* v. *McIntyre*, 13 Gray, 157; *Barker* v. *Bigelow*, 15 Id. 130; *Delano* v. *Wild*, 6 Allen, 1; *Bowker* v. *Mill River etc. Assoc.*, 7 Id. 100; *Hammerslough* v. *Kansas City B. etc. Assoc.*, 79 Mo. 80; *Shannon* v. *Dunn*, 43 N. H. 194; *Franklin B. Assoc.* v. *Marsh*, 29 N. J. L. 225; *Hoboken B. Assoc.* v. *Martin*, 13 N. J. Eq. 427; *Somerset County B. etc. Assoc.* v. *Canman*, 11 Id. 282; *Clarksville B. & L. Assoc.* v. *Stephens*, 26 Id. 351; *Red Bank Mut. B. & L. Assoc.* v. *Patterson*, 27 Id. 223; *Citizens' Mut. L. etc. Assoc.* v. *Webster*, 25 Barb. 263; *City B. & L. Co.* v. *Fatty*, 1 Abb. App. Dec. 347; *Concordia S. & Aid Assoc.* v. *Read*, 93 N. Y. 474; *White* v. *Mechanics' B. Assoc.*, 22 Gratt. 233; *Winchester B. Assoc.* v. *Gilbert*, 23 Id. 787. In Georgia it is held that whether the contract of a borrowing member is in fact usurious, depends upon the object of the association—being illegal if a mere device to evade the usury laws, but otherwise not, and this was a question of fact for the jury: *Parker* v. *Fulton L. & B. Assoc.*, 46 Ga. 166; S. C., 42 Id. 451; *Redwine* v. *Gate City L. & B. Assoc.*, 54 Id. 474; *Bibb County L. Assoc.* v. *Richards*, 21 Id. 592; see also *Shannon* v. *Dunn*, 43 N. H. 194, *supra*.

In a few states premiums in excess of lawful interest are not allowed: *Gordon* v. *Winchester B. etc. Assoc.*, 12 Bush, 110; *Herbert* v. *Kenton B. etc. Assoc.*, 11 Id. 296; *Lincoln B. & S. Assoc.* v. *Graham*, 7 Neb. 173; *Lincoln B. & S. Assoc.* v. *Benjamin*, Id. 181; *Mills* v. *Salisbury B. & L. Assoc.*, 75 N. C. 292; *Vann* v. *Fayetteville B. & L. Assoc.*, Id. 494; *Latham* v. *Washington B. & L. Assoc.*, 77 Id. 145; *Hanner* v. *Greensborough B. & L. Assoc.*, 78 Id. 188; *Hoskins* v. *Mechanics' B. & L. Assoc.*, 84 Id. 838; *Columbia B. L. Assoc.* v. *Bollinger*, 12 Rich. Eq. 124; *Mechanics' etc. B. & L. Assoc.* v. *Dorsey*, 15 S. C. 462; *Martin* v. *Nashville B. Assoc.*, 2 Coldw. 418; *Pfeister* v. *Wheeling B. Assoc.*, 19 W. Va. 676. In a number of the states of the first class, charging interest on premiums is not usurious, and is now expressly authorized in some states, as in Alabama and Pennsylvania: *Montgomery Mut. B. & L. Assoc.* v. *Robinson*, 69 Ala. 413; *Selden* v *Reliable S. & B. Assoc.*, 81½ Pa. St. 336; S. C., 2 Week. Not. Cas. 481; *Building Assoc.* v. *Neurath*, Id. 95; *Building Assoc.* v. *George*, 3 Id. 239; *Johnston* v. *Elizabeth B. & L. Assoc.*, 14 Id. 247; compare *Mobile B. & L. Assoc.* v. *Robertson*, 65 Ala. 382. Although in Pennsylvania, prior to the act of 1859, building associations could only recover

Digitized by Google

upon their obligations from members the amounts actually loaned, with legal interest thereon: *Bechtold* v. *Brehm*, 26 Pa. St. 269; *Kupfert* v. *Guttenberg B. Assoc.*, 30 Id. 465; *Hughes's Appeal*, Id. 471; *Reiser* v. *William Tell etc. Assoc.*, 39 Id. 137; *Denny* v. *West Philadelphia etc. B. Assoc.*, Id. 154; *Premium Fund Association's Appeal*, Id. 156; *Houser* v. *Hermuan B. Assoc.*, 41 Id. 478; and the amount paid beyond the sum actually advanced, with legal interest, might have been recovered back by the borrower: *Philanthropic B. Assoc.* v. *McKnight*, 35 Id. 470; and even under the act of 1859 unincorporated building associations cannot recover upon their mortgages more than was actually advanced, with legal interest: *Jarrett's Ex'r* v. *Cope*, 68 Pa. St. 67; *Link* v. *Germantown B. Assoc.*, 89 Id. 15; *Hansbury* v. *Pfeiffer*, 12 Phila. 250; so this act does not apply to borrowers who are not members, or who are not *sui juris*, and incapable of acquiring membership: *Wolbach* v. *Lehigh B. Assoc.*, 84 Pa. St. 211; but this ruling that a building association cannot recover from a married woman more than the sum borrowed, with legal interest, is not to be extended to the husband, who joins with the wife and obtains the full benefit of the loan: *Tanner's Appeal*, 95 Id. 118. In some states, however, where premiums themselves may be taken, charging interest thereon is illegal: *Hawkeye Ben. & L. Assoc.* v. *Blackburn*, 48 Iowa, 385; *Burlington Mut. L. Assoc.* v. *Heider*, 55 Id. 424; *Forest City etc. B. Assoc.* v. *Gallagher*, 25 Ohio St. 208; *Risk* v. *Delphos B. & S. Assoc.*, 31 Id. 517; *Oak Cottage B. etc. Assoc.* v. *Eastman*, 31 Md. 561; *Baltimore Permanent B. etc. Soc.* v. *Taylor*, 41 Id. 409; *Williar* v. *Baltimore Butchers' L. etc. Assoc.*, 45 Id. 546; *Birmingham* v. *Maryland Land etc. Assoc.*, Id. 541; *Citizens' etc. Co.* v. *Uhler*, 48 Id. 458; *Geiger* v. *Eighth German B. Assoc.*, 58 Id. 569. In Maryland, however, mortgages to building associations, such as are contemplated and provided for by the act of 1852, c. 148, if executed in conformity with the provisions of that act, are free from objection on the ground of usury: *Baltimore Permanent B. etc. Soc.* v. *Taylor*, 41 Id. 417; *Williar* v. *Baltimore Butchers' L. etc. Assoc.*, 45 Id. 562; *Citizens' etc. Co.* v. *Uhler*, 48 Id. 458, all citing the principal case to this effect. And see the principal case also cited in *Pfeister* v. *Wheeling B. Assoc.*, 19 W. Va. 705; *Martin* v. *Nashville B. Assoc.*, 2 Coldw. 418; as adopting the views of *Silver* v. *Barnes*, 6 Bing. N. C. 180, and other English cases. If a statute authorizes the receipt of a premium or bonus only upon a loan to a member of the association, in addition to the legal rate of interest, such a loan is usurious, if made to a corporation incapable of becoming a stockholder or member: *Mechanics' etc. B. Assoc.* v. *Meriden Agency Co.*, 24 Conn. 159; or if made to persons, generally, who are not members: *St. Joseph etc. B. Assoc.* v. *Thompson*, 19 Kan. 321.

The personal character of the defense of usury applies to contracts of building and loan associations. Thus, it cannot be set up by one who purchases the mortgaged premises subject to the mortgage: *Stein* v. *Indianapolis etc. Assoc.*, 18 Ind. 237; *People's etc. B. Assoc.* v. *Collins*, 27 Conn. 142; nor by one who, for a full consideration, assumes payment of the mortgage: *Burlington Mut. L. Assoc.* v. *Heider*, 55 Iowa, 424.

6. *Application of Stock-payments or Dues of Borrower to Extinguishment of his Debt.*—When a member of an association becomes a borrower, the transaction has been considered as so much in the nature of a loan that subsequent payments made by the member upon his stock are partial payments upon his debt: *Overby* v. *Fayetteville B. & L. Assoc.*, 81 N. C. 56; *Hoskins* v. *Mechanics' B. & L. Assoc.*, 84 Id. 838; and therefore every such payment is a *pro tanto* extinguishment of his debt: *Kupfert* v. *Guttenberg B. Assoc.*, 30 Pa. St. 465; *Hughes's Appeal*, Id. 471; *Philanthropic B. Assoc.* v. *McKnight*, 35 Id. 470;

Digitized by Google

Building Assoc. v. *Timmins*, 3 Phila. 209; *Building Assoc.* v. *Reid*, Id. 345; but other cases, proceeding upon the sound theory that a borrower still continues a member, maintain that payment of dues are not payments of the mortgage debt, and do not *ipso facto* work a *pro tanto* extinguishment: *North America B. Assoc.* v. *Sutton*, 35 Pa. St. 463; *Spring Garden Assoc.* v. *Tradesmen's Loan Assoc.*, 46 Id. 493; *Selden* v. *Reliable S. & B. Assoc.*, 81½ Id. 336; S. C., 2 Week. Not. Cas. 481; *Link* v. *Germantown B. Assoc.*, 89 Pa. St. 15; *Early's Appeal*, Id. 411; *Economy B. Assoc.* v. *Hungerbuehler*, 93 Id. 258; S. C., 9 Week. Not. Cas. 218; *Germania B. Assoc.* v. *Neill*, 93 Pa. St. 322; *Watkins* v. *Workingmen's B. & L. Assoc.*, 97 Id. 514; S. C., 10 Week. Not. Cas. 414; *Building Assoc.* v. *Eshelbach*, 7 Phila. 189; *Building Assoc.* v. *Wall*, Id. 240; *Weiss's Appeal*, 5 Week. Not. Cas. 423; *Kreamer* v. *Building Assoc.*, 6 Id. 267; *Knigsessing B. Assoc.* v. *Roan*, 9 Id. 15; see also *Barker* v. *Bigelow*, 15 Gray, 130; *Delano* v. *Wild*, 6 Allen, 1; *Mechanics' B. & L. Assoc.* v. *Conover*, 1 McCart. 219; *Hoboken B. Assoc.* v. *Martin*, 13 N. J. Eq. 427; *Somerset County B. etc. Assoc.* v. *Vandervere*, 11 Id. 282; *State ex rel. Washington B. & L. Assoc.* v. *Hornbacher*, 42 N. J. L. 635; *Hekelnkamper* v. *German B. etc. Assoc.*, 22 Kan. 549; but the borrower has, notwithstanding, a right so to apply them, and the association having a lien upon his shares may, in case of default, make a like application: *Spring Garden Assoc.* v. *Tradesmen's B. Assoc.*, 46 Pa. St. 493; *Early's Appeal*, 89 Id. 411; *North America B. Assoc.* v. *Sutton*, 35 Id. 463; *Watkins* v. *Workingmen's B. Assoc.*, 97 Id. 514; S. C., 10 Week. Not. Cas. 414; *Economy B. Assoc.* v. *Hungerbuehler*, 93 Pa. St. 258; S. C., 9 Week. Not. Cas. 218; and his assignee for the benefit of creditors may also apply the payments: *Spring Garden Assoc.* v. *Tradesmen's B. Assoc.*, *supra;* but not a sheriff's vendee of the mortgagor: *Springville etc. L. Assoc.* v. *Raber's Adm'r*, 11 Phila. 546. A member who has assigned his shares of stock to a third person as collateral security for a debt cannot, when sued upon his mortgage to the association, claim a credit for the value of such shares: *Shober* v. *Accommodation etc. L. Assoc.*, 35 Pa. St. 223; and where a member assigned all his shares as collateral security upon obtaining a loan from an association, and on obtaining a second loan on other shares made a second assignment of all his stock, he cannot afterwards apply the installments paid upon the stock to the first loan, which had been secured by judgment, if before obtaining the second he had made no such appropriation: *Philadelphia Mercantile L. Assoc.* v. *Moore*, 47 Id. 233.

7. *Foreclosure, and Ascertaining Amount Presently Due upon Mortgages.*—A building society is entitled to a foreclosure of mortgages to members, although the deeds and rules contain only powers of sale in case of default: *Ingoldby* v. *Riley*, 28 L. T. 55.

Where a borrowing member wishes to withdraw, or is in default, and his mortgage is sought to be enforced, an important question is the ascertaining of the amount presently due upon his mortgage, which he is justly liable to pay. It must be remembered that when a member obtains a loan or advance he anticipates the amount he is to receive upon the termination of the association, or of the series to which he belongs. His obligation does not look to a repayment before that time. If he desires to withdraw, or it becomes necessary to enforce his mortgage against him before that period arrives, the question is, What amount ought he equitably to pay? In ascertaining this amount the only difference between the two cases seems to be that when he voluntarily withdraws he is entitled to receive the bonus or share of profits allowed him under the laws of the associations, and when he is in default, no such allowance is to be made him. Bearing this difference in mind, the rule,

Digitized by Google

as established by the English decisions, is to estimate the probable or possible duration of the society, to then calculate the aggregate amount of subscriptions and redemption money for that period, and to charge the member as a present debt with that amount, in addition to all arrearages and fines, deducting redemption money paid in: See *Fleming* v. *Self*, 3 De G. M. & G. 997; S. C., 1 Jur., N. S., 25; 24 L. J. Ch. 29; 3 Week. Rep. 89; *Smith* v. *Pilkington*, 1 De G. F. & J. 120; S. C., 4 Jur., N. S., 58; 29 L. J. Ch. 227; 30 L. T. 196; *Mosley* v. *Baker*, 6 Hare, 87; S. C., 12 Jur. 551; 17 L. J. Ch. 257; *Seagrave* v. *Pope*, 1 De G. M. & G. 783; S. C., 15 Eng. L. & Eq. 477; *Archer* v. *Harrison*, 7 De G. M. & G. 404; S. C., 3 Jur., N. S., 194; 29 L. T. 71; *Matteson* v. *Elderfield*, L. R. 4 Ch. 207; S. C., 20 L. T. 503; 17 Week. Rep. 422; *Farmer* v. *Smith*, 4 H. & N. 196; S. C., 5 Jur., N. S., 533, note; 28 L. J. Exch. 226; *Sparrow* v. *Farmer*, 26 Beav. 511; S. C., 5 Jur., N. S., 530; 28 L. J. Ch. 537; 33 L. T. 216; *Handley* v. *Farmer*, 29 Beav. 362. In America the same rule, substantially, has been applied, except that from the aggregate amount of the interest and dues a just amount of interest is rebated: See *Shannon* v. *Howard Mut. B. Assoc.*, 36 Md. 383; *Lister* v. *Log Cabin B. Assoc.*, 38 Id. 115; *McCahan* v. *Columbian B. Assoc.*, 40 Id. 226; *Henighausen* v. *Tischer*, 50 Id. 583; *Border State Perpetual B. Assoc.* v. *McCarthy*, 57 Id. 555; *Cincinnati German B. Assoc.* v. *Flach*, 1 Cin. Sup. Ct. 468; *Hagerman* v. *Ohio B. & S. Assoc.*, 25 Ohio St. 186; *Risk* v. *Delphos B. & S. Assoc.*, 31 Id. 517. This is the rule adopted by the principal case, which has been approved, recognized, or referred to in the following: *Shannon* v. *Howard Mut. B. Assoc.*, 36 Md. 394, 397; *McCahan* v. *Columbian B. Assoc.*, 40 Id. 237–239; *Border State Perpetual B. Assoc.* v. *McCarthy*, 57 Id. 555; *Knell* v. *Green Street B. Assoc.*, 34 Id. 72; *Low Street B. Assoc.* v. *Zucker*, 48 Id. 452; *Home Mut. B. Assoc.* v. *Thursby*, 58 Id. 288; and see it approved but distinguished in *Oak Cottage B. Assoc.* v. *Eastman*, 31 Id. 559; and commented upon in *Cincinnati German B. Assoc.* v. *Flach*, 1 Cin. Sup. Ct. 473, 476. For other statements of the rule, as to ascertaining the amount due, see *Mechanics' B. & L. Assoc.* v. *Conover*, 14 N. J. Eq. 219; *Montgomery Mut. B. & L. Assoc.* v. *Robinson*, 69 Ala. 413; *Ocmulgee B. & L. Assoc.* v. *Thomson*, 52 Ga. 427; *Pattison* v. *Albany B. & L. Assoc.*, 63 Id. 373; *Overby* v. *Fayetteville B. & L. Assoc.*, 81 N. C. 56; *Hoskins* v. *Mechanics' B. & L. Assoc.*, 84 Id. 838; *Hekelnkemper* v. *German B. etc. Assoc.*, 22 Kan. 549; *Glynn* v. *Home B. Assoc.*, Id. 746; *Licking County S. etc. Assoc.* v. *Bebout's Adm'r*, 29 Ohio St. 252. It is held that where an association is prematurely dissolved, and the mortgages of members are foreclosed, in determining the amount due under such mortgages, the mortgagors should be allowed, not only for the sums paid by them as dues, but also for what they paid as interest, while they are to be charged interest on the sums advanced by the association, and so from time to time on the balance of such sums, after deducting therefrom the moneys paid by them for dues and interest: *Windsor* v. *Bandel*, 40 Md. 172; and see also *Low Street B. Assoc.* v. *Zucker*, 48 Id. 448; *Hampstead B. Assoc.* v. *King*, 58 Id. 279.

Where the return of loans is anticipated by borrowers, they are not entitled to a return of a proportionate part of the premium for a fraction of a year: *Sherman B. Assoc.* v. *Rock*, 9 Phila. 75. A shareholder can set off, as against the amount due by him to the association under the mortgage, claims held by him against it, consisting of balances due from the association to members who had withdrawn from the association and assigned them to the mortgagor: *Hennighausen* v. *Tischer*, 50 Md. 583.

8. *Marshaling.*—As between an association and a second mortgagee of the premises, stock held by the association as collateral security will be first ap-

Digitized by Google

plied to the payment of the amount due on the mortgage to the association before recourse is had to the mortgaged premises: *Herbert* v. *Mechanics' B. & L. Assoc.*, 17 N. J. Eq. 497; *Red Bank Mut. B. & L. Assoc.* v. *Patterson*, 27 Id. 223; *Phillipsburg Mut. L. & B. Assoc.* v. *Hawk*, Id. 355; and this equity of the second mortgagee will not be defeated by a levy on the stock under a judgment against the mortgagor: *Herbert* v. *Mechanics' B. & L. Assoc.*, *supra*; *Phillipsburg Mut. L. & B. Assoc.* v. *Patterson*, *supra*. Where a person executed a mortgage on two lots to an association, and assigned to it as collateral security five shares of stock, and afterwards gave the complainant a mortgage on one of the lots, and then assigned his interest in the stock to third persons, the complainant may require the association to sell first the lot which was exclusively embraced in its mortgage, but cannot compel the appropriation of the stock to the payment of the first mortgage: *Reilly* v. *Mayer*, 12 Id. 55.

9. *Estoppel to Deny Corporate Existence.*—A member of an association who enters into a contract with it, by which he receives a benefit, cannot, under the principles governing all corporations, deny its existence. Therefore a member who receives a loan from an association and executes a mortgage as security, cannot, in proceedings to enforce the mortgage, deny the legal existence of the association: *Cahall* v. *Citizens' Mut. B. Assoc.*, 61 Ala. 232; *West Winsted etc. B. Assoc.* v. *Ford*, 27 Conn. 282; *West Winsted etc. B. Assoc.* v. *Rice*, Id. 293; *McLaughlin* v. *Citizens' B. etc. Assoc.*, 62 Ind. 264; *Jones* v. *Kokomo B. Assoc.*, 77 Id. 340; *Massey* v. *Citizens' B. etc. Assoc.*, 22 Kan. 624; *Lord* v. *Essex B. Assoc.*, 37 Md. 320; *Lincoln B. & S. Assoc.* v. *Graham*, 7 Neb. 173; *Mechanics' B. Assoc.* v. *Stevens*, 5 Duer, 676; *Lucas* v. *Greenville B. & S. Assoc.*, 22 Ohio St. 339; *Hagerman* v. *Ohio B. & S. Assoc.*, 25 Id. 186; *Becket* v. *Uniontown B. & L. Assoc.*, 88 Pa. St. 211; *Johnston* v. *Elizabeth B. & L. Assoc.*, 14 Week. Not. Cas. 247; and a purchaser of the equity of redemption is equally estopped: *People's etc. B. Assoc.* v. *Collins*, 27 Conn. 142.

DISSOLUTION.—A court of equity has jurisdiction, at the suit of shareholders of unredeemed shares in a building association, to call the redeemed shareholders to account, enforce payment of what they respectively owe, distribute the fund among the unredeemed shareholders, and wind up the concern: *Edelin* v. *Pascoe*, 22 Gratt. 826; and where suit is brought to wind up the affairs of such an association, all the shareholders should be made parties, and if any have been illegally released, their liabilities should be enforced: *Cason* v. *Seldner*, 77 Va. 293.

Where by common consent of the stockholders a building and loan association was to be wound up, it is not competent for a majority of the stockholders to adopt a scheme of settlement, but the parties are left to the relations which equity establishes: *City L. & B. Assoc.* v. *Goodrich*, 48 Ga. 445; as to the liability of the officers carrying out such scheme, see S. C., 54 Id. 98.

Where an association has become insolvent, in winding up its affairs after deducting expenses incident to the administration of its assets, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed *pro rata* among those whose claims are based upon the stock of the association, whether they have withdrawn and hold orders for the withdrawal or not: *Christian's Appeal*, 102 Pa. St., 184; S. C., 13 Week. Not. Cas. 181; and where an association is authorized by charter to receive money on deposit from stockholders, to bear interest at a certain rate, in case of insolvency, such stockholders are creditors of the association, as to their deposits, and in payment of them are entitled to a *pro rata* share of the

Digitized by Google

assets of the association, with other outside creditors, in preference to the stockholders: *Criswell's Appeal*, 100 Pa. St. 488; S. C., 12 Week. Not. Cas. 489.

For a more complete discussion of the subject of building and loan associations than our space has permitted, the reader is referred to Mr. Endlich's able, exhaustive, and valuable treatise.

KELLENBECK v. STATE.

[10 MARYLAND, 431.]

INDICTMENT FOR ARSON MUST CHARGE OFFENSE TO HAVE BEEN DONE MALICIOUSLY, and charging it to have been done "feloniously, willfully, and unlawfully" is insufficient.

WORDS CONSTITUTING PART OF DESCRIPTION OF CRIME MUST BE USED IN INDICTMENT; and an indictment under the Maryland act of 1809, c. 138, charging a willful burning of a building, which is not a parcel of a dwelling-house, is insufficient on demurrer if it fails to describe the building as "not a parcel of any dwelling-house."

OBJECTION TO INDICTMENT MUST BE TAKEN BY DEMURRER, as well when the case is submitted to the court as when tried by a jury; and under the Maryland act of 1852, the judgment will not be reversed for any matter which might have been a subject of demurrer to the indictment.

INDICTMENT for "feloniously, willfully, and unlawfully, setting fire to and burning a certain building used as a brewery for the manufacture of beer." The other facts are stated in the opinion.

Joseph A. Wickes, for the plaintiffs.

By Court, ECCLESTON, J. The building alleged to have been burned is described as "a certain building used as a brewery for the manufacture of beer." And the indictment charges that the traversers "feloniously, willfully, and unlawfully did set fire to" the building thus described; "and the same building, used as a brewery for the manufacture of beer as aforesaid, then and there, by such firing as aforesaid, feloniously, willfully, and unlawfully, did burn and consume, contrary to the act of assembly in such case made and provided," etc.

There are three counts, all being similar, except stating different owners of the property. At the instance of the traversers, the case was tried by the court upon the plea of not guilty, without a jury.

The record states: "Whereupon the court does say that it finds the prisoners guilty of the offense as charged in the third count of the indictment, except the court does not find them

Digitized by Google

guilty of having 'feloniously' committed the offense, the court not deeming the offense felony in law. And the court further finds them not guilty on the first and second counts of said indictment." Upon this finding judgment was passed, by which George Kellenbeck was sentenced to undergo confinement in the penitentiary for seven years and two months, and Andrew Brash for six years and two months.

In claiming a reversal of this judgment, it has been argued by the traversers' counsel that the indictment contains a proper and sufficient statement of all that is essential in a case of arson. That whether the parties were or were not guilty of the charge, could not appear until the proof should be heard. And as it is evident from the finding of the court they did not commit the offense as charged, the court had no authority to pass judgment against them for a misdemeanor, under the second clause of the act of 1809, c. 138, sec. 5. The traversers therefore claim the right to have the judgment reversed, and insist that the act of 1852, c. 63, has no application to such a case as this. It prevents the reversal of a judgment "for any matter or cause which might have been a subject of demurrer to the indictment." But here, as the indictment contains all that is necessary to make it valid in a case of arson, there was no ground for a demurrer which could have been used as a defense. And although the state failed to sustain the charge as laid by proof, that surely could not be cause of demurrer, and consequently the erroneous judgment ought to be corrected by means of the present writ of error. It is unnecessary to inquire whether the conclusion of this argument is correct, conceding the premises on which it is based to be true, because there is an error in the premises in a very important particular. The indictment is defective, viewing it as charging the crime of arson. The burning is nowhere alleged to have been done "maliciously," but "feloniously, willfully, and unlawfully."

In describing this offense, it is said, in 1 Hale P. C. 566: "The felony of arson, or willful burning of houses, is described by my Lord Coke, chapter 15, page 66, to be the malicious and voluntary burning of the house of another, by night or by day." And again, on page 569, the same writer says: "It must be a willful and malicious burning, otherwise it is not felony, but only a trespass." See also 3 Ch. Crim. L. 1106; 4 Bla. Com. 220, 222; 2 Russell on Crimes, 548; and 2 East's Crown Law, 1015.

In reference to how the offense should be charged, it is said,

Digitized by Google

in 2 East's Crown Law, c. 21, sec. 11: "The indictment for arson at common law must lay the offense to have been done willfully (or voluntarily) and maliciously, as well as feloniously." The same language is used in Wharton's Am. Crim. L., 3d ed., 625. And 1 Hale P. C. 567, c. 49, we find it said: "In cases of willful burning of houses the indictment runs, *Quod felonnice, voluntarie et malitiose combusit domum*, without saying *domum mansionalem*, as in case of burglary." See likewise the note on page 568, "as to the form of the indictment," especially that portion of the note in regard to the act being done "maliciously." It also appears in 3 Ch. Crim. 1107, "the terms voluntary (or willfully) and maliciously are requisite." And on page 1109 this author gives the form of an indictment, in which it is said "feloniously, willfully, and maliciously did set fire to, and the same house then and there, by such firing as aforesaid, feloniously, willfully, and maliciously, did burn and consume." Russell, in his treatise on Crimes, vol. 2, p. 563, ed. of 1850, says: "With respect to the indictment, it may be observed that it is clearly necessary in an indictment for arson at common law to lay the offense to have been done willfully and maliciously; and though the words 'willfully and maliciously' did not occur in the statute of 9 Geo. I., c. 22, now repealed, yet they seem to have been considered as necessary in an indictment upon that statute."

From these authorities, it is evident that the present indictment, as a charge of arson, is defective, and consequently might have been demurred to. Nor can it be considered a valid indictment for an offense under the second clause in the fifth section of the act of 1809, c. 138. Were it not liable to objection in any other respect, it is so for the reason that it fails to describe the building as "not parcel of any dwelling-house." The language of the clause referred to is: "Every person, his or her aiders, abettors or counselors, who shall be duly convicted of the crime of willfully burning any mill, distillery, manufactory, barn, meat-house, tobacco-house, stable, warehouse, or other outhouse, not parcel of any dwelling-house," etc. These latter words of exception or qualification in relation to the houses mentioned constitute part of the description of the crime, and being included in the enacting portion of the statute, they should be used in the indictment: Wharton's Am. Crim. L. 191; *Rawlings* v. *State*, 2 Md. 211, 212. And as those words are not contained in this indictment, there could have been no conviction under it for the offense described in the clause of the

Digitized by Google

statute now under consideration, if the parties charged had seen fit to have filed a demurrer.

Thus it appears that by a demurrer the traversers might have successfully defended themselves against this indictment, viewing it as a charge of either crime which has been mentioned. And this being true, the act of 1852 is applicable to the present case, notwithstanding, under the submission to the court, the judge was called on to decide the whole case, both in regard to law and fact.

The act is very comprehensive in its terms, and in the second section provides that "no judgment upon any indictment for any felony or misdemeanor or upon any presentment, whether after verdict, by confession, or otherwise, shall be stayed or reversed for [sundry matters then enumerated], nor for any matter or cause which might have been a subject of demurrer to the indictment, inquisition, or presentment, as the case may be."

Now, if finding the parties guilty, in the manner shown by the record, can be considered as a verdict, the judgment rendered thereon is within the act of 1852. But if such finding is not a verdict, and the judgment is neither "after verdict or by confession," surely it must then be such a judgment as was designed to be provided for by the words "or otherwise." And believing the indictment should have been held bad on demurrer, we think the case comes within the act under consideration; consequently the judgment cannot be reversed.

Although the act of 1852, in this instance, may prevent the reversal of a judgment not strictly legal, nevertheless, as the judge below found the parties guilty of burning the building, it is but just to presume the evidence authorized such finding, and if so, the offenders will only meet that punishment which the legislature designed should be the consequence of such a crime.

As the act of 1852 prohibits a reversal of the judgment, because the parties might have prevented the judgment by demurrer on account of defects in the indictment, the writ of error must be quashed.

Writ of error quashed.

INDICTMENT MUST CONTAIN WORDS CONSTITUTING PART OF DESCRIPTION OF OFFENSE: *People* v. *Aro*, 65 Am. Dec. 503, and cases collected in the note.

JUDGMENT OF CONVICTION WILL NOT BE REVERSED for any matter or cause which might have been a subject of demurrer to the indictment: *Davis* v. *State*, 39 Md. 335, citing the principal case.

Digitized by Google

ROSE v. BEVAN.

[10 MARYLAND, 465.]

RECEIVER MAY BE APPOINTED AND INJUNCTION GRANTED AT SUIT OF JUDGMENT CREDITOR to restrain the debtor from selling his goods, notwithstanding a prior mortgage thereon, not yet due, to another person.

BILL IS SUFFICIENT FOR INJUNCTION AND APPOINTMENT OF RECEIVER if it alleges that executions upon valid judgments have been levied upon goods in a store; that a sale thereof to satisfy the judgments is sought to be prevented by the holder of a prior mortgage thereon; that the property is more than sufficient to satisfy the mortgage, and the debtor has no other property; that since the execution of the mortgage the goods remaining in the possession of the mortgagor, some of them had been sold and other goods substituted in their place, and that if the debtor is allowed to retain the possession of the goods he would so dispose of them that the complainants' claims would be wholly lost.

MORTGAGE OF PERSONAL PROPERTY DOES NOT EXTEND TO AND COVER OTHER PERSONAL PROPERTY SUBSTITUTED FOR IT UPON SALE, nor does it cover personal property purchased with the proceeds of the sale of that mortgaged.

MORTGAGEE, BEFORE HAVING RIGHT TO FORECLOSE, MAY HAVE RECEIVER APPOINTED in a case of danger of loss of the goods mortgaged.

DEBTOR'S EQUITABLE INTEREST IN PERSONAL PROPERTY CANNOT BE SOLD UNDER FIERI FACIAS; but a judgment creditor may file his bill and obtain a decree for the absolute sale of the goods to pay off incumbrances, and to satisfy his own claim.

BILL for an injunction. The mortgage mentioned in the opinion conveyed to Rose all the stock in trade and household furniture in a house and store occupied by Gauss, "and also all other property and effects," which might be brought into the building or substituted in lieu of that mortgaged. The other facts are stated in the opinion.

John J. Snyder, for the appellants.

George W. Dobbin and William A. Talbott, for the appellees.

By Court, LE GRAND, C. J. This appeal is taken from an order of the superior court of Baltimore city, sitting in equity, granting an injunction and appointing a receiver, on a bill filed by the appellees against the appellants.

The material averments of the bill may be thus stated: The appellees sold, at various times, to the appellant Gauss, certain dry goods, for which, from time to time, they took his promissory notes, which not being paid on their maturity, suits were brought before a justice of the peace, and judgments obtained thereon, amounting in number to five, whereon writs of *fi. fa.* were issued and levied on the goods of the said Gauss. The

Digitized by Google

bill then alleges that the appellant Rose, by virtue of a mortgage executed to him by Gauss, claims to prevent the execution and sale of the goods levied upon to satisfy the judgments of the appellees; that the property claimed to have been mortgaged, and in fact levied upon, is in value more than sufficient to satisfy the mortgage; that the appellant Gauss has no other property out of which the judgments of the appellees can be satisfied. The bill further avers, that since the execution of the mortgage the appellant Gauss has been permitted to use and dispose of the goods mortgaged to Rose, and that a part of the goods levied on are not the same goods as those mortgaged, but others; that if the goods levied upon be not taken from the possession of Gauss they will be disposed of, and the appellees subjected to an entire loss of their claim. The bill asks an injunction to prevent Gauss from selling the property, the appointment of a receiver to take charge of them, and sale thereof to satisfy, after the payment of the debt secured to be paid by the mortgage to Rose, the claim of the appellees. The bill undoubtedly makes a good case. Its averments on this appeal, whatever may be the real state of the case, must be taken as true. Among other things, it denies the property levied upon to be the same as that covered by the mortgage. If it be not the same, then, to the extent of the difference, the mortgagee has no right to interfere; or if any portion be the result of purchases made out of the proceeds of sale of the goods mortgaged, he has no right, as to such portion, to interfere, he having no interest in or lien on the same: *Hamilton* v. *Rogers*, 8 Md. 301. The case of *Clagett* v. *Salmon*, 5 Gill & J. 315, establishes the right of a mortgagee, before he has a right to foreclose, in the case of apprehended danger, or loss of the goods, to have a receiver appointed; and the case of *Harris* v. *Alcock*, 10 Id. 251 [32 Am. Dec. 158], shows that although a debtor's equitable estate in personal property cannot be seized and sold under a *fieri facias*, yet a creditor may file his bill and obtain a decree for the sale of the property absolutely and pay off the incumbrances, and then satisfy his own claim. This is the case made by the present bill, and we therefore affirm the order appealed from, and remand the cause for further proceedings.

Order affirmed, and cause remanded.

INJUNCTION AGAINST DEBTOR DISPOSING OF HIS PROPERTY MAY BE ISSUED and a receiver appointed at the suit of a judgment creditor: *Rhodes* v. *Cousins*, 18 Am. Dec. 715; but not prior to judgment, although a verdict has been obtained: *Moran* v. *Dawes*, 14 Id. 550.

Digitized by Google

MORTGAGE OF PERSONAL PROPERTY DOES NOT COVER THAT SUBSTITUTED FOR IT, or purchased with the proceeds of the sale thereof: *Raulett* v. *Blodgett*, 43 Am. Dec. 603; note to *Moody* v. *Wright*, 46 Id. 715; note to *Pulcifer* v. *Page*, 54 Id. 595.

THE PRINCIPAL CASE IS CITED in *Martin* v. *Jewell*, 37 Md. 535, to the point that a debtor's equitable estate in personal property cannot be seized and sold under *fieri facias;* and in *Meyers* v. *Amey*, 21 Id. 305, to the point that a bill alleging that the complainant is a judgment creditor, that the holder of a prior mortgage on the debtor's personal property is seeking to prevent the execution of a writ to satisfy his judgment, that this property was all the debtor had and was sufficient to more than pay the mortgage thereon, and that the debtor was disposing of his property for the purpose of defrauding the complainant, entitles him to an injunction and the appointment of a receiver; but the bill must allege that the property mortgaged is sufficient to pay the mortgage and some portion of complainant's claim, and that it is all the debtor has: *Bruce* v. *Levering*, 23 Id. 295, citing the principal case. In *Voshell* v. *Hynson*, 26 Id. 93, the principal case is distinguished in that the case at bar was one in which the question was not whether the receiver was originally properly appointed, but whether he should have been retained, after answer and upon motion to discharge him.

UHL *v.* DILLON.

[10 MARYLAND, 500.]

BILL IS INSUFFICIENT FOR INJUNCTION AND APPOINTMENT OF RECEIVER, if it alleges only that the defendant is indebted to the complainants, and that he is disposing of his property, collecting money due him, and secreting the same, with intent to defraud the complainants, and that they are informed and believe that he intends to abscond and defraud his creditors; it does not show that the complainants have any lien as judgment creditors or otherwise upon the defendant's property.

COURTS OF EQUITY WILL NOT RESTRAIN DEBTOR in the enjoyment and power of disposition of his property, unless clearly within the limits of the authorities of the law; nor will they stretch their power to remedy supposed defects in the law, as the legislature is the body to remedy the defects in the law if any there be.

BILL in equity for an injunction restraining the appellant from disposing of his property, and for the appointment of a receiver to take charge thereof, upon allegations that the defendant was indebted to the complainants in a specific sum of money; that he had purchased a large amount of goods from the complainants, for which a large sum was yet due; that he was selling and disposing of his property as fast as possible, and collecting all the money due him; that he was secreting his money and property with the intent, as complainants were informed and believe, to abscond and defraud the complainants out of their claims. The court granted the orders asked, and the defendant appealed.

Digitized by Google

John J. Snyder and Charles F. Mayer, for the appellant.

James Malcolm and St. George W. Teackle, for the appellees.

By Court, BARTOL, J. The bill filed by the appellees in this cause states no sufficient case entitling them to the relief prayed.

No authority has been shown to this court, nor can any be produced, entitled to consideration, which sanctions the exercise of the high and extraordinary power of a court of chancery to interpose, by writ of injunction, in a case like the one before us, restraining a debtor in the enjoyment and power of disposition of his property.

The appellees (the complainants below) are merely general creditors of the appellant, who have not prosecuted their claim to judgment and execution, nor in any other manner acquired a lien upon the debtor's property, and were not entitled to the writ of injunction nor to the appointment of a receiver. Whatever may be the supposed defects of the existing laws of the state, in leaving to the debtor the absolute power of disposing of his property and leaving the creditor to the slow and very inadequate legal remedies now provided, if such defects exist, it is solely in the power of the legislature to correct them. It is not within the province of the chancery courts to stretch their power beyond the limits of the authorities of the law, for the purpose of remedying such defects. Such a course would be productive of great mischief, and make the rights of the citizen depend upon the vague and uncertain discretion of the judges, instead of the safe and well-defined rules of law.

The learned Chancellor Kent, in the decision of the case of *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144, has stated most clearly and forcibly the principles which govern the case before us, and we adopt its reasoning as applicable here: See the authorities referred to by the chancellor in his opinion in the case cited; see also *Candler* v. *Pettit*, 1 Paige, 168 [19 Am. Dec. 399]; Adams's Eq. 487.

We reverse the order of the circuit court granting the injunction and appointing a receiver, and dismiss the bill, with costs.

Order reversed and bill dismissed, with costs.

INJUNCTION AGAINST DEBTOR'S DISPOSING OF HIS PROPERTY: See *Rose* v. *Bevan*, and note, *ante*, p. 170. A mere apprehension or fear that the debtor intends to perpetrate a fraud upon the creditor by placing his effects beyond his reach before judgment can be obtained is not sufficient: *Hubbard* v. *Hubbard*, 14 Md. 359, citing and approving the principal case. The principal case is distinguished from *Sanderson* v. *Stockdale*, 11 Id. 575, and *Flack* v. *Charron*, 29 Id. 323, in which cases it was held that partnership creditors may, under the act of 1865, proceed in equity to vacate any transfer, or agreement among the partners to dispose of their effects, for fraudulent purposes.

Digitized by Google

GENERAL INSURANCE COMPANY *v.* UNITED STATES INSURANCE COMPANY.

[10 MARYLAND, 517.]

MORTGAGES OF EQUITABLE INTERESTS IN LAND ARE WITHIN MARYLAND REGISTRY LAWS; these laws, being designed to avoid abuses and deceits by mortgages and pretended titles, and for the protection of creditors and purchasers, should be construed to effect that end.

ACTUAL KNOWLEDGE OF EXISTENCE OF PRIOR UNRECORDED INSTRUMENT AFFECTING TITLE TO LAND MUST BE SHOWN, or at least knowledge of circumstances sufficient to put a party upon inquiry, in order to give such unrecorded instrument priority over a subsequent recorded deed, and the case must be so clear that the allowance of the recorded claim would be a fraud upon the party setting up the unrecorded instrument.

NOTICE TO DIRECTOR OF CORPORATION WILL NOT BIND CORPORATION, if it is acquired by him privately, or from rumor, or through channels open to all alike, and is not communicated to his associate directors.

SUBSEQUENT DISPOSAL BY MORTGAGOR OF CONSIDERATION OF MORTGAGE does not affect the validity of the mortgage, or render it not *bona fide* at the time it was made.

MARSHALING OF SECURITIES IS DONE ONLY AT INSTANCE OF ONE CREDITOR AGAINST ANOTHER, and is never done *ex officio*, nor at the suit of the debtor, nor to the prejudice of a creditor; and the creditor seeking it must show that his co-creditor will sustain no injury thereby.

CAUSE WILL NOT BE REMANDED FOR FURTHER PROCEEDINGS unless the record shows that the ends of justice will be promoted thereby.

ORDER RATIFYING AUDITOR'S ACCOUNT WILL NOT BE REVERSED in a foreclosure case because of a failure to marshal securities, when the account was submitted by agreement, with a reservation of the right to except, and no exception was filed on that ground.

APPEAL from a decree of the court of chancery foreclosing the appellee's mortgage. The evidence in the case discloses that in March, 1827, one Keener purchased a house and lot of one Shriver, in the city of Baltimore, agreeing to pay him therefor ten thousand dollars, and upon taking possession paid Shriver seven thousand dollars, and took a bond for a conveyance upon the payment of the balance. Keener subsequently sold the property to William H. Freeman, to whom he gave possession, and who paid him seven thousand dollars, and agreed to pay said balance of the purchase money to Shriver. On January 16, 1834, Freeman, being indebted to the appellant in the sum of fifteen thousand dollars, executed to that company a mortgage of this property, but which mortgage, although duly acknowledged at that date, was not recorded until April 2, 1834. On March 29, 1834, Freeman executed to the appellee a mortgage covering this same property, together with several other parcels

Digitized by Google

of property, and which mortgage was duly acknowledged and recorded on the day of its date, and was made to secure the sum of eighty thousand dollars, received by Freeman from the appellee in its policies, which were subsequently disposed of by him under an arrangement with one Neff, the president of the appellee, as stated in the opinion. It appears that the only knowledge Neff had of the appellant's mortgage was acquired by him in a general way in conversations with Freeman about his affairs, and with no direct view to this particular mortgage, or for the purpose of being communicated to the appellee, and it does not appear that he did in fact communicate any information thereof to the appellee. Upon the foreclosure of the appellee's mortgage the property was sold, and the claim due Shriver being paid, the balance of the proceeds of the sale was awarded to the appellee, it being insufficient to pay either of the mortgages in full, and from this decree the appeal is taken.

S. T. Wallis, for the appellant.

J. V. L. McMahon, for the appellee.

By Court, TUCK, J. The chancellor correctly decided the two propositions discussed in his opinion, filed on the eleventh of April, 1847: *United States Ins. Co.* v. *Shriver*, 3 Md. Ch. 381; that is to say, that the deeds are within the registry acts, and that the appellant has not shown that the appellee had notice of the deed of January, 1834, when that of March following was executed.

The first of these questions has since been considered by this court, and determined in accordance with the views of the chancellor in the present case, and after further consideration upon the authorities and argument presented at the hearing of this appeal, we see no reason to doubt the correctness of the decision then made: *Alderson* v. *Ames*, 6 Md. 52. The same doctrine was recognized in *Watson* v. *Bane*, 7 Id. 117, where the right of a mortgagee of an equitable title, similar to the present, was established. See also *Parkist* v. *Alexander*, 1 Johns. Ch. 394, where the chancellor, upon the words of the New York statute, said that it embraced mortgages of equitable titles. We consider the language of our registry acts equally as comprehensive, and that they must have the same application. They were designed to avoid abuses and deceits by mortgages and pretended titles, and for the protection of creditors and purchasers should be construed so as to effect that end: Act 1715, c. 47, sec. 8; 1766, c. 14; 1825, c. 203; *Russell's Appeal*, 15 Pa. St. 322. The present case

Digitized by Google

shows the propriety of this interpretation. The mortgagor was at the time extensively engaged in speculation. His operations were of such a character as to cause daily changes in his property and his pecuniary means. He had transactions with the appellant, which sufficiently indicated to that company the character of his business. They dealt with him, and advanced money on the faith of this property, which they permitted him to hold, even after the time limited in the mortgage for the payment of the debt, although it contained a power in the company to sell under which the appellant might have proceeded, and thereby, most probably, have prevented the appellee from making advances on the same property. It does not appear why the deed was withheld from record. It would seem, however, from the execution and acknowledgment, that it was intended to have been recorded, because if designed to operate only as the assignment of a right in equity, these formalities need not have been resorted to. It would work great injustice, and in many cases gross frauds, if such transactions were not within the registry acts, and the construction now contended for by the appellant cannot be accepted by the court without subjecting the community to such risks.

Upon the question of notice, this court said, in *Winchester* v. *Baltimore etc. R. R. Co.*, 4 Md. 231, that "actual knowledge must be shown by proof, or at least, such circumstances must be proved as would have been sufficient to put the party on inquiry." See also *Price* v. *McDonald*, 1 Id. 403 [54 Am. Dec. 657]. Applying this principle to the present case, we have not been able to discover any sufficient ground for denying to the appellee the priority claimed by it. The case must be so clear as to satisfy the mind that the allowance of the claim would be a fraud on the party setting up the first deed. In *Wyatt* v. *Barwell*, 19 Ves. 435, it was said: "A registered deed stands upon a different footing from an ordinary conveyance. It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, we cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected." And the same principle had been recognized by Lord Hardwicke, in *Hine* v. *Dodd*, 2 Atk. 275, who said: "Though there are strong circumstances of notice before the execution of the mortgage, yet, upon

Digitized by Google

mere suspicion only, I will not overturn a positive law;" but he added, "Apparent fraud, or clear and undoubted notice, would be a proper ground for relief:" See also *Dey* v. *Dunham*, 2 Johns. Ch. 182.

No satisfactory conclusion in aid of the appellant's pretensions can be drawn from the testimony of Mr. Freeman. The record shows so many mistakes in his recollection as to matters of facts that we must suppose he had no very clear conception of his own affairs at the times at which he spoke of them. In his answer, prepared in March, 1836, two years after these deeds were executed, he professes to give a relation of his business with these companies; and in October, 1849, when examined under the commission, he confidently referred to that answer, and offered to restate the same matters as part of his evidence, yet on the cross-examination he shows that he was greatly mistaken in particulars very material to the merits of the controversy. Reliance was placed in argument on his statement that Neff knew as much of his affairs as he himself did, and the inference was deduced that he must have known of this mortgage; but we think this by no means a necessary conclusion, when we consider how his information was acquired. It is certain that these frequent conversations did not keep him advised of other matters, for he did not know of the deed to Poultney; if we are to credit everything that appears under the commission, Freeman himself must have forgotten that deed, because he offered, as security for the loan he was asking of the appellee, the very property which he had conveyed to Poultney; and when it was mentioned to him by Mr. Teackle, he had so far forgotten the transaction as to misstate the facts. Neff does not appear to have overlooked anything necessary to make his company secure. He placed the business in the hands of counsel, and if he had been advised of the deed to the appellant, or had had reason to suspect its existence, we think we should have heard something of it in the progress of the searches and investigations of title made by Mr. Teackle. As far as this record discloses, we find that whatever were the confidential relations between them, and however well informed as to each other's affairs. when a matter of business arose Neff did not rely on Mr. Freeman's statement alone, but dealt with him as any prudent man would deal with another, by resorting to counsel, and the public records where evidence of titles is usually found. It is reasonable to suppose that they had frequent conversations about their affairs, as they were engaged in the same kind of

Digitized by Google

operations; but the information acquired from such conversations, which do not appear to have related to any specific transaction, and which do not enable this witness to say, except inferentially, that Neff had knowledge of the mortgage, is not such notice as the law requires when it is sought to deprive a registered deed of its priority. In the multiplicity of his operations, and the fluctuations in the value of property in a large city, to say nothing of the inflated importance a speculator generally ascribes to the property in which he deals, or on which he may be seeking to raise money, conversations about business with a person employed as Mr. Freeman says he was could not impart that clear knowledge of his affairs which a prudent man would rely on, or which should bind him in a case like the present.

We do not find in the record evidence of facts that would charge the company with notice, on the principle that what will put a party on inquiry is equivalent to notice. Freeman offered a mortgage on this property, being, as he had been for some time, in possession. There was nothing before Neff or the company from which they could learn that the appellant held any lien on the security. If they had put themselves on such an inquiry, there was no more reason for seeking information from the general insurance company than from any resident in Baltimore.

We deem it unnecessary to examine the testimony in detail, because, conceding that Neff had sufficient notice, or that which the law deems equivalent to it, it does not appear to have been communicated to the board of directors. This question was examined by the court in *Winchester* v. *Baltimore etc. R. R. Co.*, 4 Md. 231; and after again considering it, we are prepared to affirm, with the chancellor, as far as is applicable to the present record, "that notice given to a director of an incorporated institution privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the institution."

We do not perceive that the appellant can justly complain of this conclusion on the points before us. With a deed in its possession affording ample security, it overlooked or neglected the protection of the registry acts, and in violation of the policy of these laws, left the debtor to treat with other persons on the faith of the same property; and unless it be shown that the appellee had such notice as would make it fraudulent to insist upon

Digitized by Google

its junior mortgage, the appellant must bear the consequences of that neglect.

Two other questions were presented in argument, which were not passed upon by the chancellor; viz., the consideration of the mortgage to the appellee, and the marshaling of the securities held by these companies, which we must dispose of.

In reference to the first, it appears by the cross-examination of Freeman that he got from the appellee its policies of insurance for eighty thousand dollars, and afterwards, by an arrangement with Neff, delivered to him fifty thousand dollars of them, in exchange for his own note for twenty thousand dollars, and John Clark's note for thirty thousand dollars. If he received what he agreed to take as the consideration of the mortgage, it makes no difference that he subsequently disposed of a portion of the policies in the manner stated by him. We cannot say that such a transaction was not *bona fide* at the time the loan was effected.

Next, as to marshaling, the rule in equity is well settled. The question here is, whether there is any ground for applying it. It was said by Chancellor Bland, in *Watkins* v. *Worthington*, 2 Bland, 532, that "this equity is never administered *ex officio*, nor at the suit of the debtor, but only at the instance of one creditor against another. But the securities or assets can never be marshaled to the prejudice of the creditor, or so as to suspend or put in peril his claim, or upon any other terms than giving him entire satisfaction. For, in making this arrangement, the court cannot lessen his security or vary his contract, except so far as waiting a short time to ascertain the value of the estates can be considered as having that effect. The creditor who calls for it must show that the right of his co-creditor will neither be endangered nor injuriously delayed; for if he fails to do so, he can have no other benefit than a subrogation of his right, or the being allowed to stand in his place." And according to *Watkins* v. *Worthington*, 3 Id. 514, it must be "clear that the creditor can sustain no loss, nor be in any way delayed, or have his claim subjected to any additional peril."

It is true that, under the act of 1832, c. 302, this court may remand a cause for further proceedings, and, in such cases, we sometimes do more than the court below could have done of its own motion, because, when a cause is submitted for final decree, generally it must be decided on the case as then presented: *Harris* v. *Harris*, 6 Gill & J. 111. But the record must indicate that the ends of justice will be promoted by such further pro-

Digitized by Google

ceedings, in order to authorize this court to remand a cause. It is clear that, as the case was presented to the chancellor, there was nothing by which the securities could have been marshaled as now proposed on the part of the appellant. The decree, in this aspect, was unquestionably correct: Id. Does it contain such matter as to justify our interference under the act of 1832, consistently with the views expressed by Chancellor Bland? This suit was commenced in January, 1835, and the appellee was arrested in availing of its security by the appellant's setting up its deed of March, 1834. Since then no effort has been made by the appellant to throw the appellee upon the other property contained in its mortgage. Whether in this lapse of time that property has increased or decreased in value while the incumbrances have been accumulating, nowhere appears. We have seen that the court may wait a reasonable time to ascertain the value of the estates. Now, has not sufficient time for that purpose transpired? May we not conclude that if marshaling would have benefited the appellant, steps to that end would have been taken in an earlier stage of the cause? The appellant has not shown us that the rights of the appellee will not be endangered or delayed to its prejudice, nor offered any suggestion, upon the record, by which we can determine that the equity of the case requires the record to be remanded.

Besides this objection, it appears that the auditor's report was submitted by agreement, with a reservation of the right to except; but the point now presented was not raised in the chancery court, and the account being in conformity with the previous opinion of the chancellor, and no exception filed on the question of marshaling, which was not decided in that opinion, the order ratifying the account cannot be reversed on that ground: *Miller* v. *Allison*, 8 Gill & J. 35; Act of 1825, c. 117.

Under these circumstances, we ought not to put the appellee to further litigation and delay, on the mere possibility that ultimately there may be sufficient funds to pay the claims of both parties, but should allow that company the benefit of its lien, as ascertained by the order of the chancellor.

Affirmed, with costs.

INFORMATION, GIVEN TO PURCHASER OF PROPERTY, OF PRIOR UNRECORDED INSTRUMENT AFFECTING TITLE, which ought to put him on inquiry, is sufficient notice: *Price* v. *McDonald*, 54 Am. Dec. 657, and note; and a junior mortgage, first recorded, will not be prior to an unrecorded prior mortgage, if the holder of such junior mortgage had notice of the unrecorded mortgage prior to or at the time of the making of his mortgage: *Willard's Ex'rs* v. *Ramsberg*, 22 Md. 217, citing the principal case.

Digitized by Google

NOTICE TO DIRECTOR, WHEN BINDING ON CORPORATION: See the note to *Bank of Pittsburgh* v. *Whitehead*, 36 Am. Dec. 188, and 196, where the question is fully discussed and many cases, including the principal case, are collected. The principal case is cited in *Fairfield Savings Bank* v. *Chase*, 72 Me. 228, to the point that notice to an agent, having general authority to act for a corporation, while acting for the corporation and within the scope of his authority, is notice to the corporation.

MARSHALING OF SECURITIES, AT WHOSE INSTANCE AND WHEN DONE: *Woollen's Ex'rs* v. *Hillen's Ex'r*, 52 Am. Dec. 690, and note collecting the prior cases in this series.

REGISTRY LAWS SHOULD BE INTERPRETED TO EFFECT THEIR OBJECT, which is to avoid abuses and deceits by mortgages and pretended titles, and to protect creditors and purchasers: *Nelson* v. *Hagerston Bank*, 27 Md. 73; *Sixth Ward Building Association No. 5* v. *Williams*, 41 Id. 506, both citing the principal case.

NEW ENGLAND CAR SPRING COMPANY *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

[11 MARYLAND, 81.]

STATUTES SHOULD BE CONSTRUED WITH VIEW TO ORIGINAL INTENT AND MEANING OF MAKERS; and the intention may be collected from the cause or necessity of making the act, or from foreign circumstances.

WORD "MACHINE," IN MARYLAND MECHANICS' LIEN LAW OF 1845, DOES NOT INCLUDE MACHINES THAT ARE MOVABLE in their operation and use; such a construction not being in accordance with the intention of the legislature as shown by the act, or justified by sound rules of construction. "Coal-cars" are, therefore, not subjects of mechanics' liens, under the act.

SCIRE FACIAS upon a mechanics' lien filed against certain "coal-cars" of the appellee, for materials furnished in their construction, and which were furnished to Scott & Bolster, who built the cars under a contract with the appellee, to whom due notice of the filing of the lien was given. Upon these facts, the court below instructed the jury that their verdict must be for the defendant, and judgment being for the defendant, the plaintiff appealed.

Llewellyn F. Barry, for the appellant.

Charles J. M. Gwinn and John H. B. Latrobe, for the appellee.

By Court, BARTOL, J. The question presented for decision by this appeal is whether certain "coal-cars" described in the statement of facts found in the record are the subject of mechanic's lien, under the provisions of the act of 1845, c. 176, and involves the construction of that act, and of the act of 1838, c. 205, to which it is a supplement. Although those acts have

Digitized by Google

been the subject of several adjudications in this court, the question presented by the record has not before been directly decided. In the case of *Wells* v. *Canton Company*, 3 Md. 241, and the case of *Denmead* v. *Bank of Baltimore*, 9 Id. 179, which were cases of liens on machinery, under the act of 1845, the machinery, which was the subject of the lien, was of a fixed or stationary kind.

Admitting the coal-cars in this case to be, in point of fact, machines, we are of opinion that they are not such machines as are contemplated by the act of 1845. The language of the fourth section of that act is: "That every machine hereafter to be erected, constructed, or repaired within the city of Baltimore shall be subject to a lien, in like manner as buildings are made subject under the provisions of this and the original act, to which this is a supplement."

It has been argued that the word "machine" in this section, being used without qualification, is extensive enough to embrace all kinds of machines, as well those that are movable as those which are fixed or stationary.

Such a construction would be fraught with the most mischievous consequences. The word "machine," if to be taken in its most extended signification, means everything which acts by a combination of the mechanical powers, however simple or complex it may be. The ingenious argument of the appellant's counsel, and the authorities he cites, are sufficient to demonstrate that this word, if to be understood in its broad, general sense, will not only comprehend locomotives, thrashing-machines, and such like, but that all the various machines used in agriculture and commerce, carriages and vehicles in ordinary use, even watches and clocks, and all the machines in domestic use, would be alike embraced in the terms of the law. Can it be for a moment supposed that the legislature designed to subject all these to the operation of the lien laws? Such things, like the coal-cars in question, are mere chattels which pass by delivery; a construction which would embrace them within the provisions of the lien laws would interrupt the daily transactions of trade in such articles, and render the rights of property in them insecure.

In looking at the provisions of the lien laws, and applying to them the safe and well-established rules of construction which are to govern us in arriving at the intention of the legislature, we are the more convinced of the propriety of limiting and restraining the meaning of the word "machine," used in the

Digitized by Google

law, to fixed or stationary machinery. We adopt the language employed by Judge Buchanan, in delivering the opinion of the court of appeals, in the case of *Chesapeake etc. Canal Co.* v. *Baltimore & Ohio Railroad Co.*, 4 Gill & J. 152: "Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention, which may be collected from the cause or necessity of making the act, or from foreign circumstances; and when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute. That, therefore, which is within the letter of the statute is sometimes not within the statute, not being within the intention of the makers."

We are to inquire, "What was the mischief and defect against which the common law did not provide?" and which the statute was designed to cure; and "it is the duty of the court to make such construction as shall suppress the mischief and advance the remedy:" Dwarris on Stats., 9 Law Lib. 694. In this case the mischief to be cured was, that by the common law the mechanic who erects, constructs, or repairs fixed or stationary machinery, like him who builds a house, is without that safe security for compensation which a specific lien on the house or the machine would afford; the design of the act of 1838, and its supplements, was to afford that security. But with reference to movable machines, the common law affords ample and complete security to the mechanic, by leaving in him the right of property, or in the case of repairs done, giving him a lien thereon while they remain in his possession; and he has the right to retain the possession and his right of property, or his lien, until his claim for construction or repair is paid. There is no sound reason for imputing to the legislature the intention of extending the operation of the lien laws to cases which were not within the mischief sought to be remedied. We have not failed to consider the provisions of the act of 1845, c. 287, which directs that the lien laws under consideration shall receive a liberal construction as remedial acts. But after mature reflection, we are constrained to adopt the conclusions already stated as entirely consistent with the rules of construction governing the subject.

The act of 1845 makes machines subject to a lien, "in like manner as buildings are made subject under the provisions of this and the original act, to which this is a supplement." The original act of 1838, and the supplement, must therefore be construed together as one act; and looking to their various provis-

Digitized by Google

ions, the manner in which the lien is to be asserted, the mode and time prescribed for filing the claim of record, and the form of the action and execution for its recovery, we cannot hesitate in saying that many of the provisions of the law are inapplicable to movable machines, and conclusively show that the legislature did not intend to embrace them within its operation.

These conclusions are at variance with some of the language employed in the opinion of this court, in the case of *Denmead* v. *Bank of Baltimore*, 9 Md. 179; and while we adhere to the judgment pronounced by the court in that case, we are compelled to say that a careful consideration of the question before us has convinced us that the construction of the word "machine," in the act of 1845, as extending to such as are "movable in their operation and use, such as a locomotive, a thrashing-machine, and the like," is not justified by sound rules of interpretation, or in accordance with the intention of the legislature. This question did not arise in the case just cited, and its decision was not involved in the judgment pronounced by the court.

In the decision of this case we have considered the question presented as if the coal-cars, which are the subject of the lien, were admitted to be machines—a question, however, which we do not mean to decide—and being of opinion that they are not, within the provisions of the act, subject to mechanics' lien, we concur in the propriety of the instruction given to the jury by the superior court, and affirm the judgment.

Judgment affirmed.

LEGISLATIVE INTENT AS GOVERNING CONSTRUCTION OF STATUTES: See *Mayor* v. *Root*, 63 Am. Dec. 692, and note; *Smith* v. *Randall*, 6[illegible] Id. 475; *State* v. *Baltimore & Ohio R. R. Co.*, 38 Id. 317, and note collecting prior cases in this series.

HAMILTON v. WHITRIDGE.

[11 MARYLAND, 128.]

INJUNCTION WILL NOT BE DISSOLVED WHERE EQUITY OF BILL IS NOT DENIED IN ANSWER, when a motion to dissolve it is made upon the bill, answer, and testimony, under the Maryland act of 1835.

EQUITY HAS JURISDICTION TO PROHIBIT OPENING OF HOUSE OF PROSTITUTION when the opening thereof will, by reason of its close proximity, deprive other persons of the comfortable enjoyment of their property and depreciate its value. In such cases, the suit may be brought in the name of the individual injured.

COURTS ARE NOT TO ASSUME JURISDICTION, BUT MAY AMPLIFY REMEDIES, and will grant relief in new cases if consistent with established princi

Digitized by Google

ples, though no decision upon like facts can be found in which their jurisdiction has been invoked and exercised.

EQUITY HAS JURISDICTION TO ENJOIN THREATENED INJURY whenever its nature is such that it cannot be adequately compensated by damages, and its continuance will occasion a constantly recurring grievance.

PUBLIC NUISANCE MAY BE PREVENTED BY INJUNCTION AT SUIT OF PRIVATE PERSON if he would be specially injured by its creation, and for which the law would not afford an adequate remedy.

COURTS OF EQUITY WILL NOT HESITATE TO PREVENT THREATENED ESTABLISHMENT OF HOUSE OF PROSTITUTION by the mere circumstance that in the exercise of its jurisdiction it might incidentally perform the functions of a moral censor by suppressing a vice denounced by the law, and amenable to its penalties from the earliest times.

OBJECTION OF MULTIFARIOUSNESS MAY BE RAISED AT HEARING, but is usually done by demurrer; and when made at the hearing, its allowance is in the discretion of the court, and is never allowed where the real point in controversy can be determined as well as if there were as many suits as there are plaintiffs.

BILL for an injunction. The facts are fully stated in the opinion.

Charles J. M. Gwinn, for the appellant.

By Court, TUCK, J. The injunction in this case was granted upon a bill stating that the appellees are owners of property in the city of Baltimore, in the immediate vicinity of a house which the appellant had purchased, and to which she intended to remove, for the purpose of keeping a house of ill-fame, in which business she had been for a long time and was then engaged. The bill charges also that in addition to the wrong and injury inflicted upon them, in common with other citizens of that city, by the occupation of the premises for the unlawful and immoral purpose complained of, "the complainants will be especially wronged and injured, inasmuch as they will be severally deprived of the comfortable enjoyment of their property, and that it will be greatly depreciated and lessened in value by the close proximity of their said property to the premises in which it is charged that the defendant is about to open a bawdy-house." The defendant by her answer admits the averments of residence and ownership of property by the complainants, setting forth particularly their relative situation to the house she had purchased, but declines to answer the averments that she had previously kept a bawdy-house, and intended to keep one at the house mentioned in the bill.

The case comes before us on appeal by the defendant from an order continuing the injunction, passed on motion to dissolve, and a hearing on bill, answer, and affidavits under the

Digitized by Google

act of 1835, c. 380. In this stage of the cause, if the bill shows a case entitling the parties to the injunction, it will not be dissolved if the equity is not denied by the answer: *Hardy* v. *Summers*, 10 Gill & J. 316 [32 Am. Dec. 167]; *Hutchins* v. *Hope*, 12 Id. 256. This rule of practice is an answer to the objection taken on the part of the appellant, that the judge below had passed the order appealed from in the absence of evidence that she was at the time of filing the bill the keeper of a bawdy-house and intended to pursue that business at her new residence. But we think that the case authorizes the conclusion, as a matter of fact, that the appellant purchased and was fitting up this house for the offensive purpose stated in the bill. As late as November, 1855, she had been convicted, on her own confession, of having been so employed, and two previous convictions had been obtained in the same manner in the years 1854 and 1855. Between the last of these convictions and the month of April, 1856, when the bill was filed, not one circumstance is shown from which we can infer that she had changed her course of life. On the contrary, the inference is most strongly rebutted by her conversation with one of the witnesses when she was having her house repaired.

This view of the case derives strength from her refusal to answer the allegations of the bill on this point. Touching, as it did, her reputation, she would doubtless have denied the fact alleged if it had been false. By her silence, or refusal to answer, we think she subjects herself to the remarks of the late Chancellor Bland, in *Salmon* v. *Clagett*, 3 Bland, 132, "that a defendant who manifestly omits to answer, or answers evasively, any substantial part of the bill, who evidently and purposely holds back something, cannot complain if he should find himself regarded with suspicion and distrust, and be refused that to which he may, in truth, be entitled, and under other appearances might have obtained." So in *Bently* v. *Cowman*, 6 Gill & J. 155, it is said: "Pleadings in equity are founded in the purest principles of ethics, and marked by frankness and fair dealing." It is no answer to say that the defendant was not obliged to criminate herself, for, conceding that this would have relieved her from answering the allegation that she was then carrying on that business, it is very clear that she would not have subjected herself to a prosecution by denying that she had purchased this house with a view to continue it there. We are constrained, therefore, to consider the appellant as a person about to open the premises as a house of ill-fame, and the prominent question

Digitized by Google

for decision is, whether the jurisdiction of courts of equity embraces the prohibition of such public nuisances, where the complaint is that they will, by reason of their close proximity, deprive other persons of the comfortable enjoyment of their property, and greatly depreciate and lessen its value.

As was observed by the appellant's counsel, no decision has been found in which the power was exercised in such cases as the present. Nor is there any in which the writ of injunction had been applied for and denied. But the absence of precedents, though not to be overlooked entirely, does not, of itself, determine questions of jurisdiction. We consult adjudged cases to ascertain their reason and spirit. These are the foundation of the law: *Salmon* v. *Clagett*, 3 Bland, 133; *Fisher* v. *Prince*, 3 Burr. 1364; *Rust* v. *Cooper*, Cowp. 632. Courts are not to assume jurisdiction, but they may amplify remedies and apply rules and general principles for the advancement of substantial justice: Broom's Leg. Max. 36; 50 Law Lib. 50; *Russell* v. *Smyth*, 9 Mee. & W. 818, *per* Lord Abinger.

If this were not so, and courts were confined to particular precedents, there would be no power to grant relief in new cases constantly occurring. And hence, when they do arise, and rights can be asserted or wrongs prevented or redressed consistently with established principles, it would be a great failure of justice to deny relief merely because no decision could be found in which the jurisdiction had been invoked and exercised. The point on this appeal, then, is not whether an injunction has ever issued to prevent the establishment of a public nuisance of this kind, but whether the doctrines of equity applicable to nuisances should be applied to the present case.

Although at law the remedy in respect to public nuisances is by indictment, and in respect to private ones by action at the instance of the person injured, yet in the common-law tribunals redress may be had for damage resulting from public as well as private nuisances. These remedies can only abate or afford compensation for an existing nuisance, and are ineffectual to restrain or prevent such as are threatened or in progress. Hence there is a jurisdiction in equity to enjoin whenever the nature of the injury is such that it cannot be adequately compensated by damages, or from its continuance or permanent mischief will occasion a constantly recurring grievance. And as a party injured by a public nuisance may have his action at law for damages thereby sustained, so he may apply for an injunction to prevent such nuisance if its existence will cause a substantial

Digitized by Google

prejudice to his property or the reasonable enjoyment thereof: Drewry on Injunctions, 240, 36 Law Lib. 165; Adams's Equity, 210, 68 Law Lib. 185; 2 Story's Eq. Jur., secs. 920–926; Jeremy's Equity, 309, 310. This author says: "The foundation of this court's jurisdiction on the subject of nuisance is the probability of irreparable mischief; that sort of material injury by one to the comfort of another which requires the application of a power to prevent as well as to remedy the evil."

We need not review here the cases on which these writers rely. They generally sustain the doctrine as laid down by them. Formerly the jurisdiction was more restricted than at present; but for many years, both in England and in this country, this process has been more extensively employed, as the exigencies of society created a necessity for its use, according to recognized doctrines of equity. The English decisions were examined by the vice-chancellor in *Soltau* v. *De Held*, 9 Eng. L. & Eq. 104, upon the authority of which he considered himself warranted in applying the remedy in restraint of ringing church bells, "so as to occasion any nuisance, disturbance, or annoyance to the plaintiff and his family residing in his house," upon the ground that a private person may bring his bill in equity where he apprehends injury or disturbance in the enjoyment of his property from a public nuisance.

In this country, too, there are decisions full to the point. We mention, particularly, *Corning* v. *Lowerre*, 6 Johns. Ch. 439, recognized in *City of Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, where Chancellor Kent allowed the writ, "inasmuch as there was a special grievance to the plaintiffs affecting the enjoyment of their property, and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs." The supreme court in *City of Georgetown* v. *Alexandria Canal Co.*, *supra*, said that "a court of equity, pursuing the analogy of the law, that a party may maintain a private action for special damage, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance, at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy." This principle appears to have been acted upon in this state; for in the case of *Harrison* v. *Sterett*, 4 Har. & M. 540, a claim for damage resulting from a public nuisance was sustained at law; and in *Delaware & Maryland R. R. Co.* v. *Stump*, 8 Gill & J. 479 [29 Am. Dec. 561], the jurisdiction of

Digitized by Google

courts of equity in such cases was recognized but not enforced, because the bill did not state a case of private grievance.

But the appellant's counsel suggested that a distinction should be taken between the cases relied on in support of this power and the present, because here the object is to prevent what is offensive to the moral senses. We need not inquire how far this jurisdiction can be defended on grounds of morality, and to preserve the decencies of life from gross violation. The case does not require this. But it would be strange, indeed, if, when the court's powers are invoked for the protection and enjoyment of property, and may be rightfully exercised for that purpose, its arm should be paralyzed by the mere circumstance that, in the exercise of this jurisdiction, it might incidentally be performing the functions of a moral censor by suppressing a shocking vice denounced by the law, and amenable to its penalties from the earliest times. And if, as the authorities show, the court may interfere where the physical senses are offended, the comfort of life destroyed, or health impaired, these alone being the basis of the jurisdiction, the present complainants, presenting, as they do, a case otherwise entitling them to relief, should not be disappointed merely because the effect of the process will be to protect their families from the moral taint of such an establishment as the appellant proposes to open in their immediate vicinity.

The objection of multifariousness as to parties was made at the hearing, and not by demurrer, which is the usual practice. When raised at the hearing, it is not always fatal, but will be allowed at the discretion of the court: Story's Eq. Pl., sec. 271, 284 a, 530, 540, 541. One ground for such objection is that the defendant might be required to unite in one answer defenses not applicable to all the complainants, thereby presenting various issues in the same cause, and involving the defendant in unnecessary litigation and expense. Where, however, the court can perceive that the reason of the rule does not apply, and the objection is not made by demurrer, it ought not to interfere *sua sponte*. Here the objection has been waived by the answer, which takes defense as to all the complainants, and under it the real point in controversy can be determined as well as if there were as many suits as there are plaintiffs. Therefore, without deciding whether the bill be demurrable or not, we are of opinion that the point was properly ruled against the appellant.

Order affirmed and cause remanded.

Digitized by Google

INJUNCTION WILL NOT BE DISSOLVED UPON ANSWER admitting or failing to deny plaintiff's equity: *Burnley* v. *Cook*, 65 Am. Dec. 79; *Bouldin* v. *Mayor etc. of Baltimore*, 15 Md. 20; and the answer of defendant denying the equity of plaintiff's bill will be taken as true, on motion to dissolve the injunction, unless it is overcome by testimony: *Voshell* v. *Hynson*, 36 Id. 294; both of the last cases mentioned cite the principal case, which is also referred to in *Cooke* v. *Husbands*, 11 Id. 509, as showing the necessity of fully and frankly answering the allegations of a bill in equity.

WHEN PRIVATE PERSON MAY MAINTAIN ACTION TO ENJOIN PUBLIC NUISANCE: *Bigelow* v. *Hartford Bridge Co.*, 36 Am. Dec. 502, and note; *People* v. *St. Louis*, 48 Id. 339; *Coker* v. *Birge*, 54 Id. 347; *Whitfield* v. *Rogers*, 59 Id. 244; *Walker* v. *Shepardson*, 60 Id. 423, and the notes thereto.

INJUNCTION WILL BE GRANTED AGAINST NUISANCE, where the ordinary comfort of human existence is materially interfered with: *Adams* v. *Michael*, 38 Md. 128; and where the damage is irreparable and not susceptible of pecuniary compensation: *Fort* v. *Groves*, 29 Id. 194, both citing the principal case. Against threatened nuisance: See *Burnley* v. *Cook*, 65 Am. Dec. 79, and note; and in general, see *Wolcott* v. *Melick*, 66 Id. 790, and the note thereto collecting other cases.

USE OF BUILDING AS HOUSE OF PROSTITUTION MAY BE ENJOINED: See note to *Gray* v. *Ayres*, 32 Am. Dec. 111.

INLOES v. AMERICAN EXCHANGE BANK.

[11 MARYLAND, 173.]

ASSIGNMENT FOR BENEFIT OF CREDITORS IS VOID when it contains a clause giving the trustee power to dispose of the property assigned "gradually, in the manner and on the terms in which, in course of their business, the assignors have sold and disposed of their merchandise;" such a clause being an unreasonable limitation of the trustee's powers.

ASSIGNMENT FOR BENEFIT OF CREDITORS VOID ON ITS FACE IS NOT AIDED BY PAROL PROOF that the clause therein rendering it void was inserted at the suggestion of the assignee, and was designed to and did operate to the advantage of the creditors.

INSTRUMENT VOID IN LAW CANNOT BE MADE GOOD BY AVERMENT, OR PROOF OF EXTRANEOUS FACTS, when the matter rendering it void appears in the deed itself.

TRUSTEE FOR BENEFIT OF CREDITORS MAY EXERCISE SOUND DISCRETION IN DISPOSING OF DEBTOR'S PROPERTY, and need not always sell immediately and for cash.

DIRECTION OF COURT UPON EFFECT OF TESTIMONY IN CAUSE MAY ALWAYS BE ASKED BY PARTY, without reserving objections as to its admissibility or effect at the time of its introduction.

FINDINGS OF FACT MUST BE LEFT TO JURY, except where the cause is tried upon admissions at the bar; and while the jury may discredit testimony, they cannot find contrary to the admissions of the parties.

INSTRUCTION ASSUMING EXISTENCE OF FACT ADMITTED AT TRIAL IS NOT ERRONEOUS, where the admission is made for the benefit of a party, and is of a fact without the existence of which he could not, in any event, recover.

Digitized by Google

ATTACHMENT on a judgment, by the appellee against the property and credits of Turnbull & Co., in the hands of the appellant, as garnishee, who appeared and pleaded *nulla bona*, and relied for a defense on a deed of trust for the benefit of creditors, executed by Turnbull & Co., in 1851, which purported to be executed by them as a partnership and of partnership effects, and declared that as a part of the trust thereby imposed on the appellant as trustee he should sell the property thereby conveyed to him as in his discretion might seem advantageous, and contained this provision: "It being understood that said property may be gradually sold in the manner and on the terms in which, in course of their business, said Turnbull & Co. have sold and disposed of their merchandise." This was the second trial of this case, a *procedendo* having been awarded by this court on a former appeal, as reported in 7 Md. 38. The record contains an admission by the parties of the execution of the deed of trust, and the proof shows that Turnbull & Co. were engaged in buying and selling carpets and oil-cloths, both at wholesale and retail. At the trial the appellant offered parol evidence, subject to all objections as to its admissibility and effect, to the effect that the provision above stated was inserted on his advice, and that it was designed to and did enable him to obtain better prices for the goods, and was of great advantage to the creditors. At the request of the plaintiff the court instructed the jury that the deed of trust was void. The garnishee appealed.

Charles F. Mayer and John Nelson, for the appellant.

William Schley, for the appellees.

By COURT, TUCK, J. When this deed was before the court on the former appeal—*American Exchange Bank* v. *Inloes*, 7 Md. 380—it was declared void in law, for matter apparent on its face; and the cause was sent back under a *procedendo*. At the second trial the defendant, now appellant, offered evidence that the clause, in reference to which this court had expressed its opinion, was inserted for the benefit of the creditors in order to prevent loss, and that sales at auction would have produced less than was realized from the gradual sales in the usual way of carrying on the business of the grantors—the object being to remove the objection made by the court to that clause of the instrument. But notwithstanding this proof, the court granted a prayer of the plaintiff, that "the deed is void in law," from which ruling the defendant appealed; and the question pre-

Digitized by Google

sented by this state of the case is, whether the parol proof warranted a different decision on that prayer.

We understand from the argument that this evidence was offered under the impression that the court, on the former appeal, declared the deed to be void because there was nothing to show that this provision was designed to operate, and did operate, for the advantage of the creditors, and it is now insisted that, such evidence being in the record, the deed should be pronounced valid. That opinion, when considered with reference to the cases in this court upon the subject of these trust deeds, and referred to by the judge, does not admit of the interpretation now placed upon it. That the passage relied upon by the appellant's counsel, considered alone, may sustain his view, might be conceded without placing that adjudication in conflict with previous decisions. This may be the case with many opinions, if portions are separated from the context, and considered apart from the reasoning of the whole, and the principle of the cases referred to. In using the words "as this case at present stands," the court must be understood as having reference to the validity of the transaction upon the deed alone, for we take it to be well settled that an instrument void in law, for matter appearing in the deed itself, cannot be made good by averment; and so we had decided in *Green* v. *Trieber*, 3 Md. 11. It was contended that the question of fraud should have been left to the jury, upon all the circumstances attending the transaction; but we answered (page 40): "There is nothing for the jury to pass upon, when the court can see that the instrument is fraudulent on its face. We are to look to the character with which the law stamps the deed, without reference to extrinsic facts as to motive. If the law imputes to the grantor a design in making the deed, no evidence of intention can change the presumption. If the law declares such deeds to be void, it is no matter how the question of fraud in fact may stand." And in *Sangston* v. *Gaither*, Id. 40, where it did not appear by the deed that the grantor, though requiring releases from his creditors, had conveyed all his property, and it was urged that he might have had other property to pay creditors, not provided for by the trust, we said: "This view of the case cannot change the character which the law gives to this assignment."

So, since this case was decided, we have held the doctrine in *Malcolm* v. *Hodges*, 8 Md. 418, that the validity of such deeds must be determined without regard to the surrounding circumstances, which in that instance were that a large majority of

Digitized by Google

the creditors had examined the affairs of the debtor, and concluded, unanimously, that it would be for the advantage of all the creditors that an assignment should be made, and the deed in question was executed accordingly; and in reference to the argument of counsel, that the grantors had derived no benefit from the reservation by resulting trust, and that the creditors were not injured by that feature of the deed, as there was no surplus, it was said: "We cannot look outside the assignment to ascertain whether there will be a surplus or not. That would make the efficacy of the instrument depend on extrinsic circumstances, when the law requires that its intent shall be gathered from its face." Interpreting that part of the opinion, therefore, by the application of these principles, which are the settled law of this court, we think that the only legal deduction from the words now relied upon by the appellant's counsel is that the circumstances there mentioned, which might sanction such a deed, where the grantors were manufacturers, and the power given was to work up unmanufactured materials, should appear on the face of the deed, in order that the court might determine, as a question of law, looking to the deed alone, whether it was valid or void. It is not said, nor did we mean to intimate, that the nature of the trade or business, and the effect of carrying it on, or of selling in one way or another, could be shown by parol, so as to give effect to an instrument which, in the conclusion of the opinion, we declared to be void upon its face, that the court ought so to have pronounced it, and that there was nothing left for the jury to find.

Besides, we were remarking upon the case in *Janes* v. *Whitbread*, 5 Eng. L. & Eq. 431, and its appositeness was placed upon the hypothesis of the Messrs. Turnbull being manufacturers of oil-cloths, carpets, and the like, which they have not shown themselves to be, even conceding that such evidence could aid the deed.

It does not follow, from the views we have expressed in reference to provisions of this kind, that sales must be always made immediately and for cash, whether the interests of creditors will be affected or not. The trustee may be left to the exercise of a sound discretion, but the assignment must not confine him by unreasonable provisions. Trustees are sometimes selected by a portion of the creditors; sometimes, if not generally, by the debtor and a few who are to be preferred; and often most of the creditors are informed of the transfer when it is too late to protect themselves by any other means than attacking the deed.

Digitized by Google

If these assignments are fairly and *bona fide* made, the creditors, if consulted by the trustee, will know best how the trust should be conducted, and if sales in any particular manner will yield larger results, they will have the best reason for assenting to that mode. Thus the creditors can prescribe a law for the guidance of the trustee which will fully protect him, and may accomplish for them what, under the terms of the deed, he may not be able to effect. And where the trustee is apprehensive of difficulty, or for any reason desires protection in the performance of his duties, he may invoke the jurisdiction of a court of equity, and proceed under its direction.

This evidence was offered, "subject to all objections as to its admissibleness and effect." A party may always, even without this qualification, ask the direction of the court upon the effect of testimony in a cause. Here the right was expressly reserved: *Whiteford* v. *Burckmyer*, 1 Gill, 128 [39 Am. Dec. 640]. The prayer conceded the truth of the defendant's evidence, and the court, by sustaining it, in effect declared that the provisions of the deed could not be made operative by the parol proof.

It is also contended that the *factum* of the deed was assumed by the prayer. It is well settled that even where the proof is all on one side the finding of the facts must be left to the jury; but this is not necessary where the case is tried upon admissions at the bar. The jury may discredit the testimony, but they cannot find contrary to the agreement of the parties: *Armstrong* v. *Risteau's Lessee*, 5 Md. 256 [59 Am. Dec. 115]. Here the admission was for the appellant's benefit. His defense was title under the assignment, of which there was no evidence. It was admitted at both trials, and without reliance by defendant on this concession of the plaintiff, there was no impediment to his recovery.

This deed conveys partnership property only, and the evidence shows that it embraced all of that description. There is nothing to show there was any other. The case differs from *Sangston* v. *Gaither*, 3 Md. 40, and *Malcolm* v. *Hodges*, 8 Id. 418, in this, that here the deed does not stipulate for releases. As this feature of the case was not presented at either appeal, we decline expressing any opinion on the points it may involve; and advert to it now that this decision may not be considered a precedent in support of a like deed if this objection should be raised hereafter.

Judgment affirmed.

Digitized by Google

ASSIGNMENT FOR BENEFIT OF CREDITORS GIVING DISCRETIONARY POWER TO TRUSTEE TO SELL ON CREDIT IS VOID: *Hoffman* v. *Mackall*, 64 Am. Dec. 637, and cases cited in note thereto at page 648; *Jones* v. *Syer*, 52 Md. 216; *Sumner* v. *Hicks*, 2 Black, 534; both of the latter cases cite the principal case.

FRAUDULENT CHARACTER OF ASSIGNMENT IS QUESTION OF LAW, determined from the face of the instrument itself: *Whedbee* v. *Stewart*, 40 Md 424; *Fouke* v. *Fleming*, 13 Id. 399, both citing the principal case

JURY CANNOT FIND CONTRARY TO ADMISSIONS AT BAR: *Birney* v. *New York etc. Telegraph Co.*, 18 Md. 355; *Crawford* v. *Beall*, 21 Id. 236; and where a party, by his own admissions or proof, shows facts, and the court is asked to make a ruling on them against him, it may assume the facts to be true, and the jury cannot find contrary thereto: *Waters's Lessee* v. *Riggin*, 19 Id. 552, both citing the principal case.

HOLLAND *v.* MAYOR ETC. OF BALTIMORE.

[11 MARYLAND, 186.]

TENANT FOR NINETY-NINE YEARS, OR FOR NINETY-NINE YEARS RENEWABLE FOREVER, AND NOT OWNER OF FEE, IS TO RECOMMEND PAVING of unpaved street in the city of Baltimore, under the Maryland acts of 1797, c. 54, and 1817, c. 148, construed with reference to the act of 1833, c. 40, he being the "owner" or "proprietor" within the meaning of those acts.

EQUITY WILL INTERFERE TO PREVENT MULTIPLICITY OF SUITS, OR PREVENT TITLE FROM BEING CLOUDED, by a claim which cannot be enforced either at law or in equity.

EQUITY WILL ENJOIN SALE OF LAND FOR PAYMENT FOR PAVING STREET, where the assent of the owners of a majority of feet fronting on the street was not obtained, as required by law.

BILL for an injunction. The facts are fully stated in the opinion.

Bernard Carter and J. M. Campbell, for the appellants.

E. Wyatt Blanchard, for the appellees.

By Court, LE GRAND, C. J. This is an appeal from an order of the circuit court for Baltimore city dissolving an injunction. The case may be thus stated: The appellant, at the time of the institution of proceedings, was the owner of a lot of ground on the east side of Hollins street, in the city of Baltimore. That street was paved, and a portion of the expense incurred was assessed against the appellant, who refusing to pay it, a distress was levied in the name of the mayor and city council of Baltimore on the property found on the premises. The appellant sued out a writ of replevin, and subsequently filed the bill in this case to restrain the further proceedings of the ap-

Digitized by Google

pellees to collect the amount alleged to be due by him for the paving in front of his lot. There is no question in regard to the fact of the paving having been done, nor is there any as to the ownership by the appellant of the lot for the paving in front of which he has been sought to be charged. These facts are conceded. Without stating circumstances which were relied upon in the argument, but which, in our opinion, have nothing to do with the decision of this case, we will advert to the grounds on which rests the equity set up in the bill. They are these: Holland and Cassard, owners of lots bounding on the street, did not sign a recommendation to the city commissioner of the city of Baltimore, asking that the street might be paved. General George H. Steuart signed, with others, a recommendation that the street be paved, and signed as the owner of one hundred and ninety-five feet fronting on the street, when it is conceded by the admissions of counsel, and established by the proof in the case, that, with the exception of ninety feet, he was not the absolute owner of any of the lots for the paving in front of which he signed, he having leased one hundred and five feet of them for terms of ninety-nine years, renewable forever. If he had no right to represent the one hundred and five feet which had been leased, then there was not a majority of the feet fronting on the street recommended to be paved by those who had the right or authority to do so, and, as matter of necessary consequence, the city authorities had no power to direct the paving of the street. It is a matter of mathematical ascertainment how many feet there are bounding on a street within a given distance, and in this case it is not only shown by the enumeration of the feet of the several lots fronting on the street, but admitted, that if General Steuart had not the right to represent the one hundred and five feet leased for ninety-nine years, there were not a majority of the feet represented by those who alone had the right to do so.

By the act of 1833, c. 40, sec. 1, the mayor and city council of Baltimore, on the recommendation of the owners of two thirds of the feet fronting on any street, were empowered to order that it be repaved; and by the third section of the same act it is provided "that a tenant for ninety-nine years, or for ninety-nine years, renewable forever, and the executors or administrators of such tenant, shall be deemed and taken as an owner, within the meaning of this act." By the act of 1840, c. 63, it is enacted that the mayor and city council should have full power and authority to provide, by ordinance or otherwise,

Digitized by Google

for the prompt collection of taxes due the city, and to that end to sell real as well as personal property.

It will be perceived that by the language of the act of 1833 the authority conferred in words is only to repave. But by the ordinance of the mayor and city council of Baltimore, of May 20, 1850, it is provided that whenever the city commissioner shall receive an application in writing for paving to be done in any unpaved street, or any part of such street, from the proprietors of the majority of the feet of ground binding and fronting on such street, or the part thereof to be paved, it shall be the duty of such commissioner, etc.

Although the authority of the corporation to pave an unpaved street is not derived from the act of 1833, but conferred by those of 1797, c. 54, and 1817, c. 148, yet in the construction of the two earlier acts that of 1833 ought to be adverted to as being *in pari materia;* and the definition of the word "owner," occurring therein, should be taken as the correct one, as applicable to it, or its synonym, "proprietor," when either appears in the other acts in relation to paving.

It was conceded at the bar that a majority of the feet must be represented to give the authority. In this case, if General Steuart had not the authority to speak for one hundred and ninety-five feet, as he did, then there was no power in the corporation or its commissioner to direct the paving alluded to in the proceedings; and that he had no such authority is manifest from the language of the act of 1833, which, in express terms, designates the lessee for ninety-nine years, or for ninety-nine years, renewable forever, as the "owner." General Steuart could only act to the extent of the ninety feet in which he retained an absolute fee-simple.

This being so, the only remaining inquiry is, Will equity relieve in such a case against an attempt to enforce payment by a sale where no debt is due? We entertain no doubt on the question. There are several principles recognized in courts of equity which cover the case, among which is, that (where ample and perfect justice can be done) equity will interfere to prevent multiplicity of suits; and again, that equity will not allow a title otherwise clear, to be clouded by a claim which cannot be enforced either in law or equity. These are principles of universal application. The idea that a party ought to stand by and see his property illegally exposed to public sale, and then force the purchaser to bring his ejectment to gain possession, or to try his title, seems to be sustained by no good authority. Such

Digitized by Google

a doctrine would not only encourage circuity of action and multiplicity of suits, but render the title of the real owner comparatively valueless, while the suits at law should be pending. We have shown that there is not the slightest claim, under the acts of assembly and ordinances of the city of Baltimore, against the property of the appellant for the paving done in front of his lot, and it would be strange indeed if a court of equity had no right to interpose, in his behalf, to save him from an annoying, protracted, and expensive litigation in the courts of law. But such is not the law, and the following, without referring to others, are authorities abundantly clear on the point: *McCann* v. *Taylor*, 10 Md. 418; 2 Story's Eq. Jur., sec. 955. The case of *Dolan* v. *Mayor and City Council of Baltimore*, 4 Gill, 402, recognized, substantially, the jurisdiction of equity in a case similar to the present.

We shall reverse the order of the circuit court dissolving the injunction, and pass one making it perpetual.

Order reversed, and injunction made perpetual.

INJUNCTIONS TO RESTRAIN COLLECTION OF TAXES AND ASSESSMENTS.—No other branch of the law of injunctions presents a greater want of harmony among the decisions than that concerning the restraining of taxation and assessments. Courts of equity on the one side, looking at the grave consequences of embarrassing the operations of the government by stopping its revenue, prefer, in most cases, to leave a party to his remedies at law. "How," says Benning, J., in *Eve* v. *State*, 21 Ga. 50, "could a government calculate with any certainty upon the revenues, if the collection of the taxes was subject to be arrested in every instance in which a tax-payer or tax collector could make out *prima facie* a technical case for arresting such collection? Far better is it . . . . to let the individual pay to the government what it demands of him, at the time of the demand, as he will be certain of getting it back with interest, after more or less delay, if it is not due." On the other hand, other courts seem to have been very little influenced by policy, and have more freely restrained collection of taxes. The cases are irreconcilable, but still some general principles are capable of being deduced. Much of the conflict undoubtedly arises from the fact that courts are more willing to restrain the collection of municipal taxes and assessments than to enjoin the collection of taxes imposed by more important political divisions. Thus in *Decker* v. *McGowan*, 59 Id. 805, it is asserted that, as a general rule, judicial interference with the collection of state taxes is forbidden; while in *Alexandria Canal R. R.* v. *District of Columbia*, 1 Mackey, 217, it is suggested that the rule that the mere illegality of a tax is no ground of itself for the interposition of a court of equity, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, applies only to taxes levied by the sovereign, and would seem not to be properly applicable to the case of an illegal tax levied by a municipal corporation; see also *Parmley* v. *St. Louis etc. R. R.*, 3 Dill. 25. Undoubtedly the question of policy and expediency should have some consideration, but it seems to us that there is danger of pushing it to an extreme.

Digitized by Google

EQUITY WILL NOT, IN GENERAL, INTERFERE.—The rule is sustained by a preponderance of authority that the collection of taxes and assessments will not be enjoined, unless some special reason is shown for equitable interference: Cooley on Taxation, 536; 1 High on Injunctions, 2d ed., sec. 485; *Dows* v. *City of Chicago*, 11 Wall. 109; *Hannewinkle* v. *Georgetown*, 15 Id. 548; *State Railroad Tax Cases*, 92 U. S. 575; *Alexander* v. *Dennison*, 2 McArthur, 562; *Harkness* v. *District of Columbia*, 1 Id. 121; *Cutting* v. *Gilbert*, 5 Blatchf. 259; *Alabama Gold L. Ins. Co.* v. *Latt*, 54 Ala. 499; *Elyton Land Co.* v. *Ayres*, 62 Id. 413; *City Council of Montgomery* v. *Sayre*, 65 Id. 564; *Tallassee Mfg. Co.* v. *Glenn*, 50 Id. 489; *Clayton* v. *Lafargue*, 23 Ark. 137; *Floyd* v. *Gilbreath*, 27 Id. 675; *Murphy* v. *Harrison*, 29 Id. 340; *Oliver* v. *Memphis etc. R. R.*, 30 Id. 128; *De Witt* v. *Hays*, 2 Cal. 463; S. C., 56 Am. Dec. 352; *Minturn* v. *Hays*, 2 Cal. 590; S. C., 56 Am. Dec. 366; *Robinson* v. *Gaar*, 6 Cal. 273; *Merrill* v. *Gorham*, Id. 41; *Bucknall* v. *Story*, 36 Id. 67; *Savings and Loan Society* v. *Austin*, 46 Id. 415; *Houghton* v. *Austin*, 47 Id. 646; *Central Pacific R. R.* v. *Corcoran*, 48 Id. 65; *Hollister* v. *Sherman*, 63 Id. 38; *Dodd* v. *City of Hartford*, 25 Conn. 232; *Arnold* v. *Town of Middleton*, 39 Id. 491; *Rowland* v. *First School District*, 42 Id. 30; *Waterbury Savings Bank* v. *Lawler*, 46 Id. 243; *Frost* v. *Flick*, 1 Dak. 131; *Linlin* v. *Mayor etc. of Athens*, 53 Ga. 588; *Decker* v. *McGowan*, 59 Id. 605; *Georgia Mutual Loan Association* v. *McGowan*, Id. 811; *Wilkerson* v. *Walters*, 1 Idaho, 564; *Burnes* v. *Mayor etc. of Atchison*, 2 Kan. 454; *Missouri River etc. R. R.* v. *Morris*, 7 Id. 210, 231; *Freeland* v. *Hastings*, 10 Allen, 570; *Brewer* v. *City of Springfield*, 97 Mass. 152; *Loud* v. *City of Charlestown*, 99 Id. 209; *Whiting* v. *Mayor etc. of Boston*, 106 Id. 89; *Hunnewell* v. *City of Charlestown*, Id. 350; *Pillsbury* v. *Humphrey*, 26 Mich. 245; *Scribner* v. *Allen*, 12 Minn. 148; *Coulson* v. *Harris*, 43 Miss. 729; *McDonald* v. *Murphree*, 45 Id. 705; *Page* v. *City of St. Louis*, 20 Mo. 136; *Deane* v. *Todd*, 22 Id. 90; *Sayre* v. *Tompkins*, 23 Id. 443; *State* v. *Parkville etc. R. R.*, 32 Id. 496; *First Nat. Bank* v. *Meredith*, 44 Id. 500; *Steines* v. *Franklin Co.*, 48 Id. 167; *McPike* v. *Pew*, Id. 525; *Hallenbeck* v. *Hahn*, 2 Neb. 377; *Burlington etc. R. R.* v. *Commissioners of Seward Co.*, 10 Id. 211; *Wells* v. *Dayton*, 11 Nev. 161; *Rockingham Savings Bank* v. *Portsmouth*, 52 N. H. 17; *Brown* v. *Concord*, 56 Id. 375; *Hoagland* v. *Township of Delaware*, 17 N. J. Eq. 106; *Liebstein* v. *Mayor etc. of Newark*, 24 Id. 200; *Hoboken Land etc. Co.* v. *Mayor etc. of Hoboken*, 31 Id. 461; *Dusenbury* v. *Mayor etc. of Newark*, 25 Id. 295; *Bank of Utica* v. *City of Utica*, 4 Paige, 399; S. C., 27 Am. Dec. 72; *Wiggin* v. *Mayor etc. of New York*, 9 Paige, 16; *Van Doren* v. *Mayor etc. of New York*, Id. 388; *Heywood* v. *City of Buffalo*, 14 N. Y. 534; *Susquehanna Bank* v. *Supervisors of Broome Co.*, 25 Id. 312; *Marsh* v. *City of Brooklyn*, 59 Id. 280; *Livingston* v. *Hollenbeck*, 4 Barb. 9; *Van Rensselaer* v. *Kidd*, Id. 17; *Messeck* v. *Supervisors of Columbia Co.*, 50 Id. 190; *Thatcher* v. *Dusenbury*, 9 How. Pr. 32; *Chemical Bank* v. *Mayor etc. of New York*, 12 Id. 476; S. C., 1 Abb. Pr. 79; *Corwin* v. *Campbell*, 45 How. Pr. 9; *Mann* v. *Board of Education*, 53 Id. 289; *Crevier* v. *Mayor etc. of New York*, 12 Abb. Pr., N. S., 340; *Broadnax* v. *Groom*, 64 N. C. 244; *Burnet* v. *Cincinnati*, 3 Ohio, 73; S. C., 17 Am. Dec. 582; *McCoy* v. *Chilicothe*, 3 Ohio, 370; S. C., 17 Am. Dec. 607; *Mechanics' etc. Bank* v. *Debolt*, 1 Ohio St. 591; *Exchange Bank* v. *Hines*, 3 Id. 1; *Hughes* v. *Kline*, 30 Pa. St. 227; *Wharton* v. *School Directors*, 42 Id. 358; *Green* v. *Munford*, 5 R. I. 472; *Sherman* v. *Leonard*, 10 Id. 469; *People's Sav. Bank* v. *Tripp*, 13 Id. 621; *Red* v. *Johnson*, 53 Tex. 284; *Blanc* v. *Meyer*, 59 Id. 89; *White Sulphur Springs Co.* v. *Robinson*, 3 W. Va. 542; *Douglass* v. *Town of Harrisville*, 9 Id. 162; S. C., 27 Am. Rep. 548; *Carrothers* v. *Board of Educa-*

Digitized by Google

tion, 16 W. Va. 527; *Christie* v. *Malden*, 23 Id. 667; *Warden* v. *Supervisors of Lafayette Co.*, 14 Wis. 618; *Kellogg* v. *Oshkosh*, Id. 623; *Miltimore* v. *Supervisors of Rock Co.*, 15 Id. 9; *Ivinson* v. *Hance*, 1 Wy. 270. That the tax or assessment is unfair, unjust, excessive, inequitable, or illegal, merely, furnishes, in general, no ground for restraining its collection, according to these decisions. Nor will equity interfere because of irregularities, informalties, or errors in the levy of the tax, in the proceedings incident to its collection, or in the execution of the power conferred upon the taxing officers: 1 High on Injunctions, sec. 486; Cooley on Taxation, 540; *Alabama Gold Life Ins. Co.* v. *Lott*, 54 Ala. 499; *King* v. *Gwynn*, 14 Fla. 32; *Finnegan* v. *City of Fernandina*, 15 Id. 379; S. C., 21 Am. Rep. 292; *Burke* v. *Speer*, 59 Ga. 353; *Chicago etc. R. R.* v. *Frary*, 22 Ill. 34; *McBride* v. *City of Chicago*, Id. 574; *Merritt* v. *Farris*, Id. 303; *Munson* v. *Minor*, Id. 594; *City of Peoria* v. *Kidder*, 26 Id. 351; *Supervisors of Du Page Co.* v. *Jenks*, 65 Id. 275, 286; *Chicago etc. R. R.* v. *Siders*, 88 Id. 320; *Traders' Ins. Co.* v. *Farwell*, 102 Id. 413; *Center etc. Co.* v. *Black*, 32 Ind. 468; *Jones* v. *Sumner*, 27 Id. 510; *City of Delphi* v. *Bowen*, 61 Id. 29; *Ricketts* v. *Spraker*, 77 Id. 371; *Macklot* v. *City of Davenport*, 17 Iowa, 379; *Conway* v. *Younkin*, 28 Id. 295; *Iowa Railroad Land Co.* v. *Sac Co.*, 39 Id. 124; *Iowa Railroad Land Co.* v. *Carroll Co.*, Id. 151; *Cedar Rapids etc. R. R.* v. *Carroll Co.*, 41 Id. 153; *Sioux City etc. R. R.* v. *Osceola Co.*, 45 Id. 168; *Powers* v. *Bowman*, 53 Id. 359; *City of Lawrence* v. *Killam*, 11 Kan. 499; *Challiss* v. *Commissioners of Atchison Co.*, 15 Id. 49; *Hagaman* v. *Commissioners of Cloud Co.*, 19 Id. 394; *Ryan* v. *Commissioners of Leavenworth Co.*, 30 Id. 185; *O'Neal* v. *Virginia etc. Bridge Co.*, 18 Md. 1; *Stoddert* v. *Ward*, 31 Id. 562; *Commissioners of Alleghany Co.* v. *Union Min. Co.*, 61 Id. 545; *Albany etc. Min. Co.* v. *Auditor-General*, 37 Mich. 391; *Burt* v. *Wadsworth*, 39 Id. 126; *Hallenbeck* v. *Hahn*, 2 Neb. 377; *Burlington etc. R. R.* v. *Commissioners of Saline Co.*, 12 Id. 396; *Mayor etc. of Brooklyn* v. *Meserole*, 26 Wend. 132; *Van Doren* v. *Mayor etc. of New York*, 9 Paige, 388; *Mooers* v. *Smedley*, 6 Johns. Ch. 28; *Le Roy* v. *Mayor etc. of New York*, 4 Id. 352; *Heywood* v. *City of Buffalo*, 14 N. Y. 534; *Van Rensselaer* v. *Kidd*, 4 Barb. 17; *Truesdell's Appeal*, 58 Pa. St. 148; *Harrison* v. *Vines*, 46 Tex. 15; *George* v. *Dean*, 47 Id. 73; *Labadie* v. *Dean*, Id. 90; *Mills* v. *Gleason*, 11 Wis. 470; *Dean* v. *Gleason*, 16 Id. 1; *Hersey* v. *Supervisors of Milwaukee Co.*, Id. 185; *Bond* v. *City of Kenosha*, 17 Id. 293; *Mills* v. *Johnson*, 617; *West* v. *Ballard*, 32 Id. 168; *Kaehler* v. *Dobberphul*, 56 Id. 480; *Muscatine* v. *Mississippi etc. R. R.*, 1 Dill. 536; *Union Pacific R. R.* v. *Lincoln Co.*, 2 Id. 279.

An individual has no right as a tax-payer, either in his own name or on behalf of himself and other tax-payers, to file a bill to enjoin proceedings in advance of the actual levy of the tax: *Miller* v. *Grandy*, 13 Mich. 540; and a suit to restrain the imposition of a tax which will be a lien upon the plaintiff's lands and a cloud upon his title cannot be sustained, where it does not appear that any one has sued the plaintiff or threatened to sue him in respect to the tax: *Magee* v. *Cutter*, 43 Barb. 239. A general assessment of taxes for county purposes cannot be enjoined on the ground that the commissioners contemplate an unlawful use of the funds when collected: *Commissioners of Madison County* v. *Brown*, 28 Ind. 128; nor will an injunction lie to prevent the collection of a tax legally assessed, upon the ground that its collection had not been ordered for the purpose of appropriating the same to the object for which it was assessed: *Wilson* v. *Commissioners of Hamilton County*, 68 Id. 507.

GROUNDS FOR EQUITABLE INTERFERENCE.—While the foregoing doctrine is well established, the rule is also maintained that equity will enjoin the collection of a tax or assessment where a cloud on title would be created, a mul-

Digitized by Google

tiplicity of suits is apprehended, irreparable injury likely to be produced, or some other special ground for equitable interference shown, where the legal remedies would be inadequate: Cooley on Taxation, 542; 1 High on Injunctions, secs. 524 et seq.; 2 Dillon Mun. Corp., sec. 923; *Floyd* v. *Gilbreath*, 27 Ark. 675; *Greedup* v. *Franklin County*, 30 Id. 101; *Hare* v. *Carnall*, 39 Id. 196; *Waters Peirce Oil Co.* v. *City of Little Rock*, Id. 412; *Palmer* v. *Boling*, 8 Cal. 384, 388; *Fremont* v. *Boling*, 11 Id. 380; *Burr* v. *Hunt*, 18 Id. 303; *Seeley* v. *Town of Westport*, 47 Conn. 294; S. C., 36 Am. Rep. 70; *Gould* v. *Mayor etc. of Atlanta*, 55 Ga. 678; *Wright* v. *Southwestern R. R.*, 64 Id. 783; *Southwestern R. R.* v. *Wright*, 68 Id. 311; *Stebbins* v. *Challiss*, 15 Kan. 55; *Minnesota Linseed Oil Co.* v. *Palmer*, 20 Minn. 468; *Sewall* v. *City of St. Paul*, Id. 511; *Mayall* v. *City of St. Paul*, 30 Id. 294; *Armstrong* v. *City of St. Paul*, Id. 299; *Palmer* v. *Rich*, 12 Mich. 414; *Scofield* v. *City of Lansing*, 17 Id. 437; *Kinyon* v. *Duchene*, 21 Id. 498; *Folkerts* v. *Power*, 42 Id. 283; *Simpkins* v. *Ward*, 45 Id. 559; *Richardson* v. *Scott*, 47 Miss. 236; *Mechanics' Bank* v. *City of Kansas*, 73 Mo. 555; *South Platte Land Co.* v. *Commissioners of Buffalo County*, 7 Neb. 253; *Earl* v. *Duras*, 13 Id. 234; *Burlington etc. R. R.* v. *Clay County*, Id. 367; *Brooks* v. *Howland*, 58 N. H. 98; *Morris Canal etc. Co.* v. *Mayor etc. of Jersey City*, 12 N. J. Eq. 227; *Hatch* v. *City of Buffalo*, 38 N. Y. 276; *Temple Grove Seminary* v. *Cramer*, 26 Hun, 309; *London* v. *City of Wilmington*, 78 N. C. 109; *Culbertson* v. *City of Cincinnati*, 16 Ohio, 574; *Miller* v. *Gorman*, 38 Pa. St. 309; *Sherman* v. *Benford*, 10 R. I. 559; *Blessing* v. *City of Galveston*, 42 Tex. 641; *George* v. *Dean*, 47 Id. 73; *Dean* v. *City of Madison*, 9 Wis. 402; *Delaplaine* v. *City of Madison*, Id. 409; *Knowlton* v. *Supervisors of Rock Co.*, Id. 410; *Foster* v. *City of Kenosha*, 12 Id. 616; *Jenkins* v. *Supervisors of Rock Co.*, 15 Id. 11; *Mitchell* v. *City of Milwaukee*, 18 Id. 92; *Crane* v. *City of Janesville*, 20 Id. 305; *Judd* v. *Town of Fox Lake*, 28 Id. 583; *Marsh* v. *Supervisors of Clark Co.*, 42 Id. 502; *Schettler* v. *City of Fort Howard*, 43 Id. 48; *Roe* v. *Lincoln Co.*, 56 Id. 66; *Union Pacific R'y* v. *Donnellan*, 2 Wy. 459; *Foote* v. *Linck*, 5 McLean, 616; *Albany City Nat. Bank* v. *Maher*, 20 Blatchf. 341; *Parmley* v. *St. Louis etc. R. R.*, 3 Dill. 13; *Bailey* v. *Atlantic etc. R. R.*, Id. 22; *First Nat. Bank* v. *Douglas Co.*, Id. 298; *Union Pacific R. R.* v. *McShane*, Id. 303; *Louisville etc. R. R.* v. *Gaines*, 2 Flipp. 621; *Coulson* v. *City of Portland*, Deady, 481; *Dundee Mortgage etc. Co.* v. *School District*, 19 Fed. Rep. 359; the principal case is cited and approved on this point in *Bouldin* v. *Mayor etc. of Baltimore*, 15 Md. 18, 19; *Mayor etc. of Baltimore* v. *Porter*, 18 Id. 284, 302; *Mayor etc. of Baltimore* v. *Bouldin*, 23 Id. 368; *Steuart* v. *Meyer*, 54 Id. 454, 468. A cloud is cast upon title, within the meaning of the rule, where the illegality or defect does not appear upon the face of the record, but must be shown by extrinsic evidence; and also where, although the illegality or defect is apparent, the deed or certificate is made by statute *prima facie* evidence of a good title in the purchaser: See 3 Pomeroy's Eq. Jur., sec. 1399, and notes; Cooley on Taxation, 543. No cloud exists if the invalidity or defect is apparent upon the face of the record. The earlier Connecticut cases seem disposed to deny the relief of injunction, although the illegality would not appear on the face of the record: *Waterbury Sav. Bank* v. *Lawler*, 46 Conn. 243; and see *Dodd* v. *City of Hartford*, 25 Id. 232; *Arnold* v. *Town of Middleton*, 39 Id. 401; *Rowland* v. *First School District*, 42 Id. 30; but a later case abandons this extreme doctrine: *Seeley* v. *Town of Westport*, 47 Id. 294; S. C., 36 Am. Rep. 70. A bill to restrain the collection of taxes on the ground that they constitute a cloud upon title must set forth the description of the lands or it cannot be sustained: *Conway* v. *Township Board of Waverly*, 15 Mich. 257.

Digitized by Google

While, in general, equity will not relieve against a merely excessive tax, if it is fraudulently made excessive its collection will be enjoined: *Merrill* v. *Humphrey*, 24 Mich. 170; *Lefferts* v. *Supervisors of Calumet Co.*, 21 Wis. 688; *Milwaukee Iron Co.* v. *Hubbard*, 29 Id. 51. So if a bill to restrain the collection of a tax alleges that the levy was made to pay a judgment fraudulently recovered, this will give the court jurisdiction to grant the relief prayed for: *Leitch* v. *Wentworth*, 71 Ill. 146; see also the Illinois cases cited *post*.

A state cannot tax the bank of the United States, and any attempt on the part of its agents or officers to enforce the collection of such tax against the property of the bank will be restrained: *Osborn* v. *U. S. Bank*, 9 Wheat. 736; and taxation by a state authority of the capital stock of a national bank invested in United States securities will also be restrained: *First Nat. Bank* v. *Douglas Co.*, 3 Dill. 298.

SPECIAL DOCTRINES IN CERTAIN STATES.—The courts of certain states grant injunctions to restrain the collection of taxes and assessments with considerable freedom. Thus in Illinois an injunction will be granted where the tax is illegal, or levied without authority of law, or levied by persons not authorized to levy it, or where the property is exempt from taxation, or in case of fraud, or generally where the tax-payer is likely to suffer irreparable injury: *Town of Ottowa* v. *Walker*, 21 Ill. 605; *McBride* v. *City of Chicago*, 22 Id. 574; *Drake* v. *Phillips*, 40 Id. 388; *Supervisors of Du Page Co.* v. *Jenks*, 65 Id. 275, 287; *Cleghorn* v. *Postlewaite*, 43 Id. 428; *Vieley* v. *Thompson*, 44 Id. 9; *Darling* v. *Gunn*, 50 Id. 424; *Deming* v. *James*, 72 Id. 78; *McConkey* v. *Smith*, 73 Id. 313; *Chicago etc. R. R.* v. *Cole*, 75 Id. 591; *Kimball* v. *Merchants' Sav. etc. Co.*, 89 Id. 611; *Gage* v. *Evans*, 90 Id. 569; *Lamont* v. *Singer etc. Stone Co.*, 98 Id. 94; *Searing* v. *Heavysides*, 106 Id. 85; but not otherwise: *Cook Co.* v. *Chicago etc. R. R.*, 35 Id. 465; *Supervisors of Du Page Co.* v. *Jenks*, 65 Id. 275; *Munson* v. *Miller*, 66 Id. 380; *Swinney* v. *Beard*, 71 Id. 27; *Dunham* v. *Miller*, 75 Id. 379; *Porter* v. *Rockford etc. R. R.*, 76 Id. 561; *Village of Nunda* v. *Village of Chrystal Lake*, 79 Id. 311; *Pacific Hotel Co.* v. *Lieb*, 83 Id. 602; *Chicago etc. R. R.* v. *Siders*, 88 Id. 320; *Union Trust Co.* v. *Weber*, 96 Id. 346; *Evans* v. *Gage*, 1 Ill. App. 202; and it will not enjoin the collection of the whole tax because, in determining the valuation of an aggregate property, exempt property may have been included as a factor: *Huck* v. *Chicago etc. R. R.*, 86 Ill. 352. So in Indiana, Iowa, and Kentucky injunctions are granted to restrain the collection of merely unauthorized and illegal taxes: *Toledo etc. R. R.* v. *City of Lafayette*, 22 Ind. 262; *Shoemaker* v. *Commissioners of Grant Co.*, 36 Id. 175; *Riley* v. *Western Union Tel. Co.*, 47 Id. 511; *City of Delphi* v. *Bowen*, 61 Id. 29, 37; *Columbus etc. R'y* v. *Commissioners of Grant Co.*, 65 Id. 427; *Indianapolis etc. R'y* v. *Commissioners of Tipton Co.*, 70 Id. 385; *Litchfield* v. *Polk Co.*, 18 Iowa, 70; *Hubbard* v. *Supervisors of Johnson Co.*, 23 Id. 130; *Williams* v. *Peinny*, 25 Id. 436; *Zorger* v. *Township of Rapids*, 36 Id. 175; *Rood* v. *Supervisors of Mitchell Co.*, 39 Id. 444; *Cattell* v. *Lowry*, 45 Id. 478; *Brandirff* v. *Harrison Co.*, 50 Id. 164; *Gates* v. *Barrett*, 79 Ky. 295; or to restrain the collection of taxes levied upon property exempt from taxation: *Smith* v. *Osburn*, 52 Iowa, 474; or to prevent land from being advertised and sold for the payment of delinquent taxes thereon, while the owner also owns leviable personal property sufficient to pay the taxes: *Abbott* v. *Edgerton*, 53 Ind. 196. In other states a sale of realty, it may here be observed, will not be restrained because the owner has personalty out of which the taxes might have been collected: *Hallenbeck* v. *Hahn*, 2 Neb. 377. In these states, as in others, a tax will not be restrained for irregularities, informalities, or errors: See the cases cited *ante*. In Wisconsin the col-

Digitized by Google

lection of a tax will be restrained for lack of equality or uniformity in the assessment: *Marsh* v. *Supervisors of Clark Co.*, 42 Wis. 502.

INJUNCTIONS TO RESTRAIN ENFORCEMENT OF TAXES OR ASSESSMENTS AGAINST PERSONAL PROPERTY will very seldom be granted, since the remedy at law is almost invariably considered adequate: Cooley on Taxation, 538; 2 Dillon on Mun. Corp., sec. 924; 1 High on Injunctions, sec. 505; *Selma Building & L. Ass'n* v. *Morgan*, 57 Ala. 33; *Mayor etc. of Mobile* v. *Baldwin*, Id. 61; *Ritter* v. *Patch*, 12 Cal. 298; *Berri* v. *Patch*, Id. 299; *Baldwin* v. *Tucker*, 16 Fla. 258; *Henry* v. *Gregory*, 29 Mich. 68; *Youngblood* v. *Sexton*, 32 Id. 406; S. C., 20 Am. Rep. 654; *Hagenbuch* v. *Howard*, 34 Mich. 1; *Clarke* v. *Ganz*, 21 Minn. 387; *Conley* v. *Chedic*, 6 Nev. 222; *Wells* v. *Dayton*, 11 Id. 161; *New York L. Ins. Co.* v. *Supervisors of New York*, 4 Duer, 192; S. C., 1 Abb. Pr. 250; *Wilson* v. *Mayor etc. of New York*, 4 E. D. Smith, 675; S. C., 1 Abb. Pr. 4; *Mutual Benefit L. Ins. Co.* v. *Supervisors of New York*, 8 Bosw. 683; 33 Barb. 322; 3 Abb. App. Dec. 344; *Pacific Mail Steamship Co.* v. *Mayor etc. of New York*, 57 How. Pr. 511; *Worth* v. *Commissioners of Fayetteville*, 2 Winst. L. & Eq. 70; *White* v. *Stender*, 24 W. Va. 615; S. C., 49 Am. Rep. 283; *Van Cott* v. *Supervisors of Milwaukee Co.*, 18 Wis. 247; *Chicago etc. R. R.* v. *Borough of Fort Howard*, 21 Id. 44; *Peck* v. *School District*, Id. 516; *Guimney* v. *Town of Stockbridge*, 33 Id. 505; *Union Pacific R. R.* v. *Lincoln Co.*, 2 Dill. 279; *Lockwood* v. *City of St. Louis*, 24 Mo. 20. There may, however, be exceptions, as where the property possesses a peculiar value, not capable of compensation at law: See *Henry* v. *Gregory*, *supra;* or where an injunction is necessary to prevent a multiplicity of suits, or irreparable injury will be occasioned: See *Pacific Mail Steamship Co.* v. *Mayor etc. of New York*, *supra; Clarke* v. *Ganz*, *supra; City Nat. Bank* v. *City of Paducah*, 2 Flipp. 61; *Osborn* v. *U. S. Bank*, 9 Wheat. 738; *First Nat. Bank* v. *Douglas Co.*, 3 Dill. 298. In *Lewis* v. *Spencer*, 7 W. Va. 689, S. C., 23 Am. Rep. 619, it was asserted that equity had jurisdiction to enjoin the sale of personal property for the payment of taxes, where the bill alleges that the taxes have been fully paid; but this decision is extremely questionable; see *White* v. *Stender*, *supra*. Undoubtedly, where an invalid tax includes an assessment on personalty as well as on realty, a court which obtains jurisdiction to restrain the collection of the tax on the land may properly give relief from the assessment on personalty: *Folkerts* v. *Power*, 42 Mich. 283. The courts of Illinois, Indiana, Iowa, and Kentucky, which go to the extent of granting injunctions for mere illegality of taxes, make no distinction between personalty and realty, and the collection is restrained in the one case as freely as in the other.

TAXES OR ASSESSMENTS PARTLY LEGAL AND PARTLY ILLEGAL.—1. *Bill should Show to What Extent Tax or Assessment is Illegal*, in order that the court may enjoin that portion: *Cheney* v. *Jones*, 14 Fla. 587; *Taylor* v. *Thompson*, 42 Ill. 9; *Wilson* v. *Weber*, 3 Ill. App. 125; *Conway* v. *Township Board of Waverly*, 15 Mich. 257; *Merrill* v. *Humphrey*, 24 Id. 170. If a portion of a tax is legal and a portion illegal, and the legal can be separated from the illegal, an injunction will not be granted to restrain the collection of the entire tax: *Burlington etc. R. R.* v. *Commissioners of York Co.*, 7 Neb. 487.

2. *Payment or Tender of Amount Justly Due is Prerequisite* to obtaining relief against a portion sought to be enjoined, upon the principle that he who seeks equity must do equity: 1 High on Injunctions, sec. 498; *State Railroad Tax Cases*, 92 U. S. 575; *National Bank* v. *Kimball*, 103 Id. 732; *Huntington* v. *Palmer*, 7 Saw. 355; *Mayor etc. of Mobile* v. *Waring*, 41 Ala. 139; *Tallassee Mfg. Co.* v. *Spigener*, 49 Id. 262; *Alabama Gold L. Ins. Co.* v. *Lott*, 54 Id. 499; *City Council of Montgomery* v. *Sayre*, 65 Id. 564; *Worthen* v. *Badgett*, 32

Digitized by Google

Ark. 496; *Ottowa Glass Co.* v. *McCaleb*, 81 Ill. 556; *Johnson* v. *Roberts*, 102 Id. 655; *Ewing* v. *Batzner*, 24 Ind. 409; *Roseberry* v. *Huff*, 27 Id. 12; *Farris* v. *Reynolds*, 70 Id. 359; *Mulliken* v. *Reeves*, 71 Id. 281; *Rinard* v. *Nordyke*, 76 Id. 130; *Morrison* v. *Hershire*, 32 Iowa, 271; *City of Lawrence* v. *Killam*, 11 Kan. 499; *Hagaman* v. *Commissioners of Cloud Co.*, 19 Id. 394; *Palmer* v. *Township of Napoleon*, 16 Mich. 176; *Smith* v. *Humphrey*, 20 Id. 398; *Miller* v. *Humphrey*, 24 Id. 170; *Pillsbury* v. *Humphrey*, 26 Id. 245; *Connors* v. *City of Detroit*, 41 Id. 128; *Overall* v. *Ruenzi*, 67 Mo. 203; *Hallenbeck* v. *Hahn*, 2 Neb. 377; *Burlington etc. R. R.* v. *Commissioners of York Co.*, 7 Id. 487; *Wood* v. *Helmer*, 10 Id. 65; *Hunt* v. *Easterday*, Id. 165; *London* v. *City of Wilmington*, 78 N. C. 109; *Rio Grande R. R.* v. *Scanlan*, 44 Tex. 649; *George* v. *Dean*, 47 Id. 73; *Blanc* v. *Meyer*, 59 Id. 89; *Bond* v. *City of Kenosha*, 17 Wis. 284; *Myrick* v. *City of La Crosse*, Id. 442; *Whittaker* v. *City of Janesville*, 33 Id. 77; *Kæhler* v. *Dobberpuhl*, 56 Id. 480; but where a bill to restrain collection of taxes shows precisely the amount of the excess of the taxes claimed to be illegal, and only asks to have the collection of such excess restrained, the objection that it does not offer to pay the amount of taxes legally chargeable is without force: *Clement* v. *Everest*, 29 Mich. 19.

NEGLECT TO TAKE ADVANTAGE OF LEGAL REMEDY.—If a party having a legal remedy against an unauthorized or illegal tax fails to take advantage of it, equity will not enjoin its collection unless some equitable excuse is shown for such neglect: *Adsit* v. *Lieb*, 76 Ill. 198; *City of Peoria* v. *Kidder*, 26 Id. 351; *Archer* v. *Terre Haute etc. R. R.*, 102 Id. 493; *Johnson* v. *Roberts*, Id. 655; *Andrews* v. *Rumsey*, 75 Id. 598; *Houston etc. R. R.* v. *Presidio Co.*, 53 Tex. 518; *Harrison* v. *Vines*, 46 Id. 15. This ruling is plainly in accordance with equitable principles.

PARTY, WHEN ESTOPPED FROM ENJOINING ASSESSMENT.—Injunctions against the collection of assessments to pay for street improvements have been frequently denied where the owner of property benefited requests the work to be done, encourages it, or even, having notice of the improvement, makes no objection at the time: *Weber* v. *City of San Francisco*, 1 Cal. 455; *City of Lafayette* v. *Fowler*, 34 Ind. 140; *Sleeper* v. *Bullen*, 6 Kan. 300; *Motz* v. *City of Detroit*, 18 Mich. 495; *Byram* v. *City of Detroit*, 50 Id. 56; *Kellogg* v. *Ely*, 15 Ohio St. 64; *Dusenbury* v. *Mayor etc. of Newark*, 25 N. J. Eq. 295; but in *Steckert* v. *City of East Saginaw*, 22 Mich. 104, it was held that knowledge, presumptive or actual, of the progress of a work of public improvement in a city will not estop a party from complaining of illegalities in the proceedings by which the work was authorized; and in *Longworthy* v. *City of Dubuque*, 13 Iowa, 86, it was also held that mere submission on the part of a citizen to an illegal levy of taxes will not, except in extreme cases, be construed into a recognition of the right to the extent of subsequently estopping him from denying it.

INJUNCTION BECAUSE OF DEBT OR CLAIM DUE TAX-PAYER.—A tax is not the subject-matter of a set-off. Therefore the collection of taxes will not be enjoined because a debt is owing by a municipality or county to the tax-payer: *Finnegan* v. *City of Fernandina*, 15 Fla. 379; S. C., 21 Am. Rep. 292; *Scobey* v. *Decatur Co.*, 72 Ind. 551. So a tax-payer cannot enjoin the collection of a tax on the ground that he has at former times paid illegal taxes: *Fremont* v. *Mariposa Co.*, 11 Cal. 361; *Wayne* v. *Mayor etc. of Savannah*, 56 Ga. 448.

WHO MAY ENJOIN COLLECTION.—No one but a party directly interested can enjoin the collection of a tax or assessment. Therefore a person against whom no illegal tax has been assessed or levied cannot, by injunction, restrain the collection of an illegal tax against another person: *Missouri River etc. R.*

Digitized by Google

R. v. *Wheaton*, 7 Kan. 232; nor can a firm enjoin the collector from selling the individual property of one of its members for the taxes due from the firm: *Lyle* v. *Jacques*, 101 Ill. 644; and a township cannot enjoin the collection of an illegal tax levied on the taxable property belonging to the private individuals of such township: *Center Township* v. *Hunt*, 16 Kan. 430; but a husband and wife may properly join in a bill to restrain the collection of an illegal tax against lands belonging to the wife, but jointly occupied by both as a home: *Henry* v. *Gregory*, 29 Mich. 68.

Whether several property owners may join in a bill for an injunction against the collection of taxes or assessments on their distinct pieces of property is a disputed question. On the one side, it is maintained, it would seem in accordance with equitable principles that such persons, being affected by the same injury, and having a common interest in the relief to be obtained, may join: *Harward* v. *St. Clair etc. Drainage Co.*, 51 Ill. 130; *Supervisors of Du Page Co.* v. *Jenks*, 65 Id. 275; *Brandirff* v. *Harrison Co.*, 50 Iowa, 164; *Vanover* v. *Davis*, 27 Ga. 354; *Scofield* v. *City of Lansing*, 17 Mich. 437; *Blessing* v. *City of Galveston*, 42 Tex. 641; *King* v. *Wilson*, 1 Dill. 555; *Doonan* v. *Board of Education*, 9 W. Va. 246; *McClung* v. *Livesay*, 7 Id. 329; in Kansas this is allowed by statute: *Gilmore* v. *Norton*, 10 Kan. 491; *Gilmore* v. *Fox*, Id. 509; *Wyandotte etc. Bridge Co.* v. *Commissioners of Wyandotte Co.*, Id. 326; *Wyandotte etc. Bridge Co.* v. *City of Wyandotte*, Id. 334; compare *Hudson* v. *Commissioners of Atchison Co.*, 12 Id. 140; but where the land is not similarly situated with respect to the town which imposes the taxes, and the plaintiffs do not ask the same relief, there can be no joinder: *Lewis* v. *Eshleman*, 57 Iowa, 633. A joinder of parties is denied by other cases: *Sheldon* v. *Center School District*, 25 Conn. 224; *Dodd* v. *City of Hartford*, Id. 237; *Coulson* v. *Harris*, 43 Miss. 728; *Bouton* v. *City of Brooklyn*, 15 Barb. 375; *Magee* v. *Cutter*, 43 Id. 239; *Barnes* v. *City of Beloit*, 19 Wis. 93; *Cutting* v. *Gilbert*, 5 Blatchf. 259.

INJUNCTIONS TO PREVENT CLOUD ON TITLE: See *Carlin* v. *Hudson*, 62 Am. Dec. 521; *Guy* v. *Hermance*, 63 Id. 85, and notes thereto. A court of equity will, in a proper case, prevent a cloud from being cast upon title: *Polk* v. *Rose*, 25 Md. 162; *Mayor etc. of Baltimore* v. *Grand Lodge I. O. O. F.*, 44 Id. 445, both citing the principal case. But where a cloud cannot be cast on the title of a prior mortgage by a sale under a junior mortgage, equity will not restrain the sale: *Tome* v. *Merchants' etc. Building & L. Co.*, 34 Id. 14, distinguishing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Page* v. *Mayor etc. of Baltimore*, 34 Md. 564, to the point that where an ordinance concerning the widening of streets is void, and its provisions are about to be enforced, any party whose interests are to be injuriously affected thereby may have the execution of the ordinance stayed by injunction; but an injunction will not be granted where an adequate remedy exists at law: *Western Maryland R. R.* v. *Patterson*, 37 Id. 137, distinguishing the principal case. The principal case is cited in *Mayor etc. of Baltimore* v. *Bouldin*, 23 Id. 373, as holding that although the power to pave an unpaved street was not vested in the city of Baltimore by the act of 1833, c. 40, yet, it being *in pari materia*, the legislative definition of the word "owner" therein was to be applied to its synonym, "proprietor," as used in the acts of 1797, c. 54, and 1817, c. 148.

Digitized by Google

ATWELL v. MILLER.

[11 MARYLAND, 348.]

DECLARATIONS OF THIRD PERSON ARE NOT ADMISSIBLE AGAINST PARTY ON GROUND THAT HE IS AGENT OR PARTNER of the party, without sufficient proof being made to satisfy the court that a partnership or agency existed in fact between them.

FREIGHT IS COMPENSATION FOR CARRIAGE OF GOODS, AND WHEN PAID IN ADVANCE MUST BE REPAID, if by reason of any event not imputable to the shipper the goods are not carried and delivered, unless there be a special agreement to the contrary.

LEGAL OPERATION OF CONTRACT IN BILL OF LADING MAY BE MODIFIED BY SUBSEQUENT PAROL AGREEMENT; as by the addition of a parol suppletory agreement that the freight should be at the risk of the shipper.

PERSON HAVING NO INTEREST IN FREIGHT CANNOT INSURE IT, as to support the policy he must have an insurable interest.

FACT THAT SHIPPER INSURES FREIGHT IS CIRCUMSTANCE TENDING TO SHOW THAT HE ASSUMED RISK OF ITS LOSS, and taken in connection with parol evidence of a special agreement that the freight should be at his risk, is sufficient to be submitted to the jury as going to show an agreement to that effect, suppletory to that in the bill of lading.

ASSUMPSIT to recover from the appellants money paid to them in advance for freight on goods. It was admitted by the parties that the plaintiff had effected an insurance on the goods shipped in the defendants' vessel at a valuation of ten per centum advance on their value, as per manifest, it being customary to make such an addition to cover the expense of putting the goods on board of a vessel, and when the freight was paid in advance, and the shipper took the risk of the voyage, this addition would cover the freight. At the request of the plaintiff the court gave three instructions to the jury, the first of which was to the effect that if the goods were shipped as stated in the opinion, and the defendants failed to deliver them according to the tenor of the bill of lading, and this failure arose from no event imputable to the plaintiff, he was entitled to recover, unless they further found that there was a special agreement, at the time of the shipment, between the parties, that the freight paid in advance should in any event be retained by the defendants. The second instruction was to the effect that the fact that the plaintiff had effected insurance on the goods as above stated was not evidence from which the jury might infer that the plaintiff paid the freight at his own risk, or that there was an agreement that the freight was in any event to be retained by the defendants. The third instruction was to the effect that the refusal on the part of the defendants to take the risk of the

Digitized by Google

freight or to carry the goods unless the plaintiff paid the freight in advance and took the risk would not defeat the action, if such refusal was made by the defendants after the making of the bill of lading and after the goods had been received on board of the defendants' vessel for transportation according to said bill of lading. The defendants requested two instructions to the jury, both of which were refused, the first of which was to the effect that if the plaintiff was aware of the refusal by the defendants to take the goods offered, and the conditions of the refusal, and nevertheless paid the freight, then he was not entitled to recover, and the second instruction was to the effect that the jury were at liberty to infer from the fact of the insurance of the goods by the plaintiff, taken in connection with the evidence of a parol agreement that the freight should be at the risk of the plaintiff, that there was such an agreement, and that in such event the plaintiff was not entitled to recover. The other facts are fully stated in the opinion.

Frederick W. Brune and George W. Dobbin, for the appellants.

Charles Marshall and H. C. Dallam, for the appellee.

By Court, LE GRAND, C. J. This action was brought by the appellee to recover of the appellants the sum of five hundred and twenty-seven dollars and twenty-nine cents, with interest, for money paid in advance by the appellee to the appellants, for freight on goods contracted to be carried by the appellants from Baltimore to Monrovia, Liberia. By the agreement of counsel filed in the cause, it appears that the goods upon which the freight was paid in advance were shipped on board the appellants' vessel (the brig Harp) according to the tenor and effect of the bill of lading, dated the ninth of June, 1854, and that the vessel having the goods on board sailed on the thirteenth of June of the same year; that it was shipwrecked in the Messurado Roads, occasioning thereby a loss of a part of the goods and damage to the remainder.

The question presented to the court below may be thus stated: 1. Whether the declarations of a person, he being a negro, can be given in evidence where a white person is interested; 2. Whether, under the circumstances detailed in proof, the plaintiff below was entitled to recover the money which had been paid in advance.

The proof shows that in the month of May, 1854, the appellants, who were the owners of the brig Harp, were loading her for the coast of Africa, and were applied to by the appellee in

Digitized by Google

regard to the rate of freight by said vessel. To this application reply was made, that "the current rates to Monrovia were two dollars per barrel, measuring five feet, or in other words, forty cents per foot cubic." Some time after this the appellee put on board the Harp a quantity of cargo, measuring in all thirteen thousand five hundred and twenty-nine cubic feet, according to the receipt for the same. The bill of lading stated that this cargo was shipped by the appellee, and was to be delivered at Monrovia, the dangers of the sea excepted, to one Asbury F. Johns, or assigns, "the shipper paying freight for the said goods at the rate of forty cents per cubic foot, with five per cent primage and average accustomed;" and it was further stipulated that the goods should "be delivered at ship's tackle, vessel paying kroomen's labor taking them to shore, but goods at risk of owners thereof after leaving vessel, boats for landing furnished and controlled by owners of goods." The bill of lading was signed by the captain on or about the ninth of June, 1854. A bill of freight, dated the eighth of June, 1854, was presented to the appellee. The amount of this bill was five hundred and seventy dollars and ninety-five cents, and was for thirteen thousand five hundred and twenty-nine cubic feet of cargo at forty cents per foot, five hundred and forty-one dollars and ten cents; wharfage hire, five dollars and forty cents; primage, twenty-seven dollars and thirty-two cents, less thirty days' interest, two dollars and eighty-seven cents. This bill was not paid until the twelfth of June, nor until after a deduction of forty-three dollars and sixty-six cents, which is stated in the receipt to be as "per agreement," leaving a balance of five hundred and twenty-seven dollars and twenty-nine cents, the sum sued for and recovered below. At the trial the appellants, by their clerk, the witness Smith, proved that on the tenth of June the appellee came with his father, who was acting for him in reference to the shipment, to the counting-house of appellants, both of whom were present, and that then the appellee objected to the measurement and to the charge of primage, and said "he ought to be allowed a deduction in the freight bill, because he had to take the risk of the freight money himself;" that Atwell then said "he would take no risk, it was at the parties' own risk, that he would not insure the freight, and that if they, the appellee and his father, were not satisfied with the terms he would rather set the goods on the wharf." The same witness further testified that during the same interview and in the same presence, and before the freight was paid, "Miller did not ask security for return of freight

Digitized by Google

money in the case the vessel was [were] lost," and that Atwell stated that "he would not return the freight if the vessel was [were] lost." The witness also testified that Miller, the father of the appellee, said that as he had insurance money to pay, he thought the bill unfair. It was in addition stated by the witness that on the ascertainment of the loss application was made for the return of the freight money, whereupon Atwell asked Miller if he did not understand that he, the appellee, took the risk, and if he had not insured; to which the appellee, without denying that he had taken the risk, admitted "that he had insured and had added ten per cent, as was customary." It was proved by Daniel Miller that the deduction of forty-three dollars and sixty-six cents, per agreement, from the bill of appellants, was made by the appellant Appleton with the witness.

It was then shown that a colored man of the name of Johns had been associated in trade with the appellee, he transacting the business in Africa, the shipments being to him; that he selected a portion of the goods which made up this cargo, and was frequently attending to the shipment. The appellants then proposed the following question to the witness, which the court refused to allow to be put: "Whether he heard any conversation, at or about the time of the shipment, between the said Johns and the appellants, or either of them, in relation to the terms on which these goods were to be shipped." To the refusal of the court to allow the question to be answered the appellants objected, and this objection constitutes their first exception.

We presume this question was asked on the ground of one or the other of two theories; that is to say, that Johns was a partner of the plaintiff in the particular shipment, the subject of investigation in this case, or that he was the authorized agent of the plaintiff in the transaction, and as such capable of binding him, in and about the business, by his declarations. There is not sufficient evidence of the existence of a partnership, in regard to this affreightment, to justify his declarations being given in evidence to defeat the action, because of non-joinder of the proper parties, nor is there evidence sufficient to show an agency. Until one of these propositions was first settled to the satisfaction of the court the testimony was inadmissible. This view relieves us from all necessity of inquiring whether the color of the party, whose declarations were proposed to be given in evidence, could have a legal bearing on the question in any event. The court properly disallowed the question.

Digitized by Google

On the conclusion of the testimony, the appellee asked three, and the appellants two, instructions from the court to the jury. Those asked for by the appellee were granted, and the others refused.

We will state the principles which, in our opinion, govern this case, and then apply them to the prayers severally.

There is some difference between the law as laid down by the English and as recognized by the courts of this country. We adopt the decisions of our own courts, as more conformable to the principles of common law and of justice. In the case of *Griggs* v. *Austin*, 3 Pick. 20 [15 Am. Dec. 175], Judge Parker, in delivering the opinion of the court, after referring to the complete review of Chief Justice Kent, in the case of *Watson* v. *Duykinck*, 3 Johns. 335, proceeds as follows: "It would be but an affectation of learning to go over the ground which has been so ably preoccupied in the opinion given in that case, especially as the same ground has been traversed by Mr. Justice Story in a note in his edition of Abbott on Merchant Ships, etc., which note was avowedly supplied from the opinion of Chief Justice Kent, above cited. I wish for one, since books are so prodigiously multiplied, to spare the profession and the public the expense of reiterated citations on points indubitably settled, when both text and comment may be found in almost every book in a lawyer's library. It is sufficient, then, to say, that by reference to the above cited opinion and the note of Mr. Justice Story, it will be found to be the established law of the maritime countries on the continent of Europe that freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary."

This, then, being the law applicable to cases of freight, where there has been a failure to earn it by the delivery of the thing shipped, the question arises in this case, Was there a special agreement between the parties, modifying the legal operation of the contract contained in the bill of lading? We are of opinion there was testimony in the cause which, if believed by the jury, was sufficient to justify them in finding such an agreement. We refer to the deduction made in the bill for freight, the conversations which then took place and that had between one of the appellants, Atwell, and Miller when he applied for a return of the money, he not only not denying it when told the freight

Digitized by Google

was at his own risk, but admitting that he had insured it. This evidence tended to establish a contract suppletory to that set out in the bill of lading. If the jury found the existence of such supplemental contract, the appellants were discharged from the liability sought to be cast upon them in this suit.

That it is competent to the parties to a parol contract to modify it by adding thereto is established by the case of *Coates* v. *Sangston*, 5 Md. 131, and the authorities there collected. It is also a well-settled principle that one who has no interest in the freight cannot insure it;, he has no insurable interest. We did not understand the learned counsel for the appellee to deny this doctrine; on the contrary, the authorities which he cited fully sustained it. We understood him to contend that the appellee had no insurable interest, because, under the bill of lading, the freight was at the risk of the owner of the vessel. If it were at the risk of the owner of the vessel, then he was clearly right in the view which he urged; but this depends upon a fact, to wit, whether the contract contained in the bill of lading had been modified or not. Whether it was so or not, was to be determined by the proof in the cause, among which was to be considered the policy of insurance, as giving color to the other evidence, going to show that it was agreed and understood between the parties that the freight was to be at the risk of the shipper.

The second and third prayers on the part of the appellee are clearly erroneous; the second because it prohibits the jury from finding from the facts of the insurance of the freight a special agreement outside of the bill of lading. The fact, standing by itself, possibly might not be conclusive of the matter, but it is certainly a strong circumstance, when coupled with the others testified to, going to show an additional agreement. The prayer, by completely ignoring all the other facts in the case, to say the least of it, was well calculated to mislead the jury. It is equivalent to saying that the insurance by the appellee was no evidence whatever. In this view we do not concur.

From what we have said, it will appear that we are of opinion the instructions asked by the appellants should have been granted, and that the first prayer of the appellee should have been refused. It is defective in this: it denies the right of the parties to make another agreement after the making of the bill of lading. We know of no principle of law which warrants such a conclusion.

Judgment reversed, and *procedendo* awarded.

Digitized by Google

AGENCY MUST BE CLEARLY SHOWN BEFORE DECLARATIONS ARE ADMISSIBLE against principal: *Coweta Falls Mfg. Co.* v. *Rogers*, 65 Am. Dec. 602, and note thereto: *Rosenstock* v. *Formey*, 32 Md. 182; *National Mechanics' Bank* v. *National Bank*, 36 Id. 21, 22, citing the principal case.

FREIGHT IS COMPENSATION FOR CARRIAGE AND DELIVERY OF GOODS: Note to *Crawford* v. *Williams*, 60 Am. Dec. 149.

SUPPLETORY AGREEMENT VARYING LEGAL EFFECT OF BILL OF LADING MAY BE SHOWN BY PAROL: *Allen* v. *Sowerly*, 37 Md. 420; *Fusting* v. *Sullivan*, 41 Id. 170, both citing the principal case. As to the character of the contract in bill of lading, see the note to *Chandler* v. *Sprague*, 38 Am. Dec. 409; and as to how far controllable by parol evidence, see the note to *Bank of Rochester* v. *Jones*, 55 Id. 300.

THE PRINCIPAL CASE IS ALSO REFERRED TO in *Lee* v. *Bareda*, 16 Md. 197, as holding that freight paid in advance on goods not delivered may be recovered, and that the fact of insuring the freight is one circumstance going to show a special agreement on the part of the shipper to assume all risks.

PETTIGREW *v.* BARNUM.

[11 MARYLAND, 434.]

INTERESTED PARTY MAY TESTIFY IN HIS OWN BEHALF WHEN NO OTHER EVIDENCE IS REASONABLY TO BE EXPECTED; and when a guest sues an innkeeper to recover the value of articles stolen from his trunk, its contents may be proved, in the absence of other proof, by the testimony of the guest, as, from the necessity of the case and nature of the subject, no proof can otherwise be expected.

INNKEEPERS ARE LIABLE, WITHOUT REGARD TO ACTUAL FAULT OR NEGLECT, FOR LOSS OF BAGGAGE OF PERSON WHILE GUEST AT INN, as the custody of the baggage is assumed as a part of the service to be rendered, and the innkeeper thereby stipulates for the safety of the baggage.

INNKEEPERS ARE LIABLE ONLY FOR WHAT IS CONSIDERED BAGGAGE, and are not liable for every article that a guest may choose to carry with him; accordingly, they are not liable for the loss of silver knives, forks, and spoons stolen from the trunk of a guest.

BAGGAGE INCLUDES ALL ARTICLES DESIGNED FOR PERSONAL USE OR CONVENIENCE ON JOURNEY, and includes personal ornaments appropriate for traveler's wardrobe.

OBJECTION TO EVIDENCE MUST BE CONFINED TO THAT WHICH IS INADMISSIBLE, where testimony is taken under a commission, and a part is admissible and a part is not.

PARTY MAY ASK INSTRUCTION AS TO APPLICABILITY AND EFFECT OF EVIDENCE when testimony is taken under a commission, and the parts that are admissible are so inseparably blended with those that are not that distinct objections cannot be made.

PRAYER, SUBJECT OF WHICH IS COVERED BY PREVIOUS INSTRUCTIONS, OUGHT NOT TO BE GRANTED, because such repetitions are calculated to embarrass and mislead the jury.

JUDGMENT WILL NOT BE REVERSED FOR REFUSAL OF CORRECT PRAYER, if, by other instructions, the law has been given to the jury as favorably as the appellant could have desired.

Digitized by Google

TRESPASS on the case by the appellant against the appellees, brought to recover the value of certain articles alleged to have been stolen from his wife's trunk while they were guests at the Barnum hotel, belonging to the appellees. The plaintiff and his wife and sister stopped as guests at the hotel from the fourth to the seventh of November, 1853, and occupied adjoining rooms, between which was an unlocked door. Miss Pettigrew occupied one of the rooms, but left the hotel prior to the alleged robbery of the trunk, and the outer door of this room was left unlocked. The plaintiff's wife was told by the servant who had charge of the rooms to lock the door between the rooms, but did not do so. Miss Pettigrew's deposition, referred to in the opinion, contained a list of articles which she knew were owned by the plaintiff, and had been in the trunks a few days before the alleged robbery, and also gave an estimate of their value. The answer to the second interrogatory in the plaintiff's deposition, referred to in the opinion, contained a statement that his wife's trunk was robbed on the afternoon of November 7, 1853, while they were guests at the hotel, and gave a list of the articles and an estimate of their value. Testimony, other than by the plaintiff's deposition, was also given tending to show that the trunk had been robbed. From the deposition of the plaintiff it appeared that silver knives, forks, and spoons, of the value of two hundred and sixteen dollars and fifty cents, and a diamond ring, a cameo brooch, and other articles of jewelry, of the value of four hundred and ninety-two dollars and fifty cents, and some other articles of unknown value, had been stolen from the trunk. The list of articles and their values, given in the deposition of Miss Pettigrew, corresponded very nearly with that given in the plaintiff's deposition. The evidence on the part of the defendants tended to show that they took all necessary steps to detect the thief, and that their servants were reliable and honest, and that a watchman was constantly employed about the halls to guard the persons and property of their guests. They also proved that they kept in their office a secure iron safe for the safe-keeping of articles of value belonging to their guests, and that a notice of that fact was placed on the inner side of the plaintiff's door and his wife's attention was called to it. This notice requested all guests to deposit in the safe all articles of value, and notified them that the proprietors would not hold themselves liable for any losses that might occur, and also requested them to lock their doors on leaving the rooms and to leave the keys at the office. The sec-

Digitized by Google

ond prayer asked by the plaintiff, and refused by the court—mentioned in the opinion—was to the effect that unless the plaintiff or one of his companions read the notice or knew its contents, the defendants could not derive any benefit from it. The other facts are stated in the opinion. The judgment was for the defendants.

William S. Bryan and Henry Winter Davis, for the appellant.

and *Nevitt Steele*, for the appellees.

Rocky Court, TUCK, J. The appellant sued the appellees to recover damages for the robbery of his wife's trunk while a guest at their hotel. After having offered evidence tending to prove the robbery, the plaintiff proposed to show by his own testimony, taken under a commission, that the articles alleged to have been stolen were in the trunk, and the value of them. The entire deposition having been objected to and rejected, he offered the second interrogatory propounded to himself and the answer thereto, which were also objected to and excluded, and to this last ruling the first exception was taken.

The question therefore is, how far, if at all, innkeepers may be charged with such losses upon the evidence of their guests. And when we consider the amount of travel in this country, the subject is of great interest to the community as well as proprietors of hotels. As the loss happened before the passage of the act of 1854, c. 323, the case must be disposed of according to the law as it stood at that time.

The exception to the general law of evidence on which the appellant relies was applied many years ago in England to the liability of carriers, and also in other actions where the nature of the transaction did not admit of better evidence. It is said, however, that the rule which excludes a party from testifying in his own case was relaxed in these instances, *in odium spoliatoris*, and that as these appellees did not commit the wrong complained of, the case is not an exception to the rule. We are not satisfied that this is the only ground on which the admissibility of such proof depends. One of the earliest decisions was against a carrier, where it did not appear that he had converted the box to his own use; and in another, under the statute of Winton, the inhabitants of the hundred were as guiltless of the robbery, with the consequences of which they were charged, as are the appellees here. As against a defendant who had himself committed the act, and possessed the means of showing the damage by producing the articles, the strongest presumptions

Digitized by Google

would arise, and in such a case the plaintiff's oath would be received with greater propriety *in odium spoliatoris*. And the same reason would apply in criminal prosecutions: *Preston* v. *Leighton*, 6 Md. 88; Broom's Leg. Maxims, 425; *United States* v. *Murphy*, 16 Pet. 203. But even then the admissibility of the proof in civil actions would depend on the nature of the case, for there are many torts which go unredressed by defect of competent evidence, though the acts complained of are of the most grievous and oppressive character, for the reason that, as a general rule, actions *ex delicto* as well as those *ex contractu* must be supported by the oaths of disinterested witnesses. Where these are not to be had, justice often fails, and the wrong-doer succeeds, unless the case be excluded from the operation of general principles.

But the cases which appear to be the foundation of this doctrine do not place it on the ground suggested in argument: Chief Baron Gilbert, Gilb. Ev. 128, 129, speaking of actions under the statute of Winton, says that the exception was introduced because the remedy would be totally denied to the party if he were not accepted as a witness, inasmuch as "no person can be supposed present in such transactions to give their evidence." As showing early authority for this exception, now for the first time applied in this court, and to place its introduction on what we consider the proper basis, we give at length two cases which we find referred to and recognized in almost all the elementary works, and in most of the reported decisions on this branch of the law.

In 12 Vin. Abr. 24, pl. 34, it is said: "On a trial at Bodmyn, Coram Montague, B., against a common carrier, a question arose about the things in a box; and he declared that this was one of those cases where the party himself might be a witness, *propter necessitatem rei;* for every one did not know what he put into his box. The case of *Bennet* v. *Hundred of Hertford*, 2 Rollo, 685, is thus rendered in Norris's Peake, 223, note: "In an action against a hundred brought by the master, being a carrier, for a robbery committed on his servant in the absence of the master, *quære*, whether the master, being the plaintiff in the action brought, may be a witness to prove that he delivered the moneys, of which his servant swears he was robbed, before his servant set out on his journey in which he was robbed; for this might be proved by any other, and no person is to be a witness in his own cause, but for necessity; as if he himself had been robbed, although that he was plaintiff, yet he might be a

Digitized by Google

good witness to prove himself to have been robbed, and of what sum or things, and also to prove that he gave notice to the next ville and levied hue and cry, for this is of necessity for default of other proof. But as to proving the delivery of the money to his servant before the robbery, and before he set out on his journey, this might be proved by any other as well as by him, although it was objected that it is not safe nor usual for men to call witnesses when they deliver money to carry on a journey on account of the danger of discovery, and for this reason *per curiam*, against my opinion, it was ruled that he should be received as a witness." And in the same note it is said that a similar case occurred before Mr. Justice Chambre, in 1802, MS., where a mob having robbed the plaintiff's barge of corn which was carried in it, that part of the case was proved by the servant, but he not knowing the quantity on board, and this case (in Rolle) being cited, his lordship, on the authority of it, allowed the plaintiff to be examined to prove that fact. Buller's N. P., at page 289, states as an exception to the general rule that "a party interested will be admitted where no other evidence is reasonably to be expected;" and in *Lancum* v. *Lovell*, 9 Bing. 465, 23 Eng. Com. L. 662, it was held by the fourteen judges that the case before them, an action for toll claimed on a road, came expressly within this exception of Mr. Justice Buller, because the nature of the case was such that no other proof could reasonably be expected than that offered. See also 1 Phill. Ev. 59.

These cases show that the admissibility of such proof is recognized in England as established law, and that this exception is founded upon necessity, and was allowed for the attainment of justice in certain cases in which it would fail if the ordinary rules were applied.

The same point has been frequently ruled in this country, where the question appears to have arisen oftener than in England, and with a single exception, as far as we are informed, the decisions have followed the English doctrine. The only case the other way is that of *Snow* v. *Eastern Railroad Co.*, 12 Met. 44. The cases referred to by the appellant's counsel indicate that innkeepers, carriers, railroad and steamboat companies, and stage-owners have been deemed as coming within the exception, and that necessity has been considered as fully justifying a departure from the general rule. Greenleaf says: "Such evidence is admitted, not solely on the ground of the just odium entertained, both in equity and at law, against spoliation, but

Digitized by Google

also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected; it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers or to provide other evidence of their value:" 1 Greenl. Ev., secs. 348, 349; *Clark* v. *Spence*, 10 Watts, 335; *United States* v. *Murphy*, 16 Pet. 203.

This application of the law of evidence to innkeepers is quite compatible with—nay, in most cases necessary to insure—the performance of the duties assumed by the landlord. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all concerned. Hence, common carriers and innkeepers are made liable without regard to actual fault or neglect, because they can best guard against danger, and because, in case of loss, it would be difficult for the owner to adduce proof of embezzlement or other actual fault or neglect on the part of the defendant. Landlords can secure the attendance of faithful servants and guard their houses against thieves. "The rule is founded on the expediency of throwing the risk upon those who can best guard against it:" *Farwell* v. *Boston & Worcester R. R. Co.*, 4 Met. 49 [38 Am. Dec. 339]. When a person opens an inn he assumes a relation to the public which renders this mode of proof necessary to the protection of his guests. Whilst at large they may take measures to secure their baggage, but arrived at the hotel, the traveler has little agency in the means employed to that end. These depend on the regulations of the house, with which he has nothing to do. The baggage comes under the care of the establishment, and this custody is assumed as part of the service to be rendered for the price to be paid. The proprietor stipulates for the honesty of his servants and for the safety of baggage, except as against losses by means not necessary to mention in this case. And because it is not tolerated that trunks shall be subjected to inspection, nor indeed supposed that landlords desire such exposure of private baggage; and because travelers are not expected, in anticipation of probable loss, to have persons attending their movements, and noticing what they put in and what they remove from their trunks, from time to time, the law, upon grounds of necessity and general convenience, allows a party to be his own witness. If this were not so, it would be a

Digitized by Google

complete immunity to the innkeepers, contrary to one of the conditions on which he and his guest are presumed to come together, viz., that his baggage shall be safe. For we may as well declare at once that the guest shall be his own insurer while at the inn, as to deny to him the only evidence which he can reasonably be expected to furnish in case of loss.

It may happen, as suggested in the argument, that mischief will result by enabling dishonest persons to perpetrate frauds. This, however, may occur in any case where controversies are to be determined by oral testimony, for all suitors subject themselves to the risk and consequences of false swearing by the witnesses of their adversaries. It is true that the interest which a party feels in the result is a greater temptation to perjury than is presented to witnesses in general, but this consideration must yield to the necessity of the case, and the peculiar relations of persons in the predicament of these parties. The defendant, however, is allowed the benefit of the new character which the plaintiff assumes on taking the witness's stand. He may be cross-examined, impeached, or rebutted, and dealt with in all respects like other witnesses; and in many cases, a searching examination of the party himself, as to his position, means, and habits, will furnish the most certain test as to the probability that the trunk contained the articles in respect to which the action may be brought.

The introduction of a party's oath, as we have seen, depends on the nature of the subject, and the necessity of the case. If he has disinterested witnesses to prove what the law would otherwise allow him to show by his own oath, they should be produced. Hence, in this case, the position of the appellees' counsel, that Miss Pettigrew's deposition proved all that the plaintiff proposed to establish by his own, would be an answer to the offer of the plaintiff's oath, if they had proved the same facts. But on examining her evidence, we find that she knows nothing of the circumstances, having previously left the hotel. All that she says, bearing on this point, is, "I do know that the trunks referred to contained articles of value." Again she says, "The trunks of plaintiff and his wife contained jewelry and other articles." She nowhere states that the wife's trunk contained all these articles, or any specified portion of them. She knew nothing of the alleged robbery, and not knowing which of the trunks had been opened, she could not say that the one said to have been robbed contained the articles mentioned by her. The amount of her proof is, that her brother

Digitized by Google

and his wife had these things in their trunks; and was of little effect in the cause, except to show that they had owned such articles, and the value of some of them. It is a case, then, where it does not appear that the plaintiff had other proof to which he might have resorted as to the contents of this particular trunk.

A question sometimes arises as to the extent to which a party will be allowed to testify, that is to say, what articles he may prove to have been in his trunk. As a general rule, a landlord is liable only for what is considered baggage, and not for every article that the guest may choose to carry with him. But what is the baggage of a traveler depends so much on circumstances, such as his position, habits, taste, and mode of living and traveling, that it is easier to say, in a given instance, whether an article is embraced than to lay down a general rule that will apply to all cases. We do not think the term embraces merchandise or other valuables not designed for use, or personal convenience, on the journey. It is not within the implied contract of the landlord that he will be responsible for all goods which may be brought to his house, merely because they happen to be in a trunk. If so, it is not easy to define to what extent the power of the guest may be abused, and advantage taken by him as against the landlord: *Clark* v. *Spence*, 10 Watts, 335; *Pardee* v. *Drew*, 25 Wend. 459; Story on Bailments, 499; *Johnson* v. *Stone*, 11 Humph. 419; *Dibble* v. *Brown*, 12 Ga. 224 [56 Am. Dec. 460]; *Orange County Bank* v. *Brown*, 9 Wend. 115 [24 Am. Dec. 129]; *Hawkins* v. *Hoffman*, 6 Hill, 589 [41 Am. Dec. 767].

In the present case, we find that the trunk contained silver knives, forks, and spoons. For them the appellees were not responsible. If a party may recover for these, why may he not for many dozens of the same articles, or for any description and amount of plate? This we take to be in accordance with the reason of the case, and is supported by authority. But for personal ornaments appropriate for a traveler's wardrobe a landlord may be liable. And inasmuch as the answer to the second interrogatory contained evidence admissible under the pleadings, namely, proof of the jewelry as part of the contents of the trunk, it should not have been altogether excluded.

It was contended, on the part of the appellees, that this answer also contained evidence of the robbery, and that the plaintiff being incompetent for that purpose, it should have been rejected for that reason. We are not prepared to say that a guest cannot,

Digitized by Google

in any case, prove the loss of his baggage by his own oath. The general rule is that he cannot; but instances may occur where the reception of such testimony would be necessary to the ends of justice, and also within the reason of the rule which governs this class of cases. For example, it is in proof in this record that the chambermaid had a master-key to the rooms under her care, and that there were notices in the rooms for lodgers to leave their keys at the office. What security would locking the door by the guest afford against the improper use of the master-key or of the one left at the office? If the room be entered and robbed in his absence, and no signs of violence appear, ought the guest to be required to produce other proof of a fact that it is quite manifest he cannot so establish? And yet it is plain that under this hypothesis he might be injured by the very agents of the landlord, who, of course, would not testify against themselves. The case supposed would be within the reason assigned by Chief Baron Gilbert, "that no person can be supposed present in such transactions to give their evidence." These remarks are made, not as applying to this action, but to avoid a conclusion hereafter. As we have said, the plaintiff had offered other evidence of the robbery, and his own oath, if admissible under a different state of case, was not necessary for that purpose. And so also we may add, in reference to this deposition as containing evidence of the value of the jewelry, if relied upon for that purpose, that the party's oath of the value, if received at all, can only be where the nature of the subject and the necessity of the case are within the reason of the exception. There appears to be some diversity among the cases, and as this record does not need any expression of opinion by us, there being other proof of the fact by the plaintiff's sister, we confine ourselves to admitting the answer to the second interrogatory as evidence of the contents of the trunk.

There is, to be sure, difficulty sometimes in separating what is admissible from what the law rejects, so as to enable the party objecting to bring the precise point before the court; and this is more likely to occur in offering interrogatories and answers under a commission. Where, however, it can be done, it should be, as in *Calvert* v. *Coxe*, 1 Gill, 95, if the matters are so blended as to be inseparable for the purpose of distinct objections, the party may accomplish his object by asking an instruction as to the applicability of the evidence, and its effect on the case or any branch of it: *Pegg* v. *Warford*, 7 Md. 582; *Carroll* v. *Granite Mfg. Co.*, 11 Id. 400.

Digitized by Google

Without expressing any opinion upon the law of the plaintiff's second prayer, we may remark that if correct, its refusal furnishes no sufficient ground for reversing the judgment. His first prayer, granted by the court, had given the law to the jury as favorably as he could have desired, deciding, among other points, that the landlord's liability was not limited by the notice; whether it was read or not, therefore, could make no difference. It has been frequently ruled that a prayer, the subject of which is covered by previous instructions, ought not to be granted, because such repetitions are calculated to embarrass the jury, and may mislead them: *Mutual Safety Ins. Co.* v. *Cohen*, 3 Gill, 459 [43 Am. Dec. 341]; *Stokes* v. *Saltonstall*, 13 Pet. 181.

Judgment reversed, and *procedendo* ordered.

INNKEEPERS, FOR WHAT GOODS OF GUEST LIABLE.—It is not the purpose of this note to discuss the general liability of innkeepers. For the law on that head, see Story on Bailm., secs. 464–487; Schouler on Bailm. 245–295; *Clute* v. *Wiggins*, 7 Am. Dec. 448, and the extensive note thereto 449–458. The object here is to give the law concerning the classes and kinds of goods for which an innkeeper is liable.

The general liability of an innkeeper for the goods of his guests is understood to be somewhat in the nature of an insurer, when not restricted by statute or by the conduct of the guests themselves. The common-law rule is that an innkeeper is bound to take all possible care for the safety and security of the goods, money, etc., of his guest while in his house; and if they be stolen from the inn through no fault or neglect of the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss: *Dunbier* v. *Day*, 6 Neb. 598. Among many cases holding the innkeeper to the strict liability of an insurer, and only exempt by the act of God or the public enemy, are *Mateer* v. *Brown*, 1 Cal. 221; *Shaw* v. *Berry*, 31 Me. 478; *Norcross* v. *Norcross*, 53 Id. 163; *Burrows* v. *Trieber*, 21 Md. 320; *Mason* v. *Thompson*, 9 Pick. 280, 284; *Manning* v. *Wells*, 9 Humph. 746; *Thickstun* v. *Howard*, 8 Blackf. 535; *Sassen* v. *Clark*, 37 Ga. 242. On the contrary, see *Metcalf* v. *Hess*, 14 Ill. 129; *Johnson* v. *Richardson*, 17 Id. 302: *Howth* v. *Franklin*, 20 Tex. 798; *McDaniels* v. *Robinson*, 26 Vt. 316; *Read* v. *Amidon*, 41 Id. 15; *Kisten* v. *Hildebrand*, 9 B. Mon. 72; *Woodward* v. *Moss*, 18 La. Ann. 156; *Cutter* v. *Bomrey*, 30 Mich. 259. In some of the latter cases, however, the liability is restricted by reason of statute. The liability is likened, in a certain extent, to that of a common carrier in degree, but is not restricted, like that of a carrier, to the personal baggage of a guest, but probably extends to all the property which, as belonging to the guest, is received by the innkeeper as such: *Taylor* v. *Monnot*, 4 Duer, 110; *Needles* v. *Howard*, 1 E. D. Smith, 54. Thus it is said that "an innkeeper's liability is not limited, like that of a carrier of passengers, to the care merely of that species of property which comes under the denomination of baggage. The carrier of passengers performs a distinct employment. He undertakes to transport the passenger and his baggage. The baggage is what travelers usually carry with them, or what is essential or necessary for their use in the course of the journey. The care of it is incident to and forms a part of the contract for the carriage of the passenger, for which the carrier is

Digitized by Google

compensated by the fare or rate agreed upon. But for anything beyond mere baggage the carrier is entitled to extra compensation; it is not embraced or compensated for in the fare paid by the passenger; and if he has anything with him not coming under the denomination of baggage, of which the carrier is not advised, or for the carriage of which he receives nothing, it is at the risk of the passenger, and the carrier is not liable in the event of its loss. But the occupation of the innkeeper is different. He keeps a place of entertainment for the reception of all who travel, whether in their own vehicle or otherwise, in which the farmer carrying his produce to market, the trader vending his wares about the country, the traveler with simply his baggage, or the passenger journeying on foot, equally find accommodation; and where provision is made, not merely for the personal entertainment of the guest, but for the housing and safe-keeping of the property he brings with him, while he rests or reposes at the inn.

"In the modern times great changes have taken place in respect to the accommodation afforded by inns. Anciently the inn was a kind of a warehouse or hotel, in which travelers in journeying from one part of the country to the other for the purposes of trade or commerce found a temporary accommodation for their merchandise. But now that the superior facilities exist for the transportation of merchandise as respects the cost, the speed, and the security of its transport, this description of inn has fallen very much into disuse, except in remote or sparsely settled districts. In cities and large towns to which travelers journey by railroad or steamboat, inns, or, as they are commonly known in this country, hotels, are simply establishments for the reception of travelers accompanied merely with their ordinary baggage. The proprietors of such establishments, as they make no provision for the kind of accommodation that was afforded by the ancient inns, are under no obligation to receive a traveler with merchandise, and may, if they think proper, refuse to house or take care of it. But whatever may be the nature of the inn, or the kind of accommodation afforded, if the innkeeper receives the guest and his goods, he charges himself with their safe-keeping.

"The moment the goods are *infra hospitium* the liability of the innkeeper attaches, and that liability extends to goods, chattels, and movables of any kind or description which the traveler brings with him:" *Van Wyck's Case*, 12 How. Pr. 147, 151; see also *Trieber* v. *Burrows*, 27 Md. 131; *Stanton* v. *Leland*, 4 E. D. Smith, 88; *Kellogg* v. *Sweeny*, 1 Lans. 397. But no liability attaches until the goods are *infra hospitium; Calye's Case*, 8 Co. 32; *Dickinson* v. *Winchester*, 4 Cush. 114; and as to the goods the relation must be that of innkeeper and guest; *Mowers* v. *Fethers*, 61 N. Y. 34; *Mateer* v. *Brown*, 1 Cal. 221. If, therefore, an innkeeper, at the request of his guest, sends his horse to pasture, and the horse is stolen, or if sheep should be put in a pasture by or under the direction of the guest, and they should be injured by eating poisonous plants, being so placed at the guest's direction, they are not *infra hospitium*, and the innkeeper is not liable: *Calye's Case*, 8 Co. 32; *Hawley* v. *Smith*, 25 Wend. 642. Undoubtedly, for whatever personal property the guest may have brought *infra hospitium* the innkeeper is liable. Not only the guest's animals and private equipage may thus claim protection, his wearing apparel and personal jewelry, his baggage and traveling necessaries, but indeed money and valuables to an unlimited amount: *Armistead* v. *White*, 17 Q. B. 261; *Kent* v. *Shuckard*, 2 Barn. & Adol. 803; *Berkshire Woolen Works* v. *Proctor*, 7 Cush. 417; *Sassen* v. *Clark*, 39 Ga. 242. Where a servant of a guest was robbed in the hotel of his master's goods, it was held that such goods were *infra hospitium*, and the innkeeper liable: *Towson* v. *Havre de Grace Bank*, 14 Am. Dec. 254.

Digitized by Google

No limit was made as to the kind of property under the common-law rule, except that the liability extended only to movables. Thus in *Calye's Case*, 8 Co. 32, 1 Smith's Lead. Cas. 135, "if one brings a bag or chest of evidences of debt, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." The liability extends to horses received by the innkeeper, and stolen: *Newson* v. *Axon*, 10 Am. Dec. 685; or injured or killed: *Washburn* v. *Jones*, 14 Barb. 193; *Hill* v. *Owen*, 35 Am. Dec. 124; *Dickerson* v. *Rogers*, 40 Id. 642; and to the theft of the harness on the horse: *Mason* v. *Thompson*, 20 Id. 471. So where the innkeeper receives cattle driven on the road to keep over night, he is responsible as such for the safety of the place provided for them: *Hilton* v. *Adams*, 71 Me. 49.

The liability of the innkeeper attaches to money of the guest as well as to his other goods: *Kent* v. *Shuckard*, 2 Barn. & Adol. 803. An innkeeper has been held liable where a satchel containing coin was given to him to take charge of, without any statement being made of its contents: *Kellogg* v. *Sweeny*, 1 Lans. 397; so where a guest ordered his trunk, containing money, to be taken to his room at an inn, and during the night the money was stolen, the innkeeper was held liable: *Epps* v. *Hinds*, 61 Am. Dec. 528. In *Quinton* v. *Courtney*, 1 Hayw. 40, an innkeeper was held liable for a sum stolen out of saddle-bags of the guest, though no notice of the contents of such bags had been given. For the theft of a diamond pin which the guest was accustomed to wear, the innkeeper was held liable: *Walsh* v. *Porterfield*, 6 Week. Not. Cas. 149.

To make the innkeeper liable for goods of the guest, however, they must have been received by the innkeeper in his character as such. In *Mowers* v. *Fethers*, 61 N. Y. 38, it is said that while the innkeeper is bound to receive the person and goods of all who come in the character of guests, yet he is not bound to furnish accommodations for persons desiring to expose commodities for sale, or permit his establishment to be made a depot for the transaction of business. He is doubtless bound to receive and entertain strolling peddlers and securely guard their goods and packs of trinkets if brought *infra hospitium*, so long as they remain as mere guests. Thus where a guest secured of an innkeeper a private room to show his goods, the court, *per* Lord Ellenborough, says: "The keeping of these goods hardly falls within the innkeeper's duty, ... and the guest is therefore bound to exercise ordinary care in keeping them; and if he fails to do so, and by his negligence the goods are lost, he himself is liable and the innkeeper excused:" *Burgess* v. *Clements*, 4 Mau. & Sel. 306; see also *Farnsworth* v. *Packwood*, 1 Stark. 249. The former of these cases was one in which the guest desired a room in which to show his goods, consisting of jewelry and the like. A room was assigned him, and a key delivered, with directions to lock the door. He afterwards went away and left the room for some hours, with the key in the lock on the outside, and some of the boxes of jewelry were stolen. The innkeeper was held not liable. Analogous to this is the case of *Myers* v. *Cottrill*, 5 Biss. 465, where a guest at a hotel took to his room valuable articles of merchandise, consisting of jewelry, and exposed them there for show and for sale, inviting an examination by purchasers. The hotel-keeper, it was held, was not subject to the special liability of an innkeeper. Drummond, J., says: "I think this is the true rule of law on the subject: If a person going into a hotel as a guest takes to his room not ordinary baggage, not those articles which generally accompany a traveler, but valuable merchandise, such as watches and jewelry, and keeps them there for show and sale, and from time

Digitized by Google

to time invites parties into his room to inspect and purchase, unless there is some special circumstance in the case showing that the innkeeper assumes the responsibility as of ordinary baggage, as to such merchandise, the special obligations imposed by the common law do not exist, and the guest, as to those goods, becomes their vendor, and uses his room for the sale of merchandise, and really changes the ordinary relations between the innkeeper and guest." In *Clute* v. *Wiggins*, 7 Am. Dec. 448, the innkeeper received the plaintiff as his guest for the night, with his loaded sleigh, and horses. The sleigh and contents were put by the innkeeper into an outhouse, where he usually put such loads. The doors of the outhouse were broken in, and the load, consisting of bags of grain, was stolen. The innkeeper was held liable. In *Fisher* v. *Kelsey*, 16 Fed. Rep. 71, where a statute provided that the innkeeper's liability would attach to merchandise only in case of a written notice to the innkeeper stating the kind and amount of goods, it was held that the notice was absolutely necessary to fix such liability. In *Needles* v. *Howard*, 1 E. D. Smith, 54, an innkeeper was held liable for a package of lace merchandise bought by a guest at a store, and sent by the seller of the goods to the hotel for the guest, the package having been received by the inkeeper for the guest, but stolen before delivery to the guest. Where the owner of a stallion gave notice that on a certain day in each week the stallion would stand for mares at defendant's inn, the party coming on such day and stabling the stallion at the inn was held not to be a guest so as to render the innkeeper liable for an injury to the animal: *Mowers* v. *Fethers*, 61 N. Y. 34. Where an innkeeper kept a sea-bathing establishment, but separately from his inn, he was held not liable as an innkeeper for clothes of his patrons left while they went in bathing: *Minor* v. *Staples*, 71 Me. 316.

An innkeeper may object to receiving within his precincts goods and chattels of the guest which he perceives to be injurious and offensive for such custody, or improperly secured, or such in kind, bulk, or value that no traveler ought rightfully to make his host answerable for them: *Kellogg* v. *Sweeny*, 1 Lans. 397; *Myers* v. *Cottrill*, 5 Biss. 465; *Queen* v. *Rynier*, L. R. 2 Q. B. D. 136; *Needles* v. *Howard*, 1 E. D. Smith, 54. In *Howe Machine Co.* v. *Pease*, 49 Vt. 477, an innkeeper was held not liable for goods of a perishable character, it being stated that the loss in such case would be presumed to have been in the ordinary and natural course of affairs.

By statute, in many states, the responsibility of innkeepers for money and valuables has been curtailed, by requiring the guest to deliver them into his special custody; while upon the suggestion that the guest's own imprudence has occasioned his loss, our courts have mitigated the rigor of the legal rule. It has been held that an innkeeper is liable for money left by his guest in the hotel, even though it was not placed in the safe kept for that purpose, and of which the guest had notice; but the innkeeper may excuse himself by showing due diligence on his part, and that the loss was not the result of his negligence. The burden of proof, however, is on the innkeeper. Where the guest is shown to have had an unnecessarily large amount with him, or where he has unnecessarily exposed his property or money to danger of loss, the innkeeper has been held not liable: *Johnson* v. *Richardson*, 63 Am. Dec. 369. In *Elcox* v. *Hill*, 98 U. S. 218, a guest delivered to the baggage clerk as ordinary baggage a valise containing six thousand three hundred dollars' worth of jewelry, without notifying any one of the contents. The innkeeper was held not liable.

Where the goods or articles are retained in the immediate control and direction of the guest, the innkeeper has been held not liable: *Calye's Case*, 8

Digitized by Google

Co. 32; *Hawley* v. *Smith*, 25 Wend. 642. Thus in *Weisenger* v. *Taylor*, 1 Bush, 277, it has been held that if a guest brings into the inn an article of extraordinary value, not attached to his person nor carried with him for personal convenience, as, for example, a bag of gold, case of jewelry, or package of paper currency, the fact that he does not either notify the host or offer to place it in his actual custody will imply that he trusts it to his own care, and if stolen, the innkeeper is not liable, unless for dishonesty of his own household.

Innkeepers have been allowed to make regulations which, if reasonable, may in a measure restrict their liability. Thus it has been held that an innkeeper may require guests to put their goods, or certain of their goods, in a particular place, and that if they fail to do so the innkeeper is not liable: *Wilson* v. *Halpin*, 1 Daly, 496; *Fuller* v. *Coats*, 18 Ohio St. 343. But see *Packard* v. *Northcraft*, 2 Met. 439. An innkeeper may specially require and make regulations that goods of special value, money, jewelry, etc., not required for daily use and convenience, shall be deposited in his custody, and if actual notice is brought to the guest, and he fails to comply therewith, the innkeeper will not be liable for such articles: *Stanton* v. *Leland*, 1 E. D. Smith, 88; *Pope* v. *Hall*, 14 La. Ann. 324; *Johnson* v. *Richardson*, 63 Am. Dec. 369; *Proflet* v. *Hall*, 14 La. Ann. 524; *Van Wyck* v. *Howard*, 12 How. Pr. 147; *Purvis* v. *Coleman*, 21 N. Y. 111; S. C., 1 Bosw. 321; *Rosenplaenter* v. *Rosenplaenter*, 54 N. Y. 262; *Hyatt* v. *Taylor*, 51 Barb. 632. But there can be no rule exempting an innkeeper from liability for money or jewelry which has been left in the guest's room in his trunk, unless he brings home to the guest notice of a regulation that they must be deposited in such a place as he directs: *Kellogg* v. *Sweeny*, 1 Lans. 397. The mere posting of the notice is not sufficient: *Bodwell* v. *Bragg*, 29 Iowa, 232. The innkeeper is liable, however, for necessary baggage, the guest's watch and personal apparel, and for money which he has about him for his personal use, even though a regulation exists requiring a deposit of valuables in the safe: *Pope* v. *Hall*, 14 La. Ann. 324.

In Maryland and some other states the strict common-law rule has been relaxed, and innkeepers held liable for actual and necessary baggage only. And in determining what constitutes such baggage, the station, life, and habits of the guest may be taken into consideration: *Trieber* v. *Burrows*, 27 Md. 130; *Giles* v. *Fauntleroy*, 13 Id. 132, 139, both citing the principal case; *Proflet* v. *Hall*, 14 La. Ann. 129, 139. It should consist of only such articles of necessity and personal convenience as are usually carried by passengers for their personal use: *Sassen* v. *Clark*, 37 Ga. 242. What is proper baggage is a question for the jury. Money in a trunk for necessary traveling expenses is proper baggage: *Maltby* v. *Chapman*, 25 Md. 310; *Taylor* v. *Monnot*, 4 Duer, 116; *Van Wyck* v. *Howard*, 12 How. Pr. 152; *Stanton* v. *Leland*, 4 E. D. Smith, 88. The jury will of course determine in each case whether a sum is reasonable or not. A traveler about the country was held properly to have forty dollars in his trunk: *Noble* v. *Milliken*, 74 Me. 225. So, a traveler from Europe having four hundred and fifty dollars in his trunk: *Van Wyck* v. *Howard*, 12 How. Pr. 152; and another having five hundred dollars and a gold watch: *Murchison* v. *Sergent*, 69 Ga. 206—were held to properly have the same as part of their baggage, and the innkeeper was held liable for its loss. An ordinary watch, chain, and jewels are properly part of the guest's baggage: *Maltby* v. *Chapman*, 25 Md. 310; *Ramaley* v. *Leland*, 6 Robt. 358. But a Colt's revolver and silver tea-spoons are not embraced in the term "baggage," nor are surgical instruments, unless the guest is a physician or surgeon, or a student of medicine: *Giles* v. *Fauntleroy*, 13 Md. 126.

Digitized by Google

By statute in England and in some of the United States, qualifications of the innkeeper's liability have been introduced. This legislation is in most cases intended to exempt the innkeeper from liability for valuable articles, money, jewelry, and the like, and is also aimed to exempt the innkeeper from losses by fire occasioned by no fault or negligence on his part. Where, however, a statute so limits the innkeeper's liability as to certain goods or in certain cases, in all other cases or as to other classes of goods the full common-law liability attaches; and where a deposit of valuable articles in the office safe is required, if the deposit is so made the full common-law liability attaches to such articles, whether of minor or large value, and whether necessary baggage or not: *Wilkins* v. *Earle*, 44 N. Y. 172; *Ramaley* v. *Leland*, 43 Id. 539; *Pinkerton* v. *Woodward*, 33 Cal. 557; *Shoecraft* v. *Bailey*, 25 Iowa, 553. Under statutes requiring the deposit with the innkeeper of gold and silver articles and jewelry, the innkeeper has been still held liable for watches and money for ordinary use: See *Krone* v. *Sweeny*, 2 Daly, 200; *Bernstein* v. *Sweeny*, 33 N. Y. Super. Ct. 271; *Milford* v. *Wesley*, 1 Wil. Super. Ct. 119; *Ramaley* v. *Leland*, 43 N. Y. 539; but see, *contra*, *Stewart* v. *Parson*, 24 Wis. 241; *Hyatt* v. *Taylor*, 42 N. Y. 259.

GENERAL OBJECTION TO EVIDENCE, PART OF WHICH IS ADMISSIBLE: *Smith* v. *Causey*, 65 Am. Dec. 372; *Barlow* v. *Lambert*, Id. 374; *Smoot* v. *Eslava*, 58 Id. 310; and an objection to the admissibility of evidence must be confined to the particular evidence claimed to be inadmissible: *Everett* v. *Neff*, 28 Md. 185, citing the principal case.

REFUSAL TO REPEAT INSTRUCTION ALREADY GIVEN IN SUBSTANCE is no ground of reversal: *Tuber* v. *Huston*, 61 Am. Dec. 96, and note collecting prior cases in this series; *Holbrook* v. *Utica etc. R. R.*, 64 Id. 502; *Raver* v. *Webster*, 66 Id. 96; *Treat* v. *Lord*, Id. 298, and note; *Spencer* v. *Trafford*, 42 Md. 21; *Smith* v. *Wood*, 31 Id. 299; *Kershner* v. *Kersher*, 36 Id. 335, citing the principal case. Nor will the judgment be reversed for refusal of a correct instruction, if the others given cover the ground of controversy, and give the law to the jury as favorably for the appellant as he is entitled to ask: *Baltimore etc. R. R.* v. *Worthington*, 21 Id. 281; *Philadelphia etc. R. R.* v. *Weaver*, 34 Id. 434, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *State* v. *Baltimore etc. Steam Co.*, 13 Md. 188, to the point that if one of two persons must suffer from the acts of a third, the loss should fall upon him who could most easily have prevented it.

KELLER *v.* STATE.

[11 MARYLAND, 525.]

TITLE OF MARYLAND ACT OF 1856, CHAPTER 353, REQUIRING LICENSES OF VENDORS OF LAGER-BEER MANUFACTURED BY THEMSELVES IS SUFFICIENTLY DESCRIPTIVE OF ITS SUBJECT-MATTER, within the constitutional provision, which requires that "every law enacted by the legislature shall embrace but one subject, and that shall be described in the title," the title being "an act to raise additional revenue to pay the debts of the state, by increasing the rates of license to ordinary keepers and traders."

STATE LAW REQUIRING TAKING OUT OF LICENSES BY THOSE WHO SELL THEIR OWN MANUFACTURE OF LAGER-BEER IN SMALL QUANTITIES IS CONSTITUTIONAL; such a law being but the exercise of the right to regu-

Digitized by Google

late internal police and everything that relates to the morals and health of the community.

MANUFACTURED DOMESTIC ARTICLE IS SUBJECT TO TAXATION AND LICENSE LAWS ON SAME FOOTING WITH IMPORTED ARTICLES; and while the state may not prevent the manufacture of a deleterious article, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem advisable or necessary to guard the health or morals of its citizens.

MARYLAND LICENSE LAWS OF 1856 AND OF 1827, AND THOSE SUPPLEMENTARY TO LATTER, ARE TO BE CONSIDERED *in pari materia;* and the absence of a penalty in the later act leaves those failing to take out a license under it amenable to the penalties of the earlier act, the later act being passed with the design of subjecting the vendors of lager-beer to the same restraints as those selling other liquors.

PENAL LAWS ARE NOT TO BE SO CONSTRUED AS TO DEFEAT OBVIOUS INTENTION OF LEGISLATURE, and though they are not to be extended, they should receive a rational construction.

INDICTMENT LIES FOR DISOBEYING INJUNCTION OF LEGISLATURE, though no mode of punishment is pointed out by the statute enjoining the doing of an act.

INDICTMENT for violation of the license laws. Six different persons were prosecuted under separate indictments, and were convicted, and the cases on appeal were all argued and submitted at the same time. The act of 1856, chapter 353, is entitled "An act to raise additional revenue to pay the debts of the state, by increasing the rates of license to ordinary keepers and traders," and enjoined it as a duty upon all desiring to sell, in quantities less than a pint, spirituous or fermented liquors or lager-beer, to take out a license in the manner specified therein, but does not provide for any penalty for a failure so to do. The other facts are stated in the opinion.

John H. Ing and Charles F. Mayer, for the appellants.

Milton Whitney, for the state.

By Court, TUCK, J. These cases were argued and will be decided together, as they all depend on the same condition of facts and law. In view of their importance, as affecting the public interest, we have considered them upon the merits, and having concluded that the parties were properly indicted and convicted, it is immaterial to them whether we affirm or dismiss the appeals. The latter point we have not examined.

These appellants were indicted, each in eight several counts, for violating the license laws, from which they claim exemption, because they "are manufacturers of lager-beer, which they retail in small quantities, less than a pint, in lager-beer saloons, without license."

Digitized by Google

And first, it is contended that the title of the act of 1856, chapter 535, is not sufficiently descriptive within the seventeenth section of the third article of the constitution, which declares that "every law enacted by the legislature shall embrace but one subject, and that shall be described in the title." In the case of *Davis* v. *State*, 7 Md. 151 [61 Am. Dec. 331], a construction was placed on this clause of the constitution which, we think, maintains the validity of this act of assembly against the objection now under consideration. This law relates to licenses to ordinary keepers and traders as the subject of legislation. The purpose is declared to be the raising of additional revenue to pay the debts of the state by increasing the rates of license. The subject of the act would have been sufficiently indicated by the title, if this purpose had not been declared. The act does not dispose of the fund raised from these licenses, or in any manner treat of the revenue or debts of the state. It might, with as much reason, be said that because a person violating the act may be punished by indictment, three subjects are embraced, to wit, revenue, licenses, and crimes. The evils designed to be prevented by this clause of the constitution are well stated in *Davis* v. *State*, *supra*, and we do not perceive that the act is multifarious in the sense of that instrument, or calculated to contravene its purposes. It is also contended that the act is unconstitutional, because it lays a tax by way of license on manufacturers of lager-beer, which, it is said, compels them to pay more than their fair proportion towards the support of government; that it is a revenue measure, and not an exercise of legislative power under the last clause of the thirteenth article of the bill of rights, "with a political view, and for the good government and benefit of the community." We might dispose of this objection by referring to the case of *Burton* v. *State*, 3 Gill, 1, in which several questions were decided and points ruled, upon the act of 1844, chapter 280, entitled "An act imposing duties on promissory notes, bills of exchange, specialties, and other instruments of writing, to aid in paying the debts of the state," and which act, as to some of the instruments then before the court, was declared to be valid. The title plainly showed, as does the title of the act of 1856, that the proceeds of the duties imposed were to be applied in payment of the public debt, yet it does not appear to have been urged by counsel, or to have occurred to the court that the act was void, because persons who might use stamped paper would be contributing to the support of government on a basis other than

Digitized by Google

"his actual worth in real or personal property;" and we think that, considering the large amount raised by that source of revenue, and the opposition to the law in some sections of the state, the question would have been decided if the court had thought that act violated the old bill of rights, which was the same as the present as far as it relates to this question.

But the system of legislation to which this act belongs may be vindicated upon the plainest grounds of public policy, acknowledged and acted upon in most, if not all, the states of the Union, to wit, the right to regulate their internal police and everything that relates to the morals and health of the community, besides having received the sanction of the highest tribunal known to our institutions. In the case of *Brown* v. *State of Maryland*, 12 Wheat. 419, it was decided that a state legislature could not require the importer of foreign articles to take out a license from the state before selling a bale or package so imported, because such legislation would be repugnant to two provisions of the constitution of the United States, that which declares that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and that declaring that congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes;" but it was conceded that this prohibition continues only so long as the article remains the property of the importer in the original form or package in which it is imported, and that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it loses its distinctive character as an import, and becomes subject to the taxing power of the state, whether in the form of licenses to those who may deal in quantities less than the original package, or through sales by licensed auctioneers, or by regulations for the safety and health of its citizens. In the license cases, *Thurlow* v. *Commonwealth*, 5 How. 504, Chief Justice Taney refers to *Brown* v. *State of Maryland*, 12 Wheat. 419, as "drawing the line between foreign commerce, which is subject to the regulation of congress, and internal or domestic commerce, which belongs to the states, and over which congress can exercise no control," and all the judges who heard the cases concurred in affirming the validity of state laws regulating the sale of ardent spirits by requiring licenses to sell by retail. These were fully argued, and most of the judges delivered separate opinions in view of the importance of the ques-

Digitized by Google

tions involved, and there was a difference among them on some of the points, but there was no dissent as to this power of the state. Chief Justice Taney says: "But although a state is bound to receive and to permit the sale by the importer of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary and advisable to guard the health or morals of its citizens, although such law may discourage importation or diminish the profits of the importer, or lessen the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper." To the same effect, see the opinions of Justices McLean, pp. 588, 591, 592, 595; Daniel, p. 617; Woodbury, pp. 623, 626, 627; Grier, p. 631. The conclusion to be drawn from those cases is that the liquors sold by the parties, plaintiffs in error, stood on no higher ground than domestic spirits, and that such spirits are subject to state authority as objects of taxation or of license in restraint of their sale; and it follows that if the liquors, for selling which the present traversers stand indicted, were merely sold by them, the validity of the act of 1856 could not be doubted.

But it is supposed that the appellants are protected, although the liquor sold is domestic, because they are manufacturers and only retail beer of their own brewing. We are not now dealing with the power of the state to tax, by license or otherwise, the manufacturers of this article; the question is, Can they claim the right to trade or traffic in it, in small quantities, when all other persons are required to take out licenses for the purpose? It is very manifest that this position, if allowed, might defeat in a great decree the object of the license laws, so far as they are designed to protect the morals of the community. For every distiller and brewer may become a retail dealer, or have a tippling saloon annexed to his establishment, and thus evade the license laws altogether; or the small vendor may make brewing a part of his business, with the same injurious effect upon the policy of the state. If, as was held in *Brown* v. *State of Maryland*, 12 Wheat. 419, the imported article is liable to be affected by a state license law as soon as the original package is broken up for use or retail by the importer (see opinion of Chief Justice

Digitized by Google

Taney, *Thurlow* v. *Commonwealth*, 5 How. 575), we cannot perceive why a manufactured domestic article shall not be liable to the same laws, when placed in the market for retail, even granting that the manufacturer, as such, would be exempted from this species of tax. In the language of Chief Justice Taney, Id. 577, as applied to imports, we may say that although a state may not have power to prevent the manufacture of a deleterious article, "it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem advisable or necessary to guard the health or morals of its citizens." See also *Bode* v. *State*, 7 Gill, 326. It is also insisted that the fourth section of the act of 1856, chapter 353, does not contain any prohibition against opening the places therein mentioned, but only makes it the duty of persons desiring to do so to apply for a license in the manner prescribed, and does not impose any penalty for neglecting to obtain a license before selling in quantities less than a pint. To this the answer is that the act of 1827, chapter 117, and its supplements, and the act of 1856, are to be considered as *in pari materia*, all of them relating to licenses; and that as the third section of the act of 1827 makes it unlawful "to open, set up, or keep any ordinary tavern or inn, etc., or any place at or in which any spirituous or fermented liquor shall be sold or bartered in quantities less than a pint at any one time without first obtaining a license;" and inasmuch as the last act does not alter the punishment imposed by the act of 1827 and its supplements, persons neglecting to obtain a license, as prescribed by the act of 1856, must be considered as amenable to the penalties then in force. It is quite plain that the act of 1856 was passed with reference to previous legislation on the same subject, and with those acts before the law-makers, because the last act is a literal copy of some portions of the act of 1827. It is true that in those laws there is no mention of lager-beer, and on this an argument was made at the bar that the offense charged against the defendant is not within the prohibitions of the act of 1827 and its supplements; but we do not concede the force of this argument. The design of the legislature was to impose on the vendors of lager-beer the same restraints as were applied to keepers of houses for the sale of other liquors named in the act, and when they are expressly included among those required to take out licenses, they can plainly perceive what the law demands, and should comply. If they do not, they are amenable to the penalties denounced against others, in whose predicament they choose to place themselves

Digitized by Google

by a manifest and willful neglect of what the state authorities require as necessary to the peace and order of society. "Even penal laws, which it is said should be strictly construed, ought not to be so strictly construed as to defeat the obvious intention of the legislature:" *American Fur Company* v. *United States*, 2 Pet. 367; *United States* v. *Wilberger*, 5 Wheat. 76. And though they are not to be extended by construction, they should receive a rational interpretation: *House* v. *House*, 5 Harr. & J. 125. If a statute enjoin an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature: Russell on Crimes, 49; *Rex* v. *Davis*, Say. 163; *Gearhart* v. *Dixon*, 1 Pa. St. 224; 4 Bla. Com. 122. Here the penalty is provided by previous laws, and the plain intent was to place the keepers of lager-beer establishments on the same footing with others required to obtain licenses to sell in small quantities; and as these acts are *in pari materia*, they are liable to like punishment under the original and supplementary laws of 1832, chapter 273, and 1834, chapter 232.

Judgment affirmed.

CONSTITUTIONAL PROVISION THAT EVERY LAW ENACTED BY LEGISLATURE SHALL EMBRACE BUT ONE SUBJECT, AND THAT SHALL BE DESCRIBED IN TITLE, how construed: See *Davis* v. *State*, 61 Am. Dec. 331, and note thereto collecting other cases, fully discussing the question; *Santo* v. *State*, 63 Id. 487, and note. A strict compliance therewith is not required: *Anderson* v. *Baker*, 23 Md. 586; *Mayor* v. *State*, 30 Id. 118; *Commissioners* v. *Franklin R. R.*, 34 Id. 163; *State* v. *Young*, 47 Ind. 174—which four cases cite the principal case, and all follow the rule laid down in *Davis* v. *State*, *supra*.

POWER OF STATE TO REGULATE AND PROHIBIT SALE OF LIQUORS: See *Santo* v. *State*, 63 Am. Dec. 487, and note; the regulation of such traffic is but the exercise of the police power of the state: *Woods* v. *State*, 36 Ark. 38, citing the principal case.

SUCCESSIVE ACTS IN PARI MATERIA SHOULD BE CONSTRUED TOGETHER: *State* v. *Baltimore etc. R. R.*, 38 Am. Dec. 317.

CONSTRUCTION OF PENAL STATUTES: See *Warner* v. *Commonwealth*, 44 Am. Dec. 114; and see also notes to *Walker* v. *Harris*, 32 Id. 597, and *Carpenter* v. *State*, 34 Id. 120. They should be construed reasonably, and so as to effectuate, and not destroy, the legislative intent: *Wedge* v. *State*, 12 Md. 235; *Parkinson* v. *State*, 14 Id. 195; *Hardesty* v. *Taft*, 23 Id. 525, all citing the principal case.

Digitized by Google

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

Holly v. Boston Gaslight Company.

[8 Gray, 123.]

Injury is Immediate, and therefore Trespass, only when It is Directly Occasioned by, and is not merely a consequence resulting from, the act complained of.

Action in Nature of Action of Case may be Maintained against Gas Company for all consequential damages resulting from its negligently suffering the gas to escape from its pipes. But the burden of proof, in such an action, is upon the plaintiff to establish as a fact the failure of the company to exercise due and ordinary care in keeping its pipes in a sound and safe condition for the transmission and distribution of the gas.

In Action against Gas Company for Injury Caused by Escape of Gas from its pipes, the plaintiff must prove that he used ordinary care for his own protection against the noxious influence of the gas, or he cannot recover against the company.

Want of Ordinary Care on Part of Father of Minor Child in adopting suitable precautions to protect such child from the hurtful effects of gas escaping from the pipes will defeat an action brought against the gas company for injuries sustained by said minor child from the escape of the gas.

In Action against Gas Company for Injury Caused by Neglect to Repair Leaks in their pipes, evidence is admissible on the part of the defendant to show what was the system of the company in regard to complaints of leaks, not for the purpose of showing that the company exerted the same degree of diligence in that as in other instances, but to exhibit its system and plan of action and the means provided by it for conducting its enterprise.

Action of tort. The first and second prayers for instructions referred to in the opinion are as follows: 1. If the jury found the plaintiff was at home upon her own land, and the defend-

Digitized by Google

ants permitted their gas to escape from their pipes in the street, where they had a right to have it, and to flow upon the plaintiff so as to suffocate and injure her, they would be liable in this action for suffering their gas so to injure the plaintiff, whether they were negligent or not in the use, care, and management of their gas in the street; 2. If the court should decline so to instruct the jury, but should instruct them that the defendants were only liable for want of ordinary care in the use of the gas; that if the damage to the plaintiff arose directly and immediately from a noxious substance, over which the defendants had the sole control for their own profit, being suffered by them to flow upon the plaintiff—it was for the defendants to show that the damage happened from unavoidable accident, or such a state of facts as would justify them, and render the plaintiff's loss therefrom *damnum absque injuria*. The other facts appear from the opinion.

B. F. Butler and B. Dean, for the plaintiff.

C. P. Curtis and C. P. Curtis, jun., for the defendants.

By Court, MERRICK, J. This is an action of tort, brought by the plaintiff, an infant of the age of nine years, to recover compensation for damages alleged to have been sustained by her in consequence of the negligence of the defendants in suffering their pipes to be and remain out of repair, whereby the gas contained in them escaped and inflicted upon her the injury complained of. Under our present system of pleading an action of tort is sufficiently comprehensive to embrace all the cases in which a remedy was formerly afforded, either by an action of trespass or an action of the case. An action of tort may therefore now be supported by proof of facts which would have been sufficient to maintain either of those actions: Stats. 1852, c. 312, sec. 1.

But it is equally apparent, both from the plaintiff's declaration and for the facts and circumstances stated in the report, that no trespass has been committed upon her. All the evidence reported shows that the injury complained of, and for which she contends that the defendants are responsible, was not the immediate result of any act done or committed by them or by any of their servants. The point in controversy at the trial was whether it was not caused by their negligence or want of ordinary care. The distinction is obvious and well known. An injury is considered immediate, and therefore a trespass, only when it is directly occasioned by, and is not merely a consequence resulting from, the act complained of. "If a person pour water on my

Digitized by Google

land, the injury is immediate; but if he stop up a watercourse on his own land, or if he place a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the injury is consequential, and will not render the act itself a trespass:" 1 Ch. Pl., 6th Am. ed., 146. The defendants lawfully laid down their pipes in the public street, and filled them with gas. If they failed to discharge their duty in regard to its distribution, and negligently suffered it to escape, they were liable therefor to other parties for all consequential damages, and might be proceeded against for the recovery of compensation in an action in the nature of an action of the case, but not as trespassers, in an action of trespass. This being the ground and limitation of the responsibility of the defendants, it is manifest that the plaintiff's first and second prayers for instructions were not applicable to the case, and were therefore rightly rejected.

It is not necessary to consider, particularly and in detail, the further instructions which were desired by the plaintiff's counsel. The propositions contained in them are all covered and embraced in the instructions which were actually given to the jury.

The defendants being authorized to lay down their pipes, and to convey gas in and through them, under the surface of the public streets, to various parts of the city, it is undoubtedly their duty to conduct their whole business in all its branches, and in every particular, with ordinary prudence and care. No exact legal definition of these words, which will embrace all their meaning and be precisely applicable to every possible case, can be given. That is to say, there is no such thing in existence as an absolute standard of ordinary care and prudence, to which the conduct of individuals in each particular instance can be brought, and by which it can be compared and tested. Care and diligence should always vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted. But it must be equal to the occasion on which it is to be used, and is always to be judged of, as the jury were in this case accurately advised, "according to the subject-matter, the force and danger of the material under the defendants' charge, and the circumstances of the case."

As this action is founded upon the alleged omission of the defendants to discharge their duty in keeping their pipes in a sound and safe condition for the transmission and distribution

Digitized by Google

of gas, it was necessary for the plaintiff, in order to maintain it, to show that they failed, in this respect, to exercise due and ordinary care. The burden of proof was upon her to establish this failure as a fact: *Adams* v. *Inhabitants of Carlisle*, 21 Pick. 146; *White* v. *Winnissimmet Co.*, 7 Cush. 155; 2 Greenl. Ev., sec. 473.

It was also incumbent on her to prove that she herself used ordinary care for her own protection against the noxious influence of the gas. She had no right to expose herself carelessly or willfully to its injurious effects, and thereby make the defendants responsible for the mischievous consequences resulting from such exposure. It was said by Lord Ellenborough that "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right:" *Butterfield* v. *Forrester*, 11 East, 60. The case in which the rule of law was thus stated has often been referred to by this court with approbation, and the rights of parties determined according to the doctrine considered there to be established: *Smith* v. *Smith*, 2 Pick. 621; *Adams* v. *Inhabitants of Carlisle* and *White* v. *Winnissimmet Co.*, above cited.

Nor does it make any difference that the plaintiff is a minor. She was under the care of her father, who had the custody of her person and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care, therefore, on his part, is attributable to her, in the same degree as if she were wholly acting for herself. And for this reason the defendants were properly allowed to show any conduct on his part indicating a want of ordinary care in adopting suitable precautions against the hurtful effect of the gas after it was discovered to be penetrating and pervading the house where they resided. It was for the jury to consider whether there was not a manifest want of prudence in remaining in the house after it became known to its inmates that it was being filled with the gas which was escaping from the leak in the pipes. And it was their province, also, to decide whether the immediate communication to the officers or agents of the gas company that such a leak had occurred was not a necessary

Digitized by Google

or at least a reasonable, measure of precaution, of which those who were liable to suffer from inhaling a noxious substance ought to have availed themselves. In this view, it was competent for the defendants to offer proof of the conduct of the plaintiff and her father, that the jury might have the means of determining whether she had not herself neglected to use ordinary care in seeking relief, or resorting to expedients which might readily have been availed of for her own protection and security.

In the course of their defense the defendants called Johnson, one of their clerks, as a witness; and having first obtained his testimony as to what was actually done by them or by persons in their employment, after the fact of the leak came to their knowledge, they proposed further to inquire of him, as tending to show due diligence on their part, what was the system of the company in regard to complaints of leaks, how they were usually treated, and what was the established course of proceeding in applying remedies and making needful repairs, on the part of their officers and by their employees and servants. This inquiry was objected to by the plaintiff; but the objection was overruled, and the evidence admitted. And under the particular circumstances of the case, we think the ruling was correct, and that the evidence was properly allowed to be submitted to the jury. Indeed, upon the broad and general question of due diligence, it seems indispensable to an intelligent and correct determination. The defendants, under their charter, were in the enjoyment of a great and peculiar privilege, that of supplying the means of light to all parts of the city. This devolved upon them a corresponding degree of responsibility in the conduct of their business, and in the preservation of every part of their apparatus from defects by which the public at large might be subjected to great inconvenience, and particular individuals might also be exposed to imminent peril and danger in respect both to their property and their lives. They were therefore under the highest degree of obligation to be at all times in a state of the most ample preparation to meet, with all reasonable promptitude and dispatch, whatever exigency might occur requiring their attention. But it is manifestly impossible that they should have had at their service, at every moment and at every point of exposure, an adequate force to overcome a sudden fracture of their pipes, or any other casual and unexpected obstacle in the conduct of their affairs, in the shortest possible time. All that they can reasonably be required to do is to afford ample facili-

Digitized by Google

ties to all parties interested to make communications to them, to institute and maintain an efficient system of oversight and superintendence, and to be prepared with a sufficient force ready to be put in action, and fully competent to supply and furnish a prompt remedy for all such accidents, defects, and interruptions in the conduct of their affairs, as from experience and the character and peculiarity of their works there was any reasonable ground to anticipate might occur. To know, therefore, whether due diligence has been exerted in any particular instance, it is necessary to know what is their general system, and what are the means of relief at their command and within their control. If the system is all right, and all due preparation has been made in advance, and the force which can be commanded is applied in a proper manner to the reparation of a break in the pipes, or correction of any disturbance in the regular operation of their business, they cannot be held to have failed in the exercise of ordinary care, even though it should happen that, owing to the occurrence of several interruptions or leaks at the same moment of time, through an extraordinary state of the weather, or other unforeseen causes, a particular defect should fail to be overcome with the same promptitude and dispatch that it might be under other and more favorable circumstances. It was for this purpose, as the ruling of the presiding judge is to be understood, that the testimony of Johnson, objected to by the plaintiff, was admitted. It was not allowed for the purpose of showing that the company exerted the same degree of diligence in this as they did in other like instances, nor was it ruled that they would be exonerated from responsibility on the occasion complained of by the plaintiff if they acted up to the standard which they had themselves established as the rule of ordinary diligence. If this had been the object of the evidence, it ought to have been rejected. But upon the more broad and general ground of exhibiting their system and plan of action, the means provided for conducting the great enterprise confided to their management and control, the evidence proposed seems to be peculiarly fit and appropriate, if, indeed, it ought not to be regarded as absolutely indispensable. Without it, it is difficult to see how, amidst contradictory statements and conflicting proofs, the jury could determine, with any confidence in the correctness of their conclusions, whether the defendants were supine and negligent, or acted with the vigor and efficiency demanded by the rule requiring the exercise of ordinary care and prudence.

Digitized by Google

The several rulings and instructions of the presiding judge, which were objected to by the plaintiff, appearing to us to have been all accurate and correct, judgment must be entered upon the verdict for the defendants.

CONTRIBUTORY NEGLIGENCE, AND BURDEN OF PROOF OF: See *Lucas* v. *New Bedford & T. R. R. Co.*, 66 Am. Dec. 406, note 409, where other cases are collected. No one can maintain an action for a wrong where it appears that he has consented or contributed to the act which occasions the loss or damage: *Martin* v. *Simpson*, 6 Allen, 105; *Steele* v. *Burkhardt*, 104 Mass. 62, both citing the principal case.

ANY NEGLIGENCE IN EXERCISE OF RIGHT WHICH CAUSES LOSS TO ANOTHER is an injury which confers upon him a right of action: *Morgan* v. *Cox*, 66 Am. Dec. 623, note 627, where other cases are collected. In *Hutchinson* v. *Boston G. L. Co.*, 122 Mass. 221, it was decided, citing the principal case, that the burden is on the plaintiff, in an action against a gas company for injury resulting from gas escaping from its pipes, to show some specific act of negligence on the part of the defendant, and that such negligence directly contributed to the injury.

NEGLIGENCE OF PARENT OF CHILD OF TENDER YEARS, or of one in *loco parentis*, contributing to an injury to it, is imputable to the child, and will prevent a recovery by such child or its personal representative: *Hartfield* v. *Roper*, 34 Am. Dec. 273, note 280, where other cases are collected; note to *Freer* v. *Cameron*, 55 Id. 677, where this subject is discussed; *Wright* v. *Malden & M. R. R. Co.*, 4 Allen, 287; *Munn* v. *Reed*, Id. 433; *Pittsburgh etc. R'y Co.* v. *Vining*, 27 Ind. 514, the last three citing the principal case.

WHAT IS ORDINARY CARE: See note to *Freer* v. *Cameron*, 55 Am. Dec. 671, where this question is discussed.

WHAT IS REASONABLE OR DUE CARE depends in every case upon the subject-matter to which the care is to be applied and the circumstances attending that subject-matter at the time when the care is required: *Sullivan* v. *Scripture*, 3 Allen, 566; *Cunningham* v. *Hall*, 4 Id. 276; *Hutchinson* v. *Boston G. L. Co.*, 122 Mass. 222, all citing the principal case. Care and diligence should vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted: *Fletcher* v. *Boston & Me. R. R.*, 1 Allen, 15, citing the principal case.

THE PRINCIPAL CASE IS APPROVED in *Hunt* v. *Lowell G. L. Co.*, 1 Allen, 347.

BROWN *v.* TYLER.

[8 GRAY, 135.]

FORECLOSURE OF MORTGAGE TRANSFERRED AS COLLATERAL SECURITY for the debt of a third person does not operate as a payment of such debt. The debt is not paid until the property mortgaged has been actually sold and converted into money; and where the debt so secured is that of another person, the right of action of the mortgagee against him for money paid to his use is not barred by the statute of limitations until six years after such sale and conversion.

Digitized by Google

ACTION of contract for money paid to the use of the defendants by Mary Kinsley, the plaintiff's intestate. Answer, the statute of limitations. The bank entered to foreclose the mortgage referred to in the opinion on the fifteenth of April, 1839, and sold all their rights under the mortgage and their possession on the nineteenth of March, 1844. The plaintiff proceeded on the ground that Mrs. Kinsley had paid and extinguished a debt for which the defendants were liable, and therefore they were under an implied promise to pay her. At the trial, the chief justice was of opinion that the extinguishment of the debt was effected by the foreclosure of the mortgage, and as that took place more than six years prior to her death, the claim was barred by the statute of limitations. A verdict was therefore taken for the defendants, subject to the opinion of the whole court upon the correctness of the chief justice's direction.

S. Bartlett and G. S. Hale, for the plaintiff.

C. B. Goodrich and J. W. May, for the defendants.

By Court, DEWEY, J. The statute of limitations being pleaded in bar, the question arises, At what period of time may it properly be said that Mrs. Kinsley paid, on account of the defendants, the money demanded in this action? If it be held that the foreclosure of the mortgage transferred to the People's Bank by Mrs. Kinsley, as collateral security for the debt of the defendants, was a payment by her as of that date, then the present claim is barred by the statute of limitations; but if the payment is to be considered as having been made at the period of the sale of the foreclosed premises, two years later, then it is conceded that the action was instituted in due time by her administrator.

The facts stated show that Mrs. Kinsley, at the request of the defendants, or of some of them, who were indebted to the People's Bank on a note for four thousand dollars, agreed to transfer to the People's Bank, as collateral security for such note, a mortgage which she held against one of the defendants, taking back a written stipulation from the People's Bank that the mortgage was received by them for the purpose aforesaid, and that upon payment of the note of the defendants her assignment of the mortgage was to be void, and the notes and mortgages securing the same were to be reconveyed to her.

The case turns wholly upon the question, What was the effect of the foreclosure of this mortgage thus transferred as collateral security for the debt of a third person? Is the debt of

Digitized by Google

such third person to the amount of the notes secured by the mortgage, or the value of the land if less than the notes, at once paid? or does the party holding such mortgage as collateral hold the land after foreclosure, as he held the mortgage before, as assets to be applied whenever they can be made available?

Now, while we fully assent to the doctrine contended for on the part of the defendants, as applicable to the ordinary case of mortgagor and mortgagee, and should hold that after a foreclosure by the mortgagee it is to be taken as a payment of the debt secured by that mortgage to the value of the land, yet it by no means follows that as between other parties, standing merely in the relation of pledgor and pledgee of said mortgage, the like consequence would follow. In general, where a party transfers to another goods, stocks, or notes of hand as collateral security for a pre-existing liability, the same are held in trust for the benefit of all parties; but only the actual proceeds realized from the sales or payments, as the case may be, are to be accounted for. If, before the actual reduction of them to money, a rise in their value takes place, the assignor has the benefit of it. If a decline in price, the loss falls also on the assignor. It is only on the actual reduction of the pledged property to money that the same is to be treated as a payment and accounted for as such, and in the mean time the property is to be held as collateral. So also, we think, if a debtor, or a third person in his behalf, transfers a note secured by mortgage, and assigns both the note and the mortgage as collateral security for a debt, and the debt not being paid at maturity the pledgee proceeds to enforce the collection thereof by a foreclosure of such mortgage, which is perfected by an entry and three years' possession, as between pledgor and pledgee such foreclosure does not change the relation of the parties, nor does such foreclosure necessarily operate as a payment of the notes for which it was pledged as collateral.

In the opinion of a majority of the court, the foreclosure of the mortgage by the party holding the same as collateral for the debts of a third person did not, as respects himself and the party placing it in his hands, necessarily operate as a payment of the debt for which it was thus pledged. Such foreclosure was only one step in the process required to render available the pledge. The property, as well after foreclosure as before, was equally held in trust for the benefit of both pledgor and pledgee, and was to be disposed of for the benefit of all parties. On the one hand, the assignee who held the same as col-

Digitized by Google

lateral security was not, in consequence of the foreclosure, required to take the land in payment, if he was ready and willing to proceed to reduce the same to cash by a fair and proper sale of the same; nor, on the other hand, would he be permitted to retain the same in his own right exclusively, regardless of what would be for the interest of the assignor. The property was holden in trust, first, to pay the debt for which it was pledged, and after enough had been realized to pay this debt, the bank was to hold the surplus for the benefit of Mrs. Kinsley. It continued thus to be holden after the foreclosure. The foreclosure of the mortgage of Gardner was no more a payment of the debt of the defendants to the bank than the assignment of the mortgage. The payment by Mrs. Kinsley is to be computed from the time the assets pledged to the bank were made available. This was at a later period than that of the foreclosure, and so much later as to take the case out of the operation of the statute of limitations as a bar, upon the facts stated in the report of the case.

New trial ordered.

DEBT FOR WHICH MORTGAGE IS PLEDGED AS COLLATERAL SECURITY IS NOT PAID by the foreclosure of the mortgage, but by the conversion into money by the subsequent sale: *Whipple* v. *Blackington*, 97 Mass. 478, citing the principal case. Where a mortgage is given as collateral security, upon its foreclosure the land is substituted for the note and mortgage as collateral security: *Montague* v. *Boston & A. R. R.*, 124 Id. 245, citing the principal case. And in that case the land in the hands of the pledgee is affected by a trust to convert it into money, and after payment of the debt to pay the remaining proceeds to the party entitled to it: *Stevens* v. *Dedham Institution for Savings*, 129 Id. 549, also citing the principal case.

PLEDGEE'S POWER TO SELL PLEDGE: See *Wilson* v. *Little*, 51 Am. Dec. 307, note 314, where other cases are collected. The pledgee of a collateral security may, upon giving notice to the pledgor, sell the security and apply the proceeds to the payment of the debt: *Hancock* v. *Franklin Ins. Co.*, 114 Mass. 156, citing the principal case.

SHEPHERD v. YOUNG.

[8 GRAY, 152.]

WHERE WIDOW FURNISHES BOARD TO DESTITUTE INFANT GRANDCHILD, AS GRATUITY, from motives of affection and kindness, without any expectation of remuneration or intention of charging therefor, she cannot, after the child's death, maintain an action for the price of such board against the administrator of the child, even though he has expressly promised to pay it.

PROMISE BY ADMINISTRATOR TO PAY CLAIM NOT VALID as against his intestate's estate does not bind the assets in his hands as administrator.

Digitized by Google

ACTION on contract. The parties submitted the case on the following facts: Julia Anderson, the defendant's intestate, with her mother, having been deserted by their father and husband in 1850, went to reside with the plaintiff, who was her grandmother. The child and her mother lived with and were in part supported by the plaintiff until 1852. In 1853 the child was killed by an accident on the New York and New Haven railroad, and the company subsequently paid to the defendant, as her administrator, the sum of two thousand five hundred dollars damages. After he received this money he told the plaintiff that her claim was an honest one, and that he would see that it was paid.

F. W. Sawyer, for the plaintiff.

I. J. Austin, for the defendant.

By Court, BIGELOW, J. The facts in this case do not show any valid debt by the infant's intestate to the plaintiff. The board of the child was clearly a gratuity, furnished from motives of affection and kindness by the plaintiff, without any expectation of remuneration, or intent to make a claim in the nature of a debt. There is therefore nothing on which an implied contract can rest to charge the assets of the intestate in the lands of the defendant: *Osborn* v. *Governors of Guy's Hospital*, 2 Stra. 728; *Pelly* v. *Rawlins*, Peake's Ad. Cas. 226; *Dearborn* v. *Brownson*, 3 Met. 155; *McGilvery* v. *Capen*, 7 Gray, 524, 525.

Nor can the plaintiff maintain her action against the defendant as administrator, to charge assets in his hands on the express promise of the defendant. It was wholly without consideration and void, as *nudum pactum*. Besides, it was not competent for the defendant, by his promise, to bind the assets in his hands as administrator, to pay a claim which was not valid as against the estate of his intestate: *Washburn* v. *Hale*, 10 Pick. 431; *Ripley* v. *Sampson*, Id. 373.

Judgment for the defendant.

POWER OF ADMINISTRATOR TO CHARGE HIS INTESTATE'S ESTATE by promise to pay debt barred by the statute of limitations: See *Moore* v. *Hillebrant*, 65 Am. Dec. 118, note 120, where other cases are collected. An administrator of an estate cannot bind it by his warranty, or render it responsible in damages for frauds or torts committed by him: *Able* v. *Chandler*, 62 Id. 518, note 520, where other cases are collected.

Digitized by Google

SWAIN v. MIZNER.

[8 GRAY, 182.]

OFFICER CANNOT BREAK OUTER DOOR OF DWELLING-HOUSE in order to execute civil process.

WHERE BUILDING IS LEASED IN DISTINCT PORTIONS to several tenants, all of whom have the right to use the outer door of the building and the hallways in common, the doors leading from the hallways into a tenement in the sole and exclusive possession of a tenant are to be regarded as outer doors which an officer has no right to break open in order to serve civil process.

ACTION of tort for breaking and entering the plaintiff's dwelling-house. The defendant was a constable of Boston and broke open the door of the tenement described in the opinion, for the purpose of attaching goods belonging to a person against whom he held a writ. At the trial the judge instructed the jury "that if the plaintiff had proved to their reasonable satisfaction that he had the rightful and exclusive control and possession of a portion of the house, and had also forbidden and endeavored to prevent the entrance of the defendant, then the defendant would have no right violently to break and enter against the plaintiff's will, although he was an officer and had legal process which he was endeavoring to serve, and although he had, without the knowledge of the plaintiff, and without breaking, got an entrance into the outer door of this common house and building." The jury found for the plaintiff, and the defendant alleged exceptions.

J. F. Clarke, for the defendant.

W. W. Winthrop, for the plaintiff.

By Court, MERRICK, J. That an officer cannot break the outer door of a dwelling-house to make an attachment of the owner's goods, or to arrest the person of the debtor, or to execute civil process generally, is a doctrine as well established as any in the books; and has been distinctly recognized as the law of this commonwealth: *Semayne* v. *Gresham*, Yelv., Am. ed., 29, and note 1; *Oystead* v. *Shed*, 13 Mass. 520 [7 Am. Dec. 172]; *Ilsley* v. *Nichols*, 12 Pick. 270 [22 Am. Dec. 425]. This is not controverted by the defendant; nor does he place his defense upon anything in opposition to this principle, but solely upon a denial of the fact that the door which was broken by him, in order to make the attachment which constitutes the grievance complained of, was the outer door of the plaintiff's dwelling-house.

But upon the facts disclosed in the bill of exceptions, we think that the portion of the building occupied by the plaintiff,

Digitized by Google

distinct from the hall, entry, and stairway leading to it, did constitute what must be considered in law his dwelling-house. The whole structure appears never to have been designed as a tenement for a single family, but was so constructed as to afford separate and distinct habitations for several persons. Thus the plaintiff occupied all the rooms on one floor of the building, and the hall or entry through which he passed to reach either of the doors opening into any of the apartments occupied by him was used as a common passage-way for all the tenants of the several portions of it. It would seem to make no difference, whatever may be the character or peculiarity of the common passage by which access to a dwelling-house is attained: whether it is a public or a private way; or whether it leads from one street to another, or only into a place or court to which there is but a single entrance; or whether it is an open street or a way inclosed by buildings and covered with a roof. In the present instance the hall, entry, and stairway served as a common and public passage-way for many occupants of entirely distinct habitations. All the right to which the plaintiff or any other of the tenants of the different parts of the building in this common passage-way was entitled was the right of using it for that purpose in the enjoyment of the tenements which they severally possessed.

The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and his family. He had the sole and exclusive use and possession of them as completely as if they stood separate and apart from everything else, and were in any other distinct structure. The privilege which the law allows to a man's habitation clearly ought to attach to apartments so situated. It arises from the great regard which the law has for every man's safety and quiet; and therefore it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect: Bac. Abr., tit. Sheriff, note 3. And this reason shows that the principle of law which gives protection to dwelling-houses has no reference whatever to their quality, construction, or magnitude, but is solely for the purpose of insuring the quiet, convenience, and security of those who inhabit and dwell in them. Domestic security and peace would be equally disturbed by violence in breaking the doors and forcing an entrance into a dwelling-house, whether it should consist of the entire portions of a building or of separate and distinct apartments within it.

Nor can the fact that there were several doors leading from

Digitized by Google

the common passage-way into the different apartments occupied by the plaintiff lead to a different conclusion. For although it was said by Lord Mansfield, in *Lee* v. *Gansel*, Cowp. 1, that the having of four outer doors would lead to the grossest absurdity, since the greatest house in London has but one, that is not the manner in which, according to our prevailing habits and modes of living, our dwelling-houses are here constructed. Many might undoubtedly be found here having four, and it would perhaps be difficult to find a house of any moderate degree of pretension which has less than two, outer doors. While all the doors opening into any of the apartments occupied by the plaintiff are closed, each of them may be considered, and must be treated, as an outer door. They are all necessary to protect the habitation from the intrusion of those who have no license to enter it. Whether an officer, who had lawfully passed through one of them, might afterwards, for the purpose of completing the service of his process, treat the others as inner doors, need not now be considered, because no such question arises upon the facts reported. The complaint against the defendant is confined to the breaking open of one of the doors before he had obtained an entrance into any part of that portion of the building which was in exclusive occupation of the plaintiff.

The defendant contends that the door constructed and used for closing the entrance from the street or public highway into the common hall or entry of the building is to be considered the only outer door of the plaintiff's dwelling-house; that is to say, that his house consisted of the apartments occupied by him and of the hall and entry used by him as a passage-way in common with the tenants of all the other parts of the building. But this latter fact is by no means shown. On the contrary, these appear to have constituted no part of his tenement. He had an easement in them only in common with others, who all equally enjoyed the like privilege for the purpose of gaining access to their respective tenements.

Reliance is placed with much confidence by the defendant on the case of *Lee* v. *Gansel*, Cowp. 1, above cited, as a decisive authority against the position of the plaintiff, that the apartments in the building in which the alleged trespass was committed constituted his dwelling-house. But the facts in the two cases are quite dissimilar, and therefore the same conclusion is not necessarily to be deduced from each of them. From the statement of facts in the former case, it appears that General Gansel was a mere lodger in hired apartments in the house of Mayo,

Digitized by Google

who was at the same time dwelling in it; that the apartments thus hired were in no way connected together, but were upon different floors; and that he had only a right in the kitchen, which clearly imports that he had no exclusive possession of the premises of which, to a certain extent, he had the use and enjoyment. But this plaintiff was a housekeeper, and not a lodger only. He was tenant of the apartments which he occupied; they were all on the same floor, and substantially connected together as a single tenant; he had the sole and exclusive possession of them; and in conducting and maintaining his domestic establishment, he had no connection with or dependence upon the owner or the occupant of any other part of the building in which he resided. His tenancy resembles that of the occupants of chambers in the inns or court, and in colleges, opening upon a common staircase, which are conceded to be the dwelling-houses of those who live in them. But further than this, it is distinctly stated by Lord Mansfield that if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each tenement, they will be separate houses.

But without enlarging upon these considerations, or seeking for any peculiar principles upon which the plaintiff's action may be maintained, we think it is clear that upon the precise facts stated in the bill of exceptions, the apartments in the building embracing all the rooms on one of its floors, which were hired by the plaintiff and occupied by him with his family as a separate and distinct tenement, constituted, while he was in such possession and use of them, his dwelling-house; and that it was therefore entitled to the privilege and protection which the law affords to the habitations of men.

Exceptions overruled.

RIGHT OF OFFICER TO BREAK DOORS TO EXECUTE PROCESS: See *Barnard v. Bartlett*, 57 Am. Dec. 123, note 124; *Howe* v. *Butterfield*, 50 Id. 785, note 788; *Burton* v. *Wilkinson*, 46 Id. 145; *Curtis* v. *Hubbard*, 40 Id. 292; *People* v. *Hubbard*, 35 Id. 628, note 632, where other cases are collected; *Keith* v. *Johnson*, 25 Id. 167, note 171, where this subject is considered. A party who forcibly breaks open the door of a house without leave of the owner, for the purpose of taking away his property, is liable in trespass: *Nelson* v. *Garey*, 114 Mass. 419, citing the principal case.

THE PRINCIPAL CASE IS CITED in *White* v. *Maynard*, 111 Mass. 254, to the point that an entire floor, or a series of rooms, or even a single room, may be let for lodgings so separated from the rest of the house as to become in fact and in law the separate tenement of the lessee.

Digitized by Google

SHEPHERD v. CHAMBERLAIN.

[8 GRAY, 225.]

DEMAND OF PAYMENT OF NOTE PAYABLE AT PARTICULAR BANK, made at that bank after close of business hours, but to which the officers of the bank answer that the maker has no funds there, is sufficient to charge the indorser.

ACTION on contract against the indorser of a promissory note payable at the Merchants' Bank in Boston. Answer, want of demand and notice. The jury found for the plaintiff, and the defendant excepted.

F. W. Sawyer, for the defendant.

H. L. Hazelton, for the plaintiff.

By Court, SHAW, C. J. The single question in this case is, whether due demand was made on the promisor by the notary public. We consider the evidence that the hours of business at the banks in Boston usually ended at two o'clock for some purposes, including paying checks, immaterial. Whatever was the custom of the bank about closing business, it was open when the notary went, and officers were there competent to answer, and their answer was competent to show that the promisor had no funds there for the purpose of paying the note demanded; this was a default and dishonor of the note, upon which notice could properly be given, and was given, to the indorsers.

Exceptions overruled.

DEMAND ON NOTE PAYABLE AT PARTICULAR BANK must, as a general rule, be made in banking hours. But a demand after banking hours is in some cases sufficient: See *Harrison* v. *Crowder*, 45 Am. Dec. 290, note 293, where prior cases are collected.

COMMONWEALTH v. TIVNON.

[8 GRAY, 375.]

POSSESSION OF BURGLARIOUS IMPLEMENTS WITH GUILTY INTENT MAY BE JOINT as well as several; and where the guilty intent of several is manifested by their joint act it becomes a joint offense. In such cases, all who join in the commission of the act may be indicted either jointly or separately.

INDICTMENT AGAINST TWO, ALLEGING THAT THEY HAD IN THEIR POSSESSION, on a certain day, certain implements designed and adapted for forcing and breaking open buildings, safes, trunks, and vaults, sufficiently sets forth a joint possession and charges a joint offense in apt words, under the Massachusetts statute of 1853, chapter 194. Under this allegation, it is competent to prove the commission of one offense by both defendants on any day after the statute took effect and before the indictment was found.

Digitized by Google

INDICTMENT CHARGING POSSESSION OF BURGLARIOUS IMPLEMENTS WITH INTENT TO USE THEM for the purpose of breaking and entering a building, or other depository of money or goods, in order to steal therefrom, need not allege an intent to use them in a particular place, or for a special purpose, or in any definite manner; it is sufficient to allege a general intent.

PROOF THAT SOME OF IMPLEMENTS DESCRIBED IN INDICTMENT, under Massachusetts statute of 1853, chapter 194, were in the possession of the defendant, and designed and adapted to effect the objects charged in the indictment, is sufficient.

IT IS NOT NECESSARY TO PROVE THAT IMPLEMENTS WERE ORIGINALLY INTENDED FOR UNLAWFUL USE in order to sustain an indictment under the Massachusetts statute of 1853, chapter 194. It is sufficient if they are suitable for the purpose charged.

WHEN COMMON DESIGN OR ENTERPRISE BETWEEN TWO DEFENDANTS is first proved, declarations of one of them in relation to the joint undertaking are admissible against both.

PROOF OF MERE POSSESSION OF BURGLARIOUS IMPLEMENTS BY ONE DEFENDANT, where two defendants intend to use them in a joint undertaking, is not sufficient to sustain an indictment under the Massachusetts statute of 1853, chapter 194, as against the defendant whose possession of the implements is not proved.

INDICTMENT against Hugh Tivnon and James Johnson for having in their possession certain implements designed and adapted for forcing and breaking open buildings, safes, trunks, and vaults, in order to feloniously steal from them. The facts sufficiently appear from the opinion.

J. H. Bradley, for the defendant.

J. H. Clifford, attorney-general, for the commonwealth.

By Court, BIGELOW, J. 1. There is nothing in the nature of the offense with which the defendants stand charged which renders it several, so that it cannot be committed in concert by two or more persons. It does not resemble perjury and other similar crimes, which must necessarily be the distinct act of one individual, in the commission of which another cannot join; but, like most criminal acts, it may well be the joint act of two or more. The possession of burglarious implements with a guilty intent is the gist of the offense set out in the indictment. Such possession may be joint as well as several; and where the guilty intent of several is manifested by their joint act, it becomes a joint offense. In such cases, by the well-settled rule of criminal pleading, all who join in the commission of the act may be indicted either jointly or separately: 2 Hale P. C. 173; *Regina* v. *Atkinson*, 1 Salk. 382. The offense charged in the present case is analogous to that of having in possession counterfeit coin with a guilty intent, of which two or more persons

Digitized by Google

acting in concert may be jointly indicted: *Regina* v. *Rogers*, 2 Moo. 85; *Regina* v. *Williams*, Car. & M. 259. The allegation in the indictment sufficiently sets forth that the tools or implements were in the possession of both the defendants, and charges a joint offense in apt words and according to the precedents.

2. As the offense charged in the indictment was one into which time did not enter as an essential ingredient, it was sufficient to allege it on any day after the passing of the statute of 1853, chapter 194, which created the offense, and before the finding of the indictment. Under this allegation, it was competent to prove the commission of one offense by both defendants on any day after the statute took effect, and before the indictment was found: Archb. Crim. Pl., 5th Am. ed., 40, 41.

3. The gist of the offense being the possession of the burglarious implements with an intent to use them for the purpose of breaking and entering a shop, building, safe, or other depository of money or goods, in order to steal therefrom, it was sufficient to allege such possession with the guilty intent, without further specific averment. The offense was complete when the tools were procured with a design to use them for a burglarious purpose. A general intent was sufficient. It was not necessary to allege or prove an intent to use them in a particular place, or for a special purpose, or in any definite manner. In this respect the offense charged is similar to that of having in possession counterfeit bills with intent to utter them as true. It is never necessary to aver or prove the time, place, or manner in which the bills were intended to be uttered: Archb. Crim. Pl. 513.

4. The indictment properly charges that all the instruments or tools named therein were adopted and designed for the unlawful purposes specified. But it was not necessary to prove either that the defendants were possessed of all the implements described, or that all of them were designed or adapted to effect the objects charged in the indictment. The offense was the same, and the like punishment was prescribed, whether the defendants were found guilty of having in their possession, with an unlawful intent, any one or all of the implements specified. The number of articles alleged was therefore wholly immaterial. It was no variance if only one of them was proved to have been in the possession of the defendants as charged, and such proof was sufficient to constitute the entire offense set out in the indictment: Archb. Crim. Pl. 49.

Digitized by Google

5. Nor do we think it necessary, in order to create the offense which the statute is designed to punish, that it should appear that the tools or implements were originally made or intended for an unlawful use. If they are suitable for the purpose, so that they can be used to break and enter burglariously, it is wholly immaterial that they were also designed and adapted for honest and lawful uses. A chisel or center-bit, though a tool in common use for ordinary purposes, is quite as efficacious in the hands of a burglar, to carry out his felonious intent, as a jimmy or a lock-picker, which is made for the sole purpose of being used to break and enter buildings.

6. A common design or enterprise between the defendants being first proved, it was clearly competent to admit the declarations of one of them, in relation to the joint undertaking to affect both. This rule is not confined to cases where a conspiracy is charged, but it is applicable wherever a combination to effect a particular object is established. It rests on the principle that each is agent for the other in all matters relating to the common object, and the acts and declarations of one in furtherance of such object are admissible to effect the principal as well as the agent: 1 Greenl. Ev., sec. 111, and cases cited.

7. We have no doubt that proof of possession by the defendants of any of the implements named in the indictment, either actual or constructive, would be sufficient evidence to warrant a conviction if accompanied by the guilty intent. But what is meant by constructive possession? It would be proved by evidence that the implements were held by one for himself and as agent for another; that they were jointly bought and owned, but kept by one only, or procured and held by one by mutual agreement, or at the request of another; or that they were deposited in some place mutually agreed on, to which either could resort at pleasure. These and other instances which might be stated would constitute constructive possession.

But the instruction given to the jury in the present case on this point went further. It not only authorized the jury to convict the defendants on proof of a constructive possession, but it warranted a conviction of both, although there was evidence of possession, either actual or constructive, by one only. The instruction was, that the possession of one, both intending to use them in a joint undertaking, was the possession of both. The error in this proposition is that it makes the guilty intent, without possession, the sole ingredient in the offense; whereas the statute punishes such intent only when it is connected with

Digitized by Google

possession of the burglarious implements. Under the instruction given to the jury, a person might be convicted on proof that he intended to unite in a joint undertaking or enterprise to commit a burglary before any tools or implements were obtained for the purpose, although when they were subsequently procured and in the possession of his associate in order to carry out the preconcerted design he had abandoned his unlawful intent, and had then determined not to use the implements for the purpose for which they were obtained. We are therefore of opinion that there was a misdirection on this point, and that there must be a new trial.

Exceptions sustained.

AFTER PROOF OF COMBINATION BETWEEN PARTIES the acts or declarations of one are evidence against the others: See *State* v. *Johnson*, 65 Am. Dec. 383, note 386, where other cases are collected.

COMMONWEALTH *v.* TOLLIVER.

[8 GRAY, 386.]

IN PROSECUTIONS FOR ASSAULT, IT IS UNNECESSARY TO PROVE PLACE of committing the offense precisely as it is alleged in the indictment. An indictment for an assault in one town is supported by proof of an assault in another town in the same county, and within the jurisdiction of the court.

INDICTMENT for an assault at Boston. At the trial, evidence of an assault at Chelsea was admitted over the defendant's objection. The other facts are stated in the opinion.

S. D. Parker, for the defendant.

J. H. Clifford, attorney-general, for the commonwealth.

By Court, DEWEY, J. In criminal prosecutions of a character like the present, it is unnecessary to prove the place of committing the offense to be precisely in accordance with the allegation in the indictment. Place is immaterial, unless when it is matter of local description, if the offense be shown to have been committed within the county. All that is necessary to be shown is that the offense was committed at any place within the county: 2 Hawk. P. C., c. 25, sec. 84; 2 Russell on Crimes, 7th Am. ed., 799; 1 Archb. Crim. Pl., 5th Am. ed., 99. It was no objection, therefore, to the competency of the evidence offered that it tended to prove an assault committed in Chelsea, while the indictment alleged the same to have been committed at Boston, both places being within the county of Suffolk, and equal-

Digitized by Google

within the jurisdiction. This rule has been so long recognized and acted upon that the case presents no new or doubtful question to be solved.

Exceptions overruled.

LOCAL. OFFENSE MUST BE DESCRIBED AS COMMITTED IN PARTICULAR TOWN: *State* v. *Nixon*, 46 Am. Dec. 135. The venue must be laid in the county in which the offense was committed.

OFFENSE NOT LOCAL IN ITS NATURE, though charged to have been committed in a particular town, may be proved to have been committed anywhere within the county: *Commonwealth* v. *Creed*, 8 Gray, 389; *Commonwealth* v. *Heffron*, 102 Mass. 150; *Carlisle* v. *State*, 32 Ind. 58, all citing the principal case. Simple larceny is an offense not local in its nature, and the particular place where it was committed is immaterial if it is in the county alleged: *Commonwealth* v. *Lavery*, 101 Mass. 208, citing the principal case.

WARNER *v.* BACON.

[8 GRAY, 397.]

SPECIAL DAMAGES NOT IMPLIED BY LAW AS NECESSARY CONSEQUENCES OF BREACH OF AGREEMENT to convey real estate cannot be recovered in an action for such breach unless they are alleged in the declaration.

DAMAGES SUSTAINED AFTER ACTION BROUGHT FOR BREACH OF AGREEMENT to convey real estate, by reason of the withholding thereof from the plaintiff, cannot be given in evidence in that action, but may be recovered in a subsequent action.

PLAINTIFF CANNOT, IN ACTION FOR BREACH OF AGREEMENT TO CONVEY REAL ESTATE, RECOVER EXPENSES incurred by him in erecting a building on his other land by reason of his not obtaining a right to put thereon a similar building standing upon the land agreed to be conveyed. That ground of damage is too remote, not being a proximate consequence of the breach of the agreement.

WHERE ONE OF TWO PARTIES TO AGREEMENT FOR EXCHANGE OF LANDS EXECUTES HIS CONVEYANCE, and the other then refuses, but afterwards executes his conveyance also, which is accepted, such acceptance is a bar to an action by the first grantor for the rent of the land granted by him between the dates of the two conveyances.

WHERE PARTY TO AGREEMENT TO CONVEY REAL ESTATE HAS BROUGHT ONE ACTION for damages for the breach of the agreement, he may, in a subsequent action on the same agreement brought after a conveyance has been made and accepted, recover the legal damages sustained by him between the time when the former action was commenced and the time when the conveyance was made to him, by reason of his not having, during that interval, a full title to the estate; and he may also, in such action, recover the amount of the rent which was accruing during that time, and which the defendant received. But in such action evidence that the defendant was induced to make the agreement by the false and fraudulent representations of the plaintiff cannot be admitted either by way of bar, set-off, or recoupment.

Digitized by Google

Two actions of contract upon a written agreement between Samuel Bacon and Levi B. Warner for the sale by the former to the latter of land in Egremont, with a house and barn thereon, and including a wood-lot, for a part of the price of which he was to receive a house and lot in Brooklyn, and the residue in certain stock and a note. In December, 1854, Warner performed his part of the agreement, and Bacon accepted the deed and stock, or retained them in his possession, but refused and neglected to make or deliver a deed of his land in Egremont to Warner. On the twenty-eighth of January, 1855, Warner brought the first action on the agreement, alleging performance on his part, and Bacon's neglect and refusal, but not alleging any special damage. On the eleventh of May, 1855, the defendant executed the deed of the Egremont property, and tendered it to the plaintiff, who accepted it, and took possession of the property. At the June term, 1855, the defendant filed his answer, denying the agreement and the plaintiff's performance. At the June term, 1856, the defendant filed a supplemental answer, alleging the defendant's tender and the plaintiff's acceptance of the deed of the Egremont property, and the plaintiff's subsequent possession under it. A trial was then had, and a bill of exceptions signed. In this the plaintiff contended that he was entitled to recover from the defendant all such damages as he had actually sustained by the breach of the contract by the defendant; that in addition to the damages sustained by him prior to the date of the writ he was entitled to recover all damages that accrued to him between the date of the writ and the eleventh of May, 1855, when the tender was made. The plaintiff offered to prove, as matter of damages: 1. That the defendant forbade his having anything done to or with the Egremont property, and refused to allow him to remove a barn from said property to other land of the plaintiff; 2. That the plaintiff, about the first of April, 1855, made excavations and got out stone to build a barn on his other land; 3. That the defendant received rent on the Brooklyn property before the first of April, 1855; 4. That rent was received by the defendant, subsequently to the first of April, on the Egremont property. The jury found for the plaintiff, and assessed the damages at sixteen dollars. The plaintiff excepted. The other facts are stated in the opinion.

C. N. Emerson, for the plaintiff.

J. Price, for the defendant.

Digitized by Google

By Court, METCALF, J. The judge rightly excluded evidence of the four matters of damage which the plaintiff offered to prove. Without inquiring whether they would, under any form of declaration, have been legal grounds of damage, it is sufficient for the decision of this case that they were not the necessary consequences of the defendant's breach of agreement, which are implied by law, and were not alleged in the declaration. Nor were they consequences which (in the language sometimes used by judges) "in all probability" might follow, or would be "very likely to follow," from that breach: See *Richardson* v. *Mellish*, 2 Bing. 239; *Goslin* v. *Corry*, 7 Man. & Gr. 346; *Ferrer* v. *Beale*, 1 Ld. Raym. 692; 1 Ch. Pl., 6th Am. ed., 370, 441; 2 Greenl. Ev., sec. 254. "Mere collateral damage," says Holroyd, J., "must be stated in the declaration in order to entitle the plaintiff to give it in evidence, lest otherwise the defendant might be taken by surprise:" *Batley* v. *Faulkner*, 3 Barn. & Ald. 294. And this rule of the common law is not changed by the practice act of 1852, chapter 312: *Baldwin* v. *Western Railroad*, 4 Gray, 336.

The judge also ruled that the plaintiff "was to be limited to such damages as he had sustained up to the date of his writ." And this is the general rule of law: *Pilford's Case*, 10 Co. 117; Com. Dig., tit. Damages, D; *Pierce* v. *Woodward*, 6 Pick. 206. There are, however, exceptions to the rule. And the question now is, whether the damage sustained by the plaintiff after the date of his writ, from the defendant's omission to convey to him the Egremont estate, is within the rule, or is an exception to it. There is a compilation of most of the decisions on this subject in Sedgwick on Damages, c. 3, and Mayne on Damages, 33–38. In the latter book it is said that "damages arising subsequent to action brought, or even to the date of verdict, may be taken into consideration when they are the natural and necessary result of the act complained of; and where they do not themselves constitute a new cause of action." "On the other hand, where the damages subsequent to the commencement of the action are not the necessary result of the alleged wrong, or where they might be the foundation of a fresh action, they cannot be included in the verdict of the jury." The application of these rules to particular cases, like the application of other rules of law which seem very plain, is often very difficult. We find no adjudged case which, if we were to regard it as a binding authority, would be decisive of the case at bar.

Our judgment is, that the continued withholding of a convey-

Digitized by Google

ance of the Egremont estate, after the twenty-eighth of January (the date of the writ) till the eleventh of May, when the conveyance was made, is not a damage recoverable in this action. We think the case is more analogous to those in which damage sustained after action brought has been held not to be recoverable than to those in which it has been held that it may be recovered.

In *Hambleton* v. *Veere*, 2 Saund., pt. 2, 169, the declaration was for the defendant's procuring the plaintiff's apprentice to depart from his service, and for loss of that service for the residue (four years) of the term of apprenticeship. Judgment was arrested, because the jury assessed damages generally, as declared for; the court saying the plaintiff "ought to have recovered damages for the loss of service until the exhibiting of the bill only, and no more." See other like cases in the notes by Williams and others to the principal case, and also the opinion of Battle, J., in *Moore* v. *Love*, 3 Jones L. 215. In *Powers* v. *Ware*, 4 Pick. 106, which was an action of covenant on an indenture of apprenticeship, brought before the expiration of the apprenticeship for not maintaining the apprentice, it was decided that damages could be recovered only to the date of the writ. The reason given was, "for aught we know, the defendant may be ready to perform his covenant in future." And it was said by Littledale, J., that, "in the case in Saunders, the future damage could not be assessed, inasmuch as the apprentice might return:" *Hodsoll* v. *Stallebrass*, 3 Per. & Dav. 203. These reasons seem as applicable to this case as to those.

The same rule of damages is applied to actions for an obstruction, which may be temporary, of a stream of water, of a way, or of light and air: *Duncan* v. *Markley*, Harp. 276; *Cole* v. *Sprowl*, 35 Me. 161 [56 Am. Dec. 696]; *Blunt* v. *McCormick*, 3 Denio, 283. But if the obstruction be permanent, so that the plaintiff can no more have the flow of a stream, or the enjoyment of a way, or light or air, then all the damages which he sustains from the destruction of his rights are recoverable: *Troy* v. *Cheshire Railroad*, 23 N. H. 83 [55 Am. Dec. 177]. And if this defendant had conveyed the estate to a third person, before this action was brought, and thus made himself unable to convey it afterwards, the plaintiff would have been entitled to all the damages sustained by the loss of the estate. But the facts of the case show only a temporary withholding of the plaintiff's rights, for which, as in the cases above cited, damages have been held recoverable only to the time of action commenced.

Digitized by Google

It might have been wise in the defendant if he had not objected to the recovery of damage sustained by the plaintiff between the date of his writ and the day when the conveyance was made. In *Goslin* v. *Corry*, 7 Man. & Gr. 345, where a defendant, on the trial of an action for a libel, permitted evidence to be given of damage caused after action brought, Tindal, C. J., said: "By permitting this evidence to be given, the defendant may possibly have escaped a second action brought against him. It was therefore far from an impolitic thing to allow damages to be assessed for the whole cause of complaint in one action."

Exceptions overruled.

The plaintiff then brought a second action to recover the special damages which accrued to him between the date of the first writ and the eleventh of May, 1855, and set forth the same breach, but alleged specially the four items of damage which he attempted to prove at the first trial. The defendant alleged in his answer: 1. The former judgment; 2. Performance of the agreement; 3. That the defendant was induced to make the agreement by the false and fraudulent representations of the plaintiff as to the value and condition of the estate in Brooklyn; 4. A denial of the alleged items of damage. The parties submitted the case on a statement of the facts, admitting "that the plaintiff suffered some injury by the defendant's said breach of the contract, which was not recovered and was not admitted to be proved in the first action." The case was argued by the same counsel.

METCALF, J. If the damages now sued for could have been recovered in the former action, they cannot be recovered in this. But it does not follow, as of course, that they can be recovered now because they were allowed to be recovered then. A plaintiff may fail to recover all the damages he is entitled to by not so framing his declaration as to cover them all, or by not so managing his case as to bring the full damages to the consideration of the court or the jury. What he thus loses is lost by his own fault. Or a plaintiff may, by the erroneous exclusion of evidence, be deprived of a part of his legal damages. What he thus loses is lost by the error of the court; yet his remedy is not a new action for the recovery of what he was not before permitted to recover, but a new trial of the first action on a setting aside of the verdict for such wrong exclusion of evidence. This plaintiff first attempted that course; and if the evidence

Digitized by Google

had not been rightly excluded in the former case, a new trial would have been ordered.

The damages now demanded are those only which the plaintiff sustained, if at all, after the commencement of the former action. For all previous damages he has recovered, or might have recovered, in that action, his full legal recompense. The declaration in this case sets forth four grounds of damage: 1. The plaintiff's deprivation after the first action was brought and until the Egremont estate was conveyed to him, of the benefit and advantage which he would have enjoyed from the full title to it during that interval; 2. The expenses incurred by him in preparing to build a barn on his other land, by reason of his not obtaining a legal right to place thereon a barn that was on the land which the defendant had agreed to convey to him; 3. His loss of the use, improvement, and income of the estate in Brooklyn which he conveyed to the defendant; 4. The loss of the rents of the estate that was to be conveyed to him; the defendant having collected them.

The second and third grounds of the plaintiff's claim are easily disposed of. He has no legal cause of action for either; and would not have been entitled to damages for the second, even if the defendant had never conveyed the estate to him. That ground of damage is too remote, not being a proximate consequence of the defendant's breach of agreement: *Sibley* v. *Hoar*, 4 Gray, 222; *Blood* v. *Nashua & Lowell Railroad*, 2 Id. 137 [61 Am. Dec. 444]; *Waite* v. *Gilbert*, 10 Cush. 177; 2 Greenl. Ev., sec. 256. The third ground is to be regarded precisely as if the plaintiff had paid money as the consideration for the stipulated conveyance, instead of transferring property as the consideration therefor, and as if he were now seeking, as damages, the loss of the use of the money up to the day when the conveyance was made to him and accepted by him. If that conveyance had not been made and accepted, the plaintiff would have been entitled, in the former action, to recover the amount of the consideration which he had advanced, and interest thereon, if it had been money, or an equivalent for interest, as the facts were. But the claim to recover back the consideration was extinguished by the acceptance of the conveyance after action brought; and the principal being in effect paid, no legal claim to the interest, or to its equivalent, longer exists: *Gage* v. *Gannett*, 11 Mass. 217; *Dixon* v. *Parkes*, 1 Esp. 110; *Tillotson* v. *Preston*, 3 Johns. 229.

The question on the first and fourth grounds of the plaintiff's present claim is, whether they constitute a new cause of action.

Digitized by Google

or are only new damages resulting from the original cause of action. A fresh action cannot be brought unless there be both a new unlawful act and fresh damage: *Howell* v. *Young*, 5 Barn. & Cress. 267; *Hodsoll* v. *Stallebrass*, 11 Ad. & El. 306; S. C., 3 Per. & Dav. 203; *Adm'r of Whitney* v. *Clarendon*, 18 Vt. 258. The application of this doctrine is not always easy, and perhaps has not always been rightly or consistently made.

In actions for injury to the person of the plaintiff or his servant, by battery, or by accident on a highway or railroad, etc., it is the settled law that damages may be given for all that the plaintiff may suffer in future from the injury. The jury are to estimate, as well as they may from the evidence before them, all the loss and damage which the plaintiff has sustained or will sustain. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effect of the original injury: *Fetter* v. *Beal*, 1 Ld. Raym. 339; *Ferrer* v. *Beale*, 692; S. C., *sub nom. Fitter* v. *Veal*, 12 Mod. 542; *Fetter* v. *Beale*, 1 Salk. 11; *Black* v. *Carrollton Railroad*, 10 La. Ann. 33 [63 Am. Dec. 586]; *Curtiss* v. *Rochester & Syracuse Railroad*, 20 Barb. 282; *Hodsoll* v. *Stallebrass*, *supra*. And, as was stated in the opinion in the former case, the law is the same when one is deprived of the enjoyment of a right to the flow of a stream of water, etc., by a permanent obstruction. But we suppose the law to be different in that class of cases to which we then deemed and now deem this to be more analogous. Plain justice requires that a plaintiff should have a remedy for all the legal damage he sustains from a tort or breach of contract; and that if, by reason of some rule of law, and without any fault or mistake of his, he can recover only part of that damage in one action, he should be entitled to recover the rest in another. But, as special damage—that is, damage which is not the necessary consequence of the wrong complained of—cannot be recovered unless it is alleged in the declaration, it follows that such damage, sustained after an action has been brought, cannot be recovered at all, unless in a new action, inasmuch as it cannot be alleged and proved before it exists. And in cases of nuisance, where damages after action brought are held not to be recoverable, it is also held that a new action may be maintained for a subsequent continuance of the nuisance; every continuance thereof being a new injury, and not merely a new damage: *Fitter* v. *Veal*, 12 Mod. 544; Com. Dig., tit. Action upon the Case for a Nuisance, B; see also *Holmes* v. *Wilson*, 10 Ad. & El. 503. So where damages only to the time of action

Digitized by Google

brought are allowed to be recovered for the enticing away and detention of apprentices, or for not maintaining them according to contract, we hold that, for a subsequent detention or refusal to maintain, during the continuance of the apprenticeship, a new action may be supported. In *Horn* v. *Chandler*, 1 Mod. 271, the action was against an apprentice who had bound himself to the plaintiff for seven years; and the declaration alleged that the defendant went away from the plaintiff's service, "*per quod* he lost his service for the said term, which term is not yet expired." On demurrer, it was held that though declaring for the loss of the unexpired term was "naught after verdict," yet upon demurrer the plaintiff might take damages for the departure only, and not for the loss of service during the term. Speaking of that case, Littledale, J., said: "There a fresh cause of action arose every day:" *Hodsoll* v. *Stallebrass*, 11 Ad. & El. 304. The same is equally true of the actions above mentioned for enticing away and detaining apprentices, or for refusing to maintain them. And certainly a new action may be maintained whenever there is a new cause of action. In *Troy* v. *Cheshire R. R. Co.*, 23 N. H. 102 [55 Am. Dec. 177], Bell, J., in a very able opinion, says that if damages "result, not from the wrongful acts, but from the wrongful continuance of the state of fact produced by those acts, they form the basis of a new action."

On these grounds and authorities, we are of opinion that the continued omission of the defendant, after the former action was commenced, to make a conveyance to the plaintiff, was a new cause of action, and not merely a new damage. If it were a new damage merely, that damage should have been allowed to be recovered in the former suit.

The agreement on which this action is brought was never rescinded. It has been hitherto treated by both parties as an open and continuing agreement. If it had been rescinded, the plaintiff must have sought his remedy, not by an action for the breach of it, but by some different action: See *Canada* v. *Canada*, 6 Cush. 17; *Goodman* v. *Pocock*, 15 Ad. & El., N. S., 576; *Hochster* v. *De la Tour*, 2 El. & Bl. 678.

The case of *Classman* v. *Lacoste*, 28 Eng. L. & Eq. 140, strongly resembles this. There the plaintiff had agreed to serve the defendants for five years, and they had agreed to guarantee to him a certain sum yearly during the continuance of the agreement. After the five years had expired, the plaintiff brought an action on the agreement, alleging that the defendants had not guaranteed nor paid the stipulated sum for his service dur-

Digitized by Google

ing the fourth and fifth years. The defendants pleaded in bar a former recovery by the plaintiff in the court of exchequer, for their default in not paying him for his services during the first and second years, and for dispensing with his services during the whole of the third year. "This plea," said Lord Campbell, "is bad, unless the cause of action in the present case is the same as that in the action in the court of exchequer, and the damages recoverable now could have been recovered in that action. I am of opinion that these damages could not have been recovered in that action, and that the damages in that action could not be assessed beyond the third year. For anything that appears in that action, the relation of employer and employed still continued between these parties. The claim now being for damages in the fourth and fifth years, why should there not be a second action? . . . . If the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole *gravamen* that he suffers by such breach of contract; and that he may recover therein all the damages that may ensue to him in consequence. But there is nothing to show such a state of facts in the present case; and I am of opinion that the present is a new cause of action."

The result in the present case is that the plaintiff is entitled to recover the legal damage sustained by him between the time when the former action was commenced and the time when the conveyance of the estate was made to him, by reason of his not having, during that interval, a full title to that estate. As he was in possession, that damage cannot be great.

He may also recover the amount of the rent which he would have been entitled to if the estate had been conveyed to him at the stipulated time, namely, the rent which was accruing at that time, and which the defendant received during the aforesaid interval: *Stone* v. *Knight*, 23 Pick. 97; *Burden* v. *Thayer*, 3 Met. 76. Taking what appears in the declaration in this case in connection with what appeared in the former action, our inference is that part of the estate was under lease to a tenant when the agreement in suit was made, and that the defendant, before conveying the reversion to the plaintiff, collected the rent reserved in that lease. This will be matter of evidence hereafter.

Unless these two matters of damage are adjusted by the parties, the case is to go to a jury. But the matter of the plaintiff's misrepresentation and fraud, set out in the defendant's answer, cannot be shown on the trial of this action, either by way of bar, set-off, or recoupment.

Digitized by Google

DAMAGES MUST BE NATURAL AND PROXIMATE CONSEQUENCE of the act or omission complained of in order to be recoverable: See *Patch* v. *City of Covington*, 66 Am. Dec. 186, note 191, where other cases are collected; *Worcester* v. *Great Falls M. Co.*, Id. 217, note 219; *Burton* v. *Holley*, 65 Id. 401, note 403.

SPECIAL DAMAGES MUST BE ALLEGED IN DECLARATION or they cannot be recovered: *Heirn* v. *McCaughan*, 66 Am. Dec. 588, note 603, where other cases are collected; *Adams* v. *Barry*, 10 Gray, 362, citing the principal case.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO CONVEY REALTY: See *Foley* v. *McKeegan*, 66 Am. Dec. 107, note 116, where other cases are collected; *Welch* v. *Lawson*, Id. 606; *Old Colony R. R. Corp.* v. *Evans*, Id. 394, note 405.

DAMAGES MAY BE GIVEN FOR FUTURE SUFFERING FROM INJURY: See *Black* v. *Carrollton R. R. Co.*, 63 Am. Dec. 586, note 589. If the injury for which an action for damages is brought results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury: *Fowle* v. *New Haven & N. Co.*, 112 Mass. 339, citing the principal case.

FORMER JUDGMENT, WHEN BAR TO SUBSEQUENT ACTION: See *Lord* v. *Chadbourne*, 66 Am. Dec. 290, note 296, where other cases are collected. A judgment in an action for damages is a bar to another like action between the same parties for subsequent injuries for the same cause: *Fowle* v. *New Haven & N. Co.*, 107 Mass. 355, citing the principal case.

POWELL *v.* BAGG.

[8 GRAY, 441.]

EASEMENT IN LAND OF ANOTHER CAN BE ACQUIRED BY ADVERSE USER only with the acquiescence of the owner of the land in its exercise under a claim of right. From such a use of an easement for twenty years the law will presume a non-appearing grant.

WHERE OWNER OF LAND, BEING ON SAME, FORBIDS ANOTHER TO EXERCISE RIGHT to subvert the soil thereof for the purpose of repairing an aqueduct, under claim of an easement in the aqueduct by adverse possession, such verbal orders, though unaccompanied by further acts, are sufficient to show an interruption of the easement.

ACTION of tort for breaking and entering the plaintiff's close, and digging up the soil. The defendant admitted the entry and digging, and claimed the right to do so to repair an aqueduct laid down across the plaintiff's land. The instruction referred to in the opinion is as follows: "That words, however strongly denying the rights claimed by the defendant, or forbidding their exercise, unaccompanied by any act or deed, were not an interruption of the defendant's user and enjoyment." The other facts appear from the opinion.

Digitized by Google

M. Wilcox, for the plaintiff.

J. Rockwell, for the defendant.

By Court, BIGELOW, J. The right which the defendant claimed in the plaintiff's land was to enter and dig up the soil for the purpose of repairing an aqueduct which conducted water to the defendant's premises. This right was not founded on an express grant, but on adverse user and enjoyment of more than twenty years. Upon the question of a title to an easement thus acquired, it was clearly competent to show that when the defendant attempted to exercise it he was forbidden by the owner to enter on the land, and that he and his servants were ordered off of the premises. If this was proved to have been done by the plaintiff in good faith, as an assertion of his own absolute title to the land, and a denial of any right of the defendant therein, it tended to negative the defendant's prescriptive title to the user and enjoyment of the easement to enter and dig up the soil. It was not necessary for the plaintiff to commit an assault and battery on the defendant or his servants, or to use actual force to eject them from the premises, in order to disturb and break the continuity of possession or use, and prevent it from ripening into a title by lapse of time. An easement in the land of another can be acquired by adverse user only, with the acquiescence of the owner of the land in its exercise under a claim of right *per patientiam veri domini, qui scivit et non prohibuit, sed permisit de consensu tavito:* Bract., lib. 2, c. 28, sec. 1; 2 Greenl. Ev., sec. 539; *Sargent* v. *Ballard*, 9 Pick. 254; *Arnold* v. *Stevens*, 24 Id. 112 [35 Am. Dec. 305]. See also *Monmouthshire Canal* v. *Harford*, 5 Tyrwh. 85; S. C., 1 Cr. M. & R. 631.

From such use of an easement for twenty years the law will presume a non-appearing grant. But before the lapse of that period, if the owner of land, by a verbal act on the premises in which the easement is claimed, resists the exercise of the right, and denies its existence, the presumption of a grant is rebutted, his acquiescence in the right claimed is disproved, and the essential elements of a title to an easement by adverse use are shown not to exist. On this point the instructions given to the jury were defective, and tended to mislead them in applying the evidence to the rule of law on which the title of the defendant to the easement depended. They should have been told, and this is the precise point on which we sustain the exceptions, that if it was proved that before the expiration of twenty years from the time when the right was first claimed, the plaintiff being on

Digitized by Google

the land upon which the defendant entered for the purpose of subverting the soil, there forbade him to exercise his right and ordered his servants to desist, it was sufficient to warrant the jury in finding that the plaintiff had not acquiesced in the adverse use of the easement, and that the defendants had not acquired a title thereto.

This is not a case where a title to land is claimed by adverse possession, and where the true owner is disseised. If such disseisin continues for the requisite period, the presumption of a grant will arise, and a mere verbal prohibition to occupy the premises may not be sufficient without an entry to rebut that legal presumption, the owner, in that case, would still be disseised. But the title to an easement by adverse user stands on different ground. The owner remains in possession of the premises; there is no disseisin; the title rests chiefly on his acquiescence in the adverse use, and evidence which disproves such acquiescence rebuts the title to the easement.

Exceptions sustained.

UNINTERRUPTED USER AS EVIDENCE OF RIGHT TO EASEMENT: See *Reimer* v. *Stuber*, 59 Am. Dec. 744, note 746, where other cases are collected. It is an essential element of the use necessary to give a title by prescription that it should be with the acquiescence of the true owner having the power to grant or interrupt the easement: *Edson* v. *Munsell*, 10 Allen, 567, citing the principal case. For one to gain an easement, it must not only be claimed adversely, but it must also be acquiesced in by the owner of the land under a claim of right: *Chicago etc. R'y Co.* v. *Hoag*, 90 Ill. 349, citing the principal case. The title to an easement rests chiefly on an acquiescence in an adverse use, and evidence that disproves the acquiescence rebuts the title to the easement: *Union M. & M. Co.* v. *Daugherty*, 2 Saw. 452, citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Edson* v. *Munsell*, 10 Allen, 568, to the point that the ground upon which prescription has generally been put in Massachusetts has been the presumption of a previous grant or agreement, which has been lost by lapse of time.

COMMONWEALTH *v.* FOGERTY.

[8 GRAY, 489.]

INDICTMENT FOR RAPE WHICH ALLEGES THAT DEFENDANT "VIOLENTLY AND AGAINST HER WILL FELONIOUSLY DID RAVISH and carnally know" the woman is sufficient.

INDICTMENT FOR RAPE NEED NOT ALLEGE THAT WOMAN RAVISHED was not the wife of the defendant.

RAPE. The indictment alleged that the defendants, "with force and arms in and upon Agnes O'Connor, a female of the age

Digitized by Google

of ten years and more, in the peace of said commonwealth then and there being, violently and feloniously did make an assault, and her, the said Agnes, then and there violently and against her will feloniously did ravish and carnally know, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided." After conviction the defendants moved in arrest of judgment, because the indictment did not allege that said Agnes O'Connor was ravished, etc., by force, as required by law; and because it did not allege that she was not the wife of one of the defendants, or which defendant, if any.

G. M. Stearns, for the defendants.

D. W. Alvord, for the commonwealth.

By Court, BIGELOW, J. The indictment in the present case is in conformity with well-established precedents. It sufficiently sets forth all the elements necessary to constitute the offense of rape. It alleges that the carnal knowledge was had "violently," which means by violence, and was against the consent of the prosecutrix. The word "ravished"—*rapuit*—of itself imports the use of force, and when coupled with the allegation that the act was done against the consent of the woman, technically charges the crime of rape, which is the carnal knowledge of a woman by force and against her will: Co. Lit. 137; 2 Inst. 180; 1 Hawk., c. 16, sec. 2; 2 Hawk., c. 23, sec. 79; 2 Stark. Crim. Pl., 2d ed., 431; Archb. Crim. Pl., 10th ed., 480. Indeed, it has been held that the omission to charge an assault is not fatal to an indictment for rape, when it was alleged, as in this case, that the defendant violently and feloniously ravished and carnally knew the prosecutrix against her will; *Regina* v. *Allen*, 9 Car. & P. 521, and note; *Harman* v. *Commonwealth*, 12 Serg. & R. 69.

It is true that in this commonwealth it has been usual in indictments for this crime to aver that the act was done "by force." This practice probably grew out of the phraseology of the statute, which used the words "by force and against the will" in providing a punishment for the offense. But it is never necessary to change a crime in the words of the statute. It is sufficient that the indictment sets out in technical language all the essential ingredients which make up the crime. It is then fully, plainly, formally, and substantially described.

Nor was it necessary to allege that the prosecutrix was not the wife of the defendant. Such an averment has never been deemed essential in indictments for rape, either in this country

Digitized by Google

or in England. The precedents contain no such allegation: See authorities before cited. A husband may be guilty at common law as principal in the second degree of a rape on his wife by assisting another man to commit a rape upon her: *Lord Audley's Case*, 3 How. St. Tr. 401; and under our statutes he would be liable to be punished in the same manner as the principal felon: R. S., c. 133, sec. 1. An indictment charging him as principal would therefore be valid.

Of course it would always be competent for a party indicted to show, in defense of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife. But it is not necessary to negative the fact in the indictment.

Exceptions overruled.

RAPE, FORCE NECESSARY TO COMMISSION OF: See *State* v. *Murphy*, 41 Am. Dec. 79, note 84, where this question is considered.

THE PRINCIPAL CASE IS CITED in *Commonwealth* v. *Murphy*, 2 Allen. 165, to the point that a man may be a principal in the second degree in the commission of the crime of rape upon his own wife, and be liable under the Massachusetts statute in the same manner as the principal felon, and may be so charged in the indictment; in *Commonwealth* v. *Burke*, 105 Mass. 378, to the point that it is not necessary that an indictment which alleges that the accused feloniously did ravish and carnally know a woman should add the words "against her will;" and in *Commonwealth* v. *Thompson*, 108 Id. 463, to the point that the words "maliciously and without lawful justification" are synonymous with the word "unlawfully."

INHABITANTS OF PELHAM *v.* ALDRICH.

[8 GRAY, 515.]

VOLUNTARY CONVEYANCE MADE WITHOUT FRAUDULENT INTENT can be impeached and avoided by those only who were creditors when it was made.

POSSIBILITY THAT PLAINTIFF MAY BE CHARGED WITH COSTS IN ACTION PENDING does not become a debt until the judgment for costs is rendered against him.

WRIT of entry to recover land in Pelham. The facts are stated in the opinion.

C. Delano, for the demandants.

I. F. Conkey, for the tenants.

By Court, SHAW, C. J. The construction of the statutes of 13 and 27 Elizabeth is now well settled, that if the conveyance is fraudulent, subsequent creditors and purchasers may avail themselves of the fraud to set it aside; but if voluntary only, and made

Digitized by Google

without fraudulent intent, it may be impeached and avoided by those only who were creditors when it was made: *Beal* v. *Warren*, 2 Gray, 447.

When the grantor in this case made the deed to his sons (which was upon good consideration, though perhaps not adequate), he was plaintiff in a suit against the town, and had recovered a verdict. Subsequently the verdict was set aside, and judgment rendered in favor of the town for a large bill of costs, and execution levied on this land.

The jury have found that there was no fraudulent intent in the conveyance. And the court are of opinion that this was not a debt at the time of the conveyance; the debt did not accrue till judgment was rendered against him for costs; the debt having accrued after the conveyance, the demandants in this case were not his creditors at the time of the conveyance, and have no ground in law to avoid it, and the tenants are entitled to judgment on the verdict.

VOLUNTARY CONVEYANCE, WHEN CANNOT BE AVOIDED BY SUBSEQUENT CREDITORS: See *Bangor* v. *Warren*, 56 Am. Dec. 657, note 662; note to *Greer* v. *Wright*, 52 Id. 119, where this subject is discussed. The possibility that a plaintiff may be charged with costs in an action pending at the time of his bankruptcy is not a provable debt, nor a debt in any sense, until the judgment is rendered against him, and will not be barred by a certificate of discharge: *Dows* v. *Griswold*, 122 Mass. 440, citing the principal case; see also note to *Greer* v. *Wright*, 52 Am. Dec. 119.

MACK v. PARKS.

[8 GRAY, 517.]

OFFICER HAS NO RIGHT TO ATTACH ON MESNE PROCESS ARTICLES WORN ON PERSON of the debtor as part of his dress or apparel at the time the attachment is made, or then in his actual manual possession and use.

WATCH WHICH DEBTOR IS WEARING ON HIS PERSON IS NOT LIABLE TO ATTACHMENT, and an officer who, on its being handed to him to look at, severs it from the owner's person by forcibly breaking the silk guard to which it is attached, and which passes around his neck, is a trespasser *ab initio*, and liable for the value of the watch.

WATCH UNLAWFULLY TAKEN BY OFFICER FROM PERSON OF DEBTOR, under a writ of attachment, cannot be held under the writ, although it would have been liable to attachment if it had been taken by the officer when not connected with the debtor's person.

ACTION of tort for taking the plaintiff's watch from his person. The defendant was a deputy sheriff, and took the watch in the manner stated in the opinion.

Digitized by Google

D. Granger, for the plaintiff.

A. M. Copeland, for the defendant.

By Court, BIGELOW, J. The justification on which the defendant relies in answer to the trespass alleged in the declaration depends on the right of a sheriff or other officer to attach on mesne process articles worn on the person of the debtor as part of his dress or apparel at the time the attachment is made, or then in his actual manual possession and use.

We are not aware that any such right has ever before been asserted in this commonwealth. There is no judicial recognition of it, and we are quite sure that there has never been any attempt practically to enforce it. It can hardly be supposed that the omission to exercise it has been caused by forbearance or ignorance. Creditors are not apt to slumber over their rights, or lose them for want of vigilance or out of tenderness towards their delinquent debtors. This consideration is entitled to great weight, because we are to seek for the origin and foundation of the right on which the defendant rests his justification, among those well-understood and recognized usages and customs which have become a part of our unwritten law.

By the revised statutes, c. 90, sec. 24, it is provided that all goods and chattels that are liable to be taken on execution may be attached, "except such as, from their nature and situation, have been considered as exempted from attachment, according to the principles of the common law as adopted and practiced in this state." Our system of attachment on mesne process was derived from the ancient rule of the common law, by which, as part of the service of civil process, goods which were properly subject to distress were allowed also to be taken by a species of distress, and held as *vadii* or pledges to compel the appearance of the defendant. This right was afterwards extended by colonial ordinances so that the goods taken might be held as security for the judgment which the plaintiff might recover. But with a few exceptions, the kind of goods lawfully subject to distress or attachment has never been defined by statute, either under the colonial or state government. It must therefore be determined by the common law: *Bond* v. *Ward*, 7 Mass. 128 [5 Am. Dec. 28].

It seems to be perfectly well settled at common law that chattels in the actual possession and use of a debtor cannot be taken or distrained. It is laid down in Co. Lit. 47 a, that "although

Digitized by Google

it be of valuable property, as a horse, etc., yet when a man or woman is riding on him, or an ax in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained." So "if nets are in the hands of a man they cannot be distrained any more than a horse on which a man is:" Id., Hargrave's Note, 294; *Read* v. *Burley*, Cro. Eliz. 549; S. C., Id. 596. In the leading case of *Simpson* v. *Hartopp*, Willes, 512, which Mr. Justice Buller says, in *Gorton* v. *Falkner*, 4 T. R. 568, is "of great authority, because it was twice argued at the bar, and Lord Chief Justice Willes took infinite pains to trace with accuracy those things which are privileged from distress," it is distinctly adjudged that things in actual use cannot be taken or distrained; and the reason given is, that an attempt to distrain such articles would lead to a breach of the peace. In the modern case of *Sunbolf* v. *Alford*, 3 Mee. & W. 253, it is laid down as well-settled law that "goods in the actual possession and use of the debtor cannot be distrained; . . . . a man's clothes cannot be taken off his back in execution of a *fieri facias*." The main ground on which these and other authorities rest is that it would tend directly to a collision and breach of the peace if articles thus situated were allowed to be taken from the hands of a debtor: *Gorton* v. *Falkner*, 4 T. R. 565; *Storey* v. *Robinson*, 6 Id. 139; *Adames* v. *Field*, 12 Ad. & El. 649; *Field* v. *Adames*, 4 Per. & Dav. 504; Com. Dig., tit. Distress, C; Gilbert on Distresses, 43. There are many articles of personal property subject to attachment under our laws and usages which could not have been distrained or taken at common law under the rule as stated in the earliest authorities: *Potter* v. *Hall*, 3 Pick. 368 [15 Am. Dec. 226]. But in the absence of any proof of usage or custom in this state, from which it might be inferred that a different rule of law has ever been adopted, the present case falls within the principles on which the English authorities rest, and must be governed by them.

The watch, at the time it was taken by the defendant, was in the plaintiff's actual possession and use, worn as part of his dress or apparel, and was severed from his person by force. Such an act, if permitted, would tend quite as directly to a breach of the peace as to take from a man the horse on which he was riding, or the ax with which he was felling a tree. It is indeed a more gross violation of the sanctity of the person, and tends to a greater aggravation of the feelings of the debtor. Nor would it be practicable to place any limit to the exercise of such a right. If allowed at all, it must extend to every article

Digitized by Google

of value usually worn or carried about the person; if an officer can sever a silken cord, he may likewise break a metallic chain; if he can seize and take a watch, so he may wrest a breastpin or ear-ring from the person, or thrust his hand into the pocket and carry off money; he may, in short, resort to any act of force necessary to enable him to attach property in the personal custody of the debtor. It is obvious that such a doctrine would lead to consequences most dangerous to the good order and peace of society.

It is no answer to this action that the defendant tendered to the plaintiff the value of the cord by which the watch was attached to the person, or that the watch itself, detached from the person, was subject to attachment. The wrong consists in having taken an article from the person of the plaintiff which was at the time by law exempted from attachment. The mode in which it was done is wholly immaterial. He is liable for the value of the watch, being a trespasser *ab initio*. "No lawful thing founded on a wrongful act can be supported:" *Lutlin* v. *Benin*, 11 Mod. 50; *Ilsley* v. *Nichols*, 12 Pick. 270 [22 Am. Dec. 425]. The watch, although liable to attachment if it had been taken by the defendant when not connected with the person of the plaintiff, was wrongfully seized, and cannot now be held under the attachment.

Judgment for the plaintiff.

ARTICLES OF PERSONAL ORNAMENT CANNOT BE TAKEN UNDER WRIT OF REPLEVIN, from the person of a defendant: *Maxham* v. *Day*, 16 Gray, 219, citing the principal case.

STARKS *v.* SIKES.

[8 GRAY, 609.]

SUBSEQUENT RATIFICATION GIVES AGENCY FORCE AND EFFECT of an original express authority.

WHERE TWO OF THREE TENANTS IN COMMON LEASE ENTIRE ESTATE, without the concurrence of the third, to a lessee who covenants to insure for the benefit of the lessors, which he does, and the premises are burned during the term, and the whole of the loss is collected from the insurers by one of said lessors after an assignment to him by the other lessor, the third co-tenant may recover from the co-tenant who collected the insurance money his proportion of it.

EXCLUSION OF EVIDENCE OFFERED BY DEFENDANT FOR PURPOSE OF CONTRADICTING WITNESS WHO, on his cross-examination, testified that he had never expressed any hostile feelings towards the defendant, that the witness in a conversation with a third person about a note which had

Digitized by Google

just been signed by him and the defendant said that the defendant had never paid him for certain services, and that he was worth nothing himself, and that he had taken this course to get even with the defendant, is no ground of exception.

ACTION of contract to recover one fourth of certain money received by the defendant under a policy of insurance on a mill and machinery. One of the witnesses examined by the plaintiff at the trial stated on cross-examination by the defendant that he had never expressed any feelings of hostility towards the defendant, nor threatened to injure him. The defendant, for the purpose of showing hostile feelings towards the defendant on the part of this witness, offered the deposition of one Rogers, in which he testified that in a conversation with the witness about a note which had just been signed by the witness and then by the defendant, said witness said that the defendant would have the note to pay; that said witness was worth nothing, and that he took that course to get money out of said defendant This deposition was objected to and ruled out. The other facts are stated in the opinion.

H. Vose, for the defendant.

D. W. Alvord and G. D. Wells, for the plaintiff.

By Court, SHAW, C. J. *Assumpsit* for money had and received to the plaintiff's use, on the ground that the defendant demanded and received of an insurance company a sum, to a part of which the plaintiff, in equity and good conscience, was entitled, and therefore that money had and received will lie to recover it.

An estate was owned and held in common in certain aliquot parts by the plaintiff, the defendant, and Danforth Works. Works and the defendant, without the concurrence of the plaintiff, undertook to let the entire estate to a third party for a term of time. The two tenants in thus letting the entire estate, including the plaintiff's purparty, did undertake and purport to act as the agents of the plaintiff, and they are estopped to deny it. It might have been competent for the plaintiff to repudiate the assumed agency of his co-tenants, and claim possession of his part against the tenant. But it was also competent for him to affirm and adopt the doings of such assumed agents; and then by a well-known maxim of law the subsequent ratification gives to the agency the force and effect of an original express authority. In the present case, it appears that the plaintiff has affirmed and ratified the doings of his assumed agents, and now claims one of the benefits of it.

Digitized by Google

One of the stipulations of the lessees was to procure the whole premises to be insured for the benefit of the lessors, which was done; and the premises were burned within the time stipulated by the policy. This insurance was in the nature of rent; it was one of the benefits given as a consideration for the demise, and therefore was for the benefit of all the lessees. Perhaps the two nominal lessees, Works and Sikes, should have joined in recovering the loss from the insurers. But they joined in assigning it to Sikes alone, and he alone recovered the whole in his own name. Perhaps if the insurers had objected, he could not have done this; but if they did not, the defendant can certainly take no exception to his own act in that respect. When, therefore, he recovered the entire loss to which he and his co-tenants were entitled, he recovered to their uses respectively in proportion to their aliquot parts of the common estate, and an action at law will lie for it: *Dickinson* v. *Williams*, 11 Cush. 258; *Shepard* v. *Richards*, 2 Gray, 424 [61 Am. Dec. 473].

There seems to be nothing in the other exceptions requiring special attention. The court are of opinion that the plaintiff is entitled to recover one fourth of the money recovered by the defendant for loss on the policy, according to his aliquot part in the common property.

Judgment on the verdict.

RATIFICATION OF AGENT'S ACTS IS EQUIVALENT TO ORIGINAL AUTHORITY, WHEN: See *Persons* v. *McKibben*, 61 Am. Dec. 85, note 89, where other cases are collected.

TENANT IN COMMON CAN ONLY LEASE HIS INDIVIDUAL SHARE, unless he has authority from his co-tenants: *Mussey* v. *Holt*, 55 Am. Dec. 234.

THE PRINCIPAL CASE IS DISTINGUISHED in *Day* v. *Stickney*, 14 Allen, 261.

GREENWOOD v. MURDOCK.

[9 GRAY, 20.]

MORTGAGE OF "ALL RIGHT, TITLE, AND INTEREST WHICH MORTGAGOR NOW HAS in foundation or stone-work of a building in course of construction, and which he may have in and unto said building during its erection and completion, and after it is completed," for the purpose of securing advances to enable him to erect the building, passes the land on which the building stands.

BILL in equity to redeem certain land from a mortgage. The opinion states the facts.

Digitized by Google

O. Devens, jun., for the plaintiff.

N. Wood, for the defendant.

By Court, BIGELOW, J. The estate demised to Harwood by the inhabitants of Winchendon for the term of nine hundred and ninety-nine years is in these proceedings to be treated as an estate in fee-simple, by virtue of the revised statutes, c. 60, sec. 18, which provide that leasehold estates demised for one hundred years or more, so long as fifty years of the term remain unexpired, shall be regarded as an estate in fee-simple "as to everything concerning the redemption thereof when mortgaged."

The only question raised by the plaintiff is, whether the defendant acquired any interest in the land by virtue of the indenture of mortgage of August 5, 1850, between Harwood and Morse, which has been assigned to the defendant, or whether it was a conveyance only of the materials used in the construction of the building.

It seems to us that the terms of the grant bring it within the numerous cases in which it has been decided that land will pass by a deed which does not contain any description of the land, but which grants only the structure which is erected upon it; so that a grant of a barn, a shop, a house, a well, a mill, will convey a title to the land under it and necessary to its enjoyment and use: *Inhabitants of Cheshire* v. *Inhabitants of Shutesbury*, 7 Met. 566; *Forbush* v. *Lombard*, 13 Id. 109; *Johnson* v. *Rayner*, 6 Gray, 110.

In the present case, the grant is of all the right, title, and interest which the grantor now has in the foundation or stone-work of the building, and also of all the "right, title, and interest" which the grantor "may have in and unto said building during its erection and completion, and after it is completed, as mentioned in said lease." Now, the right which the grantor had in said foundation, stone-work, and building, under the lease, was not merely or mostly a right to the materials of which they were composed, but the more valuable right of having them on the premises as part of a structure, with a right to use and occupy them for a long period of time. It was a grant, therefore, of his right, to the use and occupation of the land, as well as of the building, or of the portion of it then erected.

Such we think was clearly the intent of the parties. It is not reasonable to suppose that the grantee, when advancing money to complete the building, would take, as security for his advances a mortgage on the materials only, which were to become a part

Digitized by Google

of the realty, and which by the terms of the lease were annexed to the freehold, he would have no right to remove or in any way render available as security for his loan.

We are therefore of opinion that the respondent has a right to receive from the plaintiff for the redemption of the premises the advances made under said indenture, and the case must go to a master to determine the amount.

MORTGAGE OF HOUSE OR OF STONE FOUNDATION OF UNFINISHED HOUSE is mortgage of land on which it stands: *Owen* v. *Fields*, 102 Mass. 102; *Scanlan* v. *Geddes*, 112 Id. 17; *Snow* v. *Orleans*, 126 Id. 456, all citing the principal case.

SMITH *v.* SLOCOMB.

[9 GRAY, 36.]

IN BOUNDING LANDS, COURSES AND DISTANCES ARE BUT CIRCUMSTANCES, and in general must yield to monuments and abuttals.

PUBLIC TAKES EASEMENT ONLY IN LAND TAKEN FOR HIGHWAY, the fee remaining in the abutter, and he may, if he choose, on making a conveyance of his land, retain the fee in the soil under the road, by properly expressing such intention in the deed; but if the property is bounded in the deed "on the road," the grantee takes to the center of the way.

CONVEYANCE OF LAND ABUTTING ON HIGHWAY, AND DESCRIBING the land as "beginning at an angle in the stone wall on the easterly side of the aforesaid road;" thence running around the rear of the lot granted, "to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first-mentioned bound," excludes the road or the grantor's interest therein from such conveyance.

TORT for breaking and entering plaintiff's close. Defendant had conveyed to plaintiff certain land according to the description in the opinion. Plaintiff claimed that by virtue of such conveyance her land extended to the center of the road, and that defendant had trespassed on such portion of her land. Defendant, on the other hand, claimed that such conveyance only vested in plaintiff the land to the line of said road, and not to middle thereof. The remaining facts appear in the opinion.

H. Chapin and C. E. Pratt, for the defendant.

F. H. Dewey, for the plaintiff.

By Court, SHAW, C. J. The question is whether the plaintiff's deed conveyed the land to the center or only to the easterly side of the road. Courses and distances are but circumstances, and in general must yield to monuments and abuttals.

Digitized by Google

The theory of the law in this respect, as held in this commonwealth, is that by taking land for a highway the public take an easement only, and not a fee; that the fee must be in somebody, and not in abeyance, and remains in the abutter; that the public easement so completely takes all that can be made serviceable to the owner, that what remains cannot be considered of much value; and therefore if he makes a new conveyance bounding "on the road," and says nothing more, the presumption is, in the absence of all other proof, that the grantee takes *ad filum viæ*. The road is an abuttal, not a monument; and if the deed does not say on what side, it shall be taken to mean the center.

But if the party chooses to retain his remnant—his fee in the soil under the road—he may do so. He may bound by the wall on one side of the road, or by the line between the land and the highway. If by a careful examination of the description such is seen to have been his intention, it must be carried into effect.

In *Newhall* v. *Ireson*, 8 Cush. 595 [54 Am. Dec. 790], the court held that under the rule of construction which gives greater effect to monuments and abuttals than to courses and distances, a boundary "to the road" and "on the road" extended to the middle of the road.

But here the description of the boundaries begins "at an angle in the stone wall on the easterly side of the aforesaid road," which is a point in the wall, not in the middle of the road. Thus commencing at the side of the road, it goes around the rear of the lot, and comes back to the road, "to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first-mentioned bound." Had it been merely "at the road" at both ends of the description, there would have been more ground for holding that it went to the middle. But when it starts at the side of the road, and comes back to the road, and thence on the line of the road to the point of beginning, the conclusion is inevitable that the road is excluded. The court are all of opinion that the description by its terms clearly excludes the highway, and thus overrides the presumption that a grant goes *ad filum viæ*.

Exceptions sustained.

DESCRIPTIONS OF BOUNDARIES BY MONUMENTS AND ABUTTALS control course and distance: See *Saltonstall* v. *Riley*, 65 Am. Dec. 334, and cases collected in note 341.

BOUNDARIES OF LAND ON STREETS AND WAYS, what passes by: See *Newhall* v. *Ireson*, 54 Am. Dec. 790, and note 794; *Palmer* v. *Dougherty*, Id. 636, and note; *Paul* v. *Carver*, 64 Id. 649, and cases in note 651. In *Low* v. *Tibbetts*, 72 Me. 94, and *Holt* v. *Somerville*, 127 Mass. 410, the principal case

Digitized by Google

is cited to the point that such boundaries usually pass title to the center of the way; but in *Boston* v. *Richardson*, 13 Allen, 153, it is held to be a question of construction what the parties intended by such boundary.

RIGHT OF PUBLIC IN LAND TAKEN FOR HIGHWAYS: See *Lewis* v. *Jones*, 44 Am. Dec. 138; *Southerland* v. *Jackson*, 50 Id. 633; *Troy* v. *Cheshire R. R. Co.*, 55 Id. 177; *Nicholson* v. *New York etc. R. R. Co.*, 56 Id. 390; *Brainard* v. *Clapp*, 57 Id. 74; *Winter* v. *Peterson*, 61 Id. 678.

BROWN v. HOWE.

[9 GRAY, 84.]

PROBATE ACCOUNT IS STATEMENT OF RECEIPTS AND PAYMENTS BY TRUSTEE concerning the estate confided to his care, the detailed statement of its administration while in his hands, what has been received and from what sources, what has been paid out and for what purposes, and the balance, if any, remaining. From the nature of such account, a claim for damages for a tort cannot be included in it.

GUARDIAN OF LUNATIC CANNOT, IN HIS PROBATE ACCOUNT, be allowed an item for damages occasioned to his own property by his ward's want of care.

SETTLEMENT of guardian's account. The opinion states the facts.

P. C. Bacon, for the appellee.

C. Allen and H. Chapin, for the appellant.

By Court, THOMAS, J. The appellee was guardian of Daniel Saunders, an insane person, now deceased. In settling his account in the probate court, the guardian charged and was allowed this item: "For loss sustained by accountant by fire, caused by want of care on part of said Daniel Saunders over and above amount received by insurance." The date and amount of the item are not given. From the allowance of the account, including this charge, the administrator of the ward appealed to this court. Whether the item is the subject of charge in the appellee's probate account is the question for our consideration.

The item sought to be charged is a claim for unliquidated damages. Two things are clear: 1. There is no express provision of the statute under which claims for damages for torts can be proved in probate accounts; 2. There are no precedents for their allowance, so far as our reports show.

If we look to the nature of such account, its object and purpose, it will be plain that damages for a tort cannot be included in it. An account, as used in the probate law, is the statement of the receipts and payments by a trustee concerning the estate confided to his care; the detailed statement of its administration while in his hands, what has been received, and from what

Digitized by Google

sources, what has been paid out and for what purposes, and the balance, if any, remaining. The accounts are evidenced by books and vouchers, with occasional resort to the testimony of witnesses.

A claim for unliquidated damages, as for assault and battery, or action on the case for negligence, by a guardian against his ward, cannot be made part of his account. It is not a matter arising from the trust. It is a question for a court of common law, to be tried at its bar and under its rules.

In the case before us, it is a question where the plaintiff and defendant are represented by the same person, and the personal interest of the trustee is in conflict with that of his trust, and where, it may be, all the weapons of defense are in the hands of the plaintiff. The existence and prosecution of such a claim are inconsistent with the continuance of the relation, and would be sufficient reason for its termination.

It would seem to be clear, therefore, that such a question could not be settled even in a court of common law, while the relation of guardian and ward continued. To say that a guardian can settle with himself for a tort of his ward, affecting his person, character, or property, and then make the amount so paid an item of charge in his account, seems still more difficult. It is a matter outside of the trust, and with which the relation of guardian and ward has nothing to do.

Upon the termination of the relation by the death of the ward, the difficulties of adjusting such a claim in a probate account increase rather than lessen. The claim not growing out of a trust, and the guardian having no lien upon the funds in his hands for its payment, the balance in his hands as guardian, after payment of his disbursements and services, goes into the hands of the administrator to pay the funeral expenses, the expense of settling the estate, and the debts. The claim of the guardian for damages for the tort has no preference over other debts and claims against the estate, and he cannot retain the property in his hands as trustee to meet it.

But the trust being terminated and the claim surviving, his only course is to sue the administrator in a court of law, and having its judgment fixing the damages, to collect it from the assets, if the estate is solvent; if not, to share with the other creditors.

Decree reversed and case remitted.

THE PRINCIPAL CASE IS CITED in *Morain* v. *Devlin*, 132 Mass. 88, to the point mentioned in the opinion, that a lunatic is civilly liable to make compensation in damages for injury, though he is not criminally liable.

Digitized by Google

COMMONWEALTH v. CASTLES.

[9 GRAY, 121.]

ON TRIAL OF INDICTMENT FOR OBTAINING SIGNATURE TO DEED BY FALSE PRETENSES, evidence is admissible of previous conversations of defendant with a third person as to procuring such a signature.

ADMITTING PROOF OF EXECUTION OF DEED other than by the subscribing witness is not a ground of exception by a party who subsequently calls the subscribing witness and examines him.

INDICTMENT for obtaining a signature to a mortgage by false pretenses, the fraud consisting in representing to the signer that the paper signed was a mortgage deed to his father. On the trial the father was permitted to testify, against defendant's objection, to a conversation between himself and defendant in the absence of his son, and before the signature of the alleged fraudulent document, in which defendant advised him to convey his farm to his son, and to have his son mortgage it back, in order to prevent foreclosure of an existing mortgage, to which the father assented. The father further testified that he, his son, and the defendant went to an attorney's office, and there signed papers without reading them, which papers they supposed from such conversation were in pursuance of the understanding had at that time. The son was permitted on the trial, and against defendant's objection, to identify the papers so executed, and to testify to their execution, without proving the same by the attesting witness. The attesting witness, however, was subsequently called by defendant, and was examined regarding the circumstances attending the execution of such instruments. Defendant was convicted, and alleged exceptions to the rulings, as above, against him.

T. H. Sweetser, for the defendant.

J. H. Clifford, attorney-general, for the commonwealth.

By Court, BIGELOW, J. The conversation of the defendant with Walsh, sen., prior to the making of the false pretenses charged in the indictment, was admissible as showing the *animus* with which the defendant acted in consummating the alleged fraudulent transaction. It was in the nature of a confession or admission, and although it did not tend directly to prove the false pretenses charged, yet it related to the subject-matter about which the false pretenses were subsequently made by the defendant. It was in fact the inducement or prelude to the fraudulent transaction, and part of the *res gestæ* which led to the criminal act.

Digitized by Google

It is not necessary to determine whether the ruling permitting the deed to be read in evidence without the testimony of the subscribing witness was correct or not. There is authority for the position that when a deed or instrument in writing is introduced in evidence collaterally or incidentally in proceedings between persons not parties to it, and when it is not offered as part of a chain of title, it is not necessary to prove it by the evidence of the subscribing witness: See *Curtis* v. *Belknap*, 21 Vt. 433. In the present case, however, the ruling on this point became wholly immaterial, because the subscribing witness was actually called at a subsequent stage of the trial and testified to all the circumstances attending the execution of the deed. The defendant therefore had ample opportunity to examine him on the subject.

Exceptions overruled.

MARLBOROUGH BRANCH R. R. CO. *v.* ARNOLD.

[9 GRAY, 159.]

STOCK-SUBSCRIPTION BOOK OF CORPORATION FOR SHARES REQUIRED TO BE SUBSCRIBED for, before any assessment could be levied, is *prima facie* evidence that the number of shares requisite for an assessment had been subscribed for, in an action to recover the amount of an assessment laid, where such book came into the possession of the corporation immediately on its organization, and which book had always been treated by them as showing the number of shares subscribed for, and on the faith of which the said assessment was laid.

ACTION to recover the unpaid balance of assessments on the shares in plaintiffs' capital stock. The facts are stated in the opinion.

D. Thaxter, for the plaintiffs.

G. Bemis, for the defendant.

By Court, MERRICK, J. The instructions asked for by the plaintiffs should, under the circumstances stated in the bill of exceptions, have been given to the jury. By the provisions of the charter of the corporation, no assessment could be laid upon the shares of its capital stock until at least eight hundred shares had been subscribed for. But it appeared by the book of subscriptions, of which the corporation immediately after its organization became possessed, that that number of shares had been taken or agreed to be taken by different individuals. These subscriptions were all recognized and accepted by the company

Digitized by Google

as valid agreements on the part of the several subscribers to take the number of shares written against their respective signatures. This book was retained by the corporation, and was always afterwards treated by it as the exhibition and proof of the number of shares of its capital stock which had actually been taken and subscribed for. The company had a right so to consider it and to make it the basis of further action; for subscriptions for shares, though made before the organization of the corporation, may become obligatory upon the parties, if made after the act of incorporation has been obtained. And in such case the subscription-book is competent and proper evidence to be submitted to the jury, and if not countervailed by any other proof, will be held to be conclusive of the liability of the subscribers: *Lexington & West Cambridge Railroad Company* v. *Chandler*, 13 Met. 311.

The corporation being in possession of the subscription-book, and the several subscriptions upon it purporting to be, and apparently being, genuine and authentic, it afforded a justification to its officers in proceeding to lay assessments upon the shares of the capital stock. The imposition of such an assessment is an act performed by the directors in the discharge of their official duty; and it is therefore, in the absence of opposing evidence, to be considered as justly and rightly done: 1 Phill. Ev., 4th Am. ed., 469, and notes. But this could be right only upon the assumption that the subscriptions for stock upon which they acted were real and genuine; and therefore this effect is to be allowed and given to them, until something is shown to create a doubt or bring the validity of the subscriptions into question. For these reasons, the book which was produced by the plaintiff should, in connection with the circumstances proved in relation to it, have been considered *prima facie* evidence of the amount and number of shares of stock subscribed for; and because the presiding judge declined to instruct the jury to that effect, the nonsuit must be set aside and a new trial granted.

RECORD OF STOCK SUBSCRIPTIONS, EFFECT OF, AS EVIDENCE: See *Wight* v. *Shelby*, 63 Am. Dec. 522, and cases cited in note; *Penobscot R. R. Co.* v. *Dummer*, Id. 654, and cases in note; *Penobscot R. R. Co.* v. *White*, 66 Id. 257.

Digitized by Google

WHITNEY v. BACON.

[9 GRAY, 206.]

EVIDENCE OF DECLARATIONS AS TO BOUNDARIES IS INADMISSIBLE UNLESS MADE by a person while he was in possession, and claiming it as owner, nor unless the boundary line was pointed out at the time the declarations were made. Where made by one now deceased, who had previously occupied, but never owned, the land, and who had ceased to occupy it at the time of the declarations, they are inadmissible as evidence against a subsequent owner.

TORT for breaking and entering plaintiff's close. Plaintiff, on the trial, was permitted, against defendant's objection, to introduce evidence of declarations of a person, then deceased, who had occupied, but never owned, the land, and who did not even occupy the land at the time the declarations were made regarding the true boundary of plaintiff's close. Verdict for plaintiff. Defendant excepted.

J. W. Bacon, for the defendant.

B. F. Ham, for the plaintiff.

By Court, BIGELOW, J. The general rule is that hearsay evidence is inadmissible. To render it competent in cases of boundary, it must fall within the exception to the rule laid down in *Daggett* v. *Shaw*, 5 Met. 228; *Flagg* v. *Mason*, 8 Gray, 557, and cases cited. In the present case, the person whose declarations concerning the boundary of the close in question were admitted was not in possession of the land when he made the statements which were offered in evidence. They do not therefore come within the exception, and were erroneously admitted.

Exceptions sustained.

EVIDENCE OF DECLARATIONS AS TO BOUNDARIES, WHEN ADMISSIBLE: See *Pike* v. *Hayes*, 40 Am. Dec. 171; *Chapman* v. *Twitchell*, 58 Id. 773, and note.

CHAPIN v. MARLBOROUGH.

[9 GRAY, 244.]

NARRATION BY PATIENT TO HIS PHYSICIAN, OF CAUSE OF INJURIES received some months previously, is not admissible as evidence, on the part of the patient, of the cause of such injury.

TORT for injuries caused by defect in a highway. On the trial, plaintiff was permitted, against defendants' objection, to introduce as a witness his physician, who testified that plaintiff had

Digitized by Google

told him that an injury for which plaintiff was being treated had been caused by a blow from a horse some months previously. Verdict for plaintiff. Defendants excepted.

J. Q. A. Griffin, for the defendants.

C. R. Train, for the plaintiff.

By Court, METCALF, J. The exception must be sustained which was taken to the admission of the plaintiff's statement to his physician that his leg had been struck by a horse. It was a statement of a fact, and was used as evidence of that fact. It was therefore wrongly admitted: *Willis* v. *Bernard*, 8 Bing. 382. The rule of evidence, in cases like this, was rightly announced by Mr. Justice Bigelow in *Bacon* v. *Inhabitants of Charlton*, 7 Cush. 586, as follows: "Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings made at the time are considered competent and original evidence in his favor. There are ills and pains of the body which are proper subjects of proof in courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady." The defendants are entitled to a new trial in consequence of the admission of the plaintiff's statement.

Exceptions sustained.

PHYSICIAN CANNOT TESTIFY AS TO RECITAL OF PAST EVENTS which his patient made to him: *Ashland* v. *Marlborough*, 99 Mass. 48, citing the principal case; and his narration of such recital as to cause of his patient's injuries would not be evidence of such cause of injury: *Rocca* v. *Boston Lumber Co.*, 132 Id. 439, 440, citing the principal case.

LANE v. BRYANT.

[9 GRAY, 245.]

IN ACTION FOR DAMAGES FOR INJURIES TO PLAINTIFF'S CARRIAGE, caused by a collision with defendant's team, where it appears that defendant was in the act of occupying a public square with his team, when plaintiff passed by with his carriage and occupied the square himself, plaintiff would not, as a matter of law, deprive himself of his right to recover, if, in driving in, placing his carriage and remaining there, as he did, he was

Digitized by Google

in the exercise of due and ordinary care, and the defendant, by want of ordinary care on his part in the management of his team, came into collision with plaintiff's team, and thereby caused the injury; and the burden of proof is on plaintiff to show that he was in the exercise of ordinary care, and that defendant was not.

In Action for Damages for Injury Caused by Collision between teams, evidence is inadmissible of declarations by defendant's servant, made immediately after the collision, and while plaintiff was being extricated from his carriage, that the plaintiff was not to blame, either as a part of the *res gestæ* or to contradict the servant's testimony.

Tort for damages for injury caused by defendant's team colliding with plaintiff's carriage. The evidence showed that defendant was about to occupy a public square with his team, when plaintiff passed him and occupied a part of the square close to the sidewalk; that defendant's team was then driven into the square, and in passing in ran into and injured plaintiff's carriage. Defendant asked the court to instruct the jury that plaintiff, by passing him and occupying the square as he did, deprived himself of any right to recover. This instruction was refused, but the court, instead, instructed the jury that if plaintiff, in passing defendant's team and occupying the square as he did, exercised due and ordinary care, and the defendant's servant, by want of ordinary care on his part in the management of his team, came into collision with plaintiff's team and caused the injury, plaintiff was not, by so passing in ahead of defendant, deprived of his right to recover. At the trial, plaintiff was allowed, against defendant's objection, by way of contradicting testimony of defendant's servant, who drove defendant's team at the time of the collision, to ask a witness what the servant said to plaintiff at the time of the accident while plaintiff was being extricated from his carriage, to which question the witness answered that the servant said plaintiff was not to blame for what had occurred. The servant had testified, prior to the examination of such witness, that he did not so excuse plaintiff from blame. Verdict for plaintiff. Defendant alleged exceptions to the above rulings.

M. G. Cobb, for the defendant.

J. Q. A. Griffin, for the plaintiff.

By Court, Bigelow, J. 1. The instructions asked for by the defendant were rightly refused, and those given were accurate and well adapted to the facts in the evidence.

2. The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred and the injury to the plaintiff's carriage had

Digitized by Google

been done. It did not accompany the principal act, on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestæ*. It is no more competent because made immediately after the accident than if made a week or a month afterwards: *Lund* v. *Inhabitants of Tyngsborough*, 9 Cush. 36.

Nor was the evidence admissible to contradict the testimony of the defendant's servant. He was asked on cross-examination by the plaintiff's counsel whether he did not excuse the plaintiff from blame at the time of the accident. His answer to this question could not be contradicted by the plaintiff. It was irrelevant and immaterial to the issue. The opinion of the witness on the subject was incompetent. The real question was, Who was actually to blame? and that was to be determined by the jury by the facts in the proof. The plaintiff was not bound by the opinion or declaration of his servant on this question.

Exceptions sustained.

EVIDENCE OF DECLARATIONS AS TO CAUSE OF COLLISION, where not made at the time of the collision, is not admissible in evidence as part of the *res gestæ*: *Bellefontaine R'y Co.* v. *Hunter*, 33 Ind. 355, citing the principal case.

DURELL *v.* HAYWARD.

[9 GRAY, 248.]

HUSBAND IS NOT LIABLE AS TRESPASSER FOR REMOVING GRAVE-STONE, placed there by his wife's mother, from the grave of his wife, whom he has buried in a public burying-ground, where he does not injure the stone, and holds it in possession ready to be delivered to the owner on demand, and causes the removal for the purpose of substituting another stone.

TORT against defendant for removing from the grave of his wife, whom he has buried in a public burial place, a grave-stone placed over such grave by the wife's mother.

M. G. Cobb, for the defendant.

J. Q. A. Griffin, for the plaintiff.

By Court, BIGELOW, J. The plaintiff had no right to erect a stone at the grave of the defendant's wife without his knowlege or consent. The indisputable and paramount right, as well as duty, of a husband to dispose of the body of his deceased wife by a decent sepulture in a suitable place carries with it the

Digitized by Google

right of placing over the spot of burial a proper monument or memorial in accordance with the well-known and long-established usage of the community. The defendant had therefore a right to remove the stone which the plaintiff had placed over the grave of his wife, in order to put in its stead the one procured by himself; and having taken it down without injury, and holding it in his possession ready to be delivered up to the plaintiff on her demand therefor, he has done no act for which an action of trespass will lie.

Exceptions sustained.

COMMONWEALTH v. HALL.

[9 GRAY, 262.]

PRECEPT FROM GOVERNOR OF STATE APPOINTING AGENT TO RECEIVE FUGITIVE FROM JUSTICE, which recites that he has made a requisition in accordance with the provisions of the constitution and laws of the United States, upon the governor of the state into which the fugitive has escaped, is *prima facie* evidence of the truth of such recitals for the purpose of protecting such agent.

WARRANT ISSUED BY GOVERNOR OF MASSACHUSETTS, AUTHORIZING AGENT OF ANOTHER STATE to "take and receive into custody" a fugitive from justice, authorizes him to arrest such fugitive, and is not in violation of the constitution or laws of the United States or of Massachusetts.

STATUTE OF STATE AUTHORIZING GOVERNOR ALONE TO ISSUE WARRANT for arrest of fugitive from justice is not repugnant to the act of congress of 1793, directing that the demand and surrender of fugitives shall be made by the "executive authority" of the state.

WHERE, UPON REQUISITION FROM GOVERNOR OF ANOTHER STATE, the governor of Massachusetts issues warrants for the apprehension of a fugitive from justice, one warrant being issued to the agent of the state making the requisition, and another similar warrant to a sheriff and his deputies, an arrest by such sheriff under his warrant, and release therefrom on bail on *habeas corpus*, will not prevent an arrest by the agent of the other state under his warrant.

INDICTMENT for forcibly attempting to kidnap one Jonas Wyeth. It appeared that said Wyeth had been arrested by one Richardson, a deputy sheriff, on a warrant issued in pursuance of a requisition from the governor of the state of Iowa; that said Wyeth had applied for discharge on a writ of *habeas corpus*, and pending the hearing on such writ had been admitted to bail; that on said requisition a similar warrant had been issued to defendant for the arrest of said Wyeth; and that on said last warrant defendant arrested and was about to take

Digitized by Google

Wyeth out of the commonwealth. The attempt to take said Wyeth out of the commonwealth was not denied, but defendant justified under the requisition and precept from the governor of Iowa, and the process issued to him thereunder as the agent of the state of Iowa, to "take and receive into custody" the said Wyeth as a fugitive from justice. The remaining facts are sufficiently stated in the opinion.

C. Cushing and S. Webster, for the defendant.

S. H. Phillips, attorney-general, for the commonwealth.

By Court, BIGELOW, J. The several objections made by the attorney-general to the justification relied on by the defendant seem to us to be untenable.

1. The precepts issued by the governor of the state of Iowa and by the governor of this commonwealth are in conformity with the act of congress of February 12, 1793, c. 45, sec. 1, and the provisions of the revised statutes, c. 142, sec. 7. By the recital in the former, it appears that the requisition on the governor of this state was made in strict conformity with the act of congress. Being an official precept, issued with all the formalities required by law and regular on its face, all its recitals are, in the absence of controlling proof, to be taken as true. It is not, therefore, open to the government to object that the requisition on the governor of this state was not accompanied by a certified copy of an indictment found on an affidavit, as required by the United States statutes of 1793, sec. 1. The precept produced by the defendant was *prima facie* evidence, at least, that all necessary legal prerequisites had been complied with, and he was entitled to the benefit of the maxim, *Omnia rite acta præsumuntur*.

2. The warrant in express terms authorized the defendant to "take" the fugitive, as well as to "receive, convey, and transport him to the line of the commonwealth." The work "take," in the sense in which it is used in this precept, is synonymous with "arrest." It is the technical word used in all writs and precepts by which a sheriff or other officer is commanded to arrest the body, and in this sense it is frequently used in the statutes of this commonwealth: R. S., c. 90, sec. 8; c. 111, sec. 5; c. 135, sec. 2. In the same sense it is manifestly used in the revised statutes, c. 142, sec. 7, under which the precept in the present case was issued to the defendant. Nor is there anything in the constitution or laws of this commonwealth to restrain the

Digitized by Google

power of the governor in giving this authority to the defendant. On the contrary, he is expressly authorized by the revised statutes, c. 142, sec. 7, to issue his warrant authorizing the agent of the state that makes the demand to arrest the fugitive. By the United States statute of 1793 he is also empowered to cause the arrest to be made. So that in issuing his precept to the defendant for the arrest of the fugitive, the governor of this commonwealth acted in conformity to the laws both of this state and of the United States.

3. It is objected, however, that the governor had no authority to issue the warrant to the defendant without the advice and consent of the council. This objection is founded on the phraseology of the United States statute of 1793, which authorizes the "executive authority" of a state to demand the surrender of fugitives from justice and to arrest and deliver them up. The argument is, that under the constitution of this commonwealth the executive authority is not vested in the governor alone, but in the governor aided by the advice and consent of the council. But we think this is founded on too narrow an interpretation of the act of congress. By the term "executive authority," as there used, nothing more was intended than to prescribe the department of the government to which application should be made for the surrender of fugitives from justice. It was the executive authority, as distinguished from the judicial and legislative branches of the government, that was to exercise the power and authority conferred by the act. But it was not intended that every member of that department should be called into action for the purpose; but only so much thereof as should be necessary to carry its provisions into effect. The provision of the revised statutes, c. 142, sec. 7, authorizing the governor to issue his warrant for the apprehension of the fugitive, was therefore in accordance with the act of congress; and being intended to aid in the enforcement of that law, and not being repugnant to any provision in the state constitution, it is not open to the objection urged by the prosecution: *Commonwealth* v. *Tracy*, 5 Met. 548.

4. The writ of *habeas corpus* in no way affected the validity of the precept under which the defendant arrested Wyeth. It was wholly a collateral and independent proceeding, and did not necessarily involve the question of the validity of the extradition of the alleged fugitive, nor would his discharge from custody on the precept held by the deputy sheriff have absolved him from arrest on that held by the defendant. The latter might well be

Digitized by Google

a valid subsisting warrant, although the former had been adjudged informal and void.

Exceptions sustained.

UPON ARREST OF FUGITIVE FROM JUSTICE, WARRANT FROM GOVERNOR OF STATE is *prima facie* evidence of compliance with all legal prerequisites: *Davis's Case*, 122 Mass. 328, citing the principal case.

PHINNEY v. WATTS.

[9 GRAY, 269.]

DEED OF LAND BOUNDED UPON ARTIFICIAL POND created by expanding a stream by means of a dam, and through which the thread of the stream has always been apparent, passes the land to the thread of the stream.

TORT for breaking plaintiff's close. The facts are stated in the opinion.

J. M. Day, for the plaintiff.

G. Marston, for the defendant.

By Court, METCALF, J. By the deed under which the plaintiff claims title to the *locus in quo*, he is bounded "westerly by Phinney's mill-pond," which, according to the agreed facts, is sometimes called by that name, and sometimes by the name of "Trout brook," and which is about thirty rods long and from one to six rods wide, and through which the thread of a stream has always been apparent. On this state of the facts, the court are of opinion that the western boundary of the plaintiff's land is the center or thread of the stream, as it unquestionably would have been if the deed had bounded him on Trout brook, the other name by which the water was known and called.

Though we cannot see any reason why the plaintiff's grantor should wish to exclude from his grant the very narrow strip of land between the brook and the edge of the water overflowing its banks—which would be worthless to him while overflowed—yet this cannot be allowed to influence our judgment. The deed must be construed by the legal rules which are applicable to its terms.

However the words "bounded by a pond" should be construed when applied to a natural pond, whether in its original state or raised by artificial means, we are of opinion, with Chief Justice Weston, that when land is bounded "upon an artificial pond created by expanding a stream by means of a dam, the

Digitized by Google

riparian proprietor would go to the thread of the stream. This is law," he says, "well settled and understood:" *Bradley* v. *Rice*, 13 Me. 201 [29 Am. Dec. 501]; see also *Waterman* v. *Johnson*, 13 Pick. 265, where Chief Justice Shaw intimates the like opinion; also *Lowell* v. *Robinson*, 16 Me. 361 [33 Am. Dec. 671]. In the absence of any adjudication conclusively settling the precise case before us, we adopt these views and apply them.

Judgment for the plaintiff.

BOUNDING LAND BY STREAM OR ARTIFICIALLY RAISED POND passes title to thread of stream: See *Luce* v. *Carley*, 35 Am. Dec. 637, and cases in note 640; *Middleton* v. *Pritchard*, 38 Id. 112, and note 119. The principal case is cited to this point and followed in *Boston* v. *Richardson*, 13 Allen, 154; *Paine* v. *Woods*, 108 Mass. 170.

COMMONWEALTH v. SOWLE.

[9 GRAY, 304.]

INDICTMENT ALLEGING THAT DEFENDANTS DID WILLFULLY AND MALICIOUSLY KILL HORSE of another person named is a sufficient averment of the offense, under a statute which prescribes a punishment for "every person who shall willfully and maliciously kill, maim, or disfigure any horses, cattle, or other beasts of another person."

INDICTMENT under statute for killing a horse. The facts appear in the opinion.

J. O. Blaisdell, for the defendant.

J. H. Clifford, attorney-general, for the commonwealth.

By Court, METCALF, J. The revised statutes, c. 126, sec. 39, prescribe a punishment for "every person who shall willfully and maliciously kill, maim, or disfigure any horses, cattle, or other beasts of another person." The offense thus made punishable was previously described in nearly the same words, by statute 1804, c. 131, sec. 4, and by the English statutes 22 & 23 Car. II., c. 7, and 9 Geo. I., c. 22. And this indictment alleges that the defendants did willfully and maliciously kill a horse of another person named. Is this a sufficient averment of the statute offense? or should "the manner, mode, or process" of killing have been set forth, as is contended by the defendant's counsel?

The court are of opinion that the indictment is sufficient. It is in the form that is found in English books, which are deemed safe precedents: Crown Circ. Comp., 7th ed., 218; 2 Stark. Crim.

Digitized by Google

Pl., 2d ed., 579, 3 Ch. Crim. L. 1086, 1087; Archb. Crim. Pl., 13th ed., 451, and in the previous editions. In *Rex* v. *Chalkley*, Russ. & Ry. 258, this form was not objected to, although other questions in the case were carried before all the judges.

American books of forms contain indictments like this; that is, setting forth the offense in the words of the statutes on which they are framed, without any description of the manner of killing. And indictments at common law, for the willful and malicious killing of beasts have been drawn in the same manner. Both have been sustained: *State* v. *Scott*, 2 Dev. & B. L. 35; *Taylor* v. *State*, 6 Humph. 285.

Under statute 9 Geo. I., c. 22, a conviction was held to be right, on an indictment which alleged that the defendant feloniously, maliciously, etc., did maim and wound two asses, the property of a third person; the manner of maiming and wounding not being stated: *Rex* v. *Whitney* 1 Moo. C. C. 3; see also Crown Circ. Comp. 219, 220; *Rex* v. *Briggs*, 1 Moody, 318; *Erle's Case*, 2 Lew. 133.

Motion in arrest of judgment overruled.

INDICTMENT CHARGING OFFENSE IN LANGUAGE OF STATUTE IS SUFFICIENT: See *Sarah* v. *State*, 61 Am. Dec. 545, and note 552. The principal case is cited and followed on this point in *Commonwealth* v. *Falvey*, 108 Mass. 307; *Commonwealth* v. *Brigham*, Id. 458.

POTTER *v.* GREENE.

[9 GRAY, 309.]

NEWSPAPER PARAGRAPH STATING THAT CERTAIN PERSON IS MEMBER OF CERTAIN PARTNERSHIP, but not purporting to be inserted by the partnership, is not admissible in evidence to charge such person as such partner, merely on proof that he was a subscriber to the paper at the time, and had made no public contradiction of the statement.

ACTION on contract to charge defendant as a member of a certain partnership, or as having held himself out as such. On the trial, it was proved that defendant was a subscriber to a certain newspaper, which he received regularly. Plaintiff then offered in evidence an article published in such newspaper as follows: "A company have purchased the valuable property of the Sagamore Thread Company, and will immediately put it into operation. B. F. Greene, esq., of Central Falls, is one of the new company, and is to have charge of the manufactory," etc.; he also offered to show that defendant had never denied

Digitized by Google

or requested a denial of the same, but he did not offer to show in any way that defendant knew of or authorized the article. The evidence so offered was not admitted. Verdict for defendant.

C. B. Farnsworth, for the plaintiff.

E. H. Bennett, for the defendant.

By Court, METCALF, J. The cases to which we have been referred by the plaintiff's counsel do not support the position to which they were cited. They do not tend to show that, upon the evidence given at the trial, the defendant held himself out as a partner in the Sagamore Thread Company. The phrase "holding one's self out as a partner" imports at least the voluntary act of the party so holding himself out, or the act of others by his authority or permission. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used. If he knows that his name is so used, though without his consent, his acquiescence may be inferred, if he do not publicly disclaim the connection: *Fox* v. *Clifton*, 6 Bing. 794, 795; Cary on Part. 19. In the case before us, it does not appear that the defendant ever was an actual member of the thread company, or ever held himself out as such, or ever knew that his name had been used as such. Whether he ever saw the newspaper paragraph is both uncertain and immaterial. If he saw it, we are of opinion that he was under no obligation, legal or moral, to give it a public contradiction. It might have been otherwise if there had been an advertisement in the newspaper purporting to have been inserted by the company, and representing that the defendant was one of its members.

Exceptions overruled.

WRIGHT *v.* MORSE.

[9 GRAY, 337.]

PERSON PLACING HIS NAME ON BACK OF NOTE SIMULTANEOUSLY with the signature by the maker, and before it is passed to the payee, is in the situation of an original promisor, and is liable in every respect to the payee of the note. Such party is deemed to participate in the original consideration, and to be liable without any new or further consideration.

PERSON PLACING HIS NAME ON BACK OF NOTE MAY SHOW BY PAROL EVIDENCE that his signature was placed there after the note had passed to the payee, and thus establish the relation of guarantor, and its liabilities only.

Digitized by Google

WHERE PARTY NOT PAYEE SIGNS NOTE ON BACK, and the fact that such signature was made simultaneously with the signature of the maker, and before the note was delivered to the payee, is uncontroverted, the liability of the party as an original promisor results therefrom and exists in the absolute form indicated on the note itself, and is not to be controlled or varied by oral testimony of a liability as guarantor or any other conditional liability.

ACTION on promissory note. The opinion states the facts.

E. L. Barney, for the defendant.

O. Prescott, for the plaintiff.

By Court, DEWEY, J. The defendant, by putting his name on the back of the note simultaneously with the signature by Ripley on the face of the note, and before it was passed to the payee, has, as has been repeatedly held by this court, placed himself in the situation of an original promisor, and is liable in every respect as such to the payee of the note: *Union Bank* v. *Willis*, 8 Met. 504 [41 Am. Dec. 541], and cases there cited. And as such original promisor he is deemed in law to participate in the original consideration, and to be liable without any new or further consideration: *Samson* v. *Thornton*, 3 Id. 275 [37 Am. Dec. 135].

It appearing in the present case that this instrument was thus signed by the defendant simultaneously with its execution by Ripley, and before the delivery of the note to the payee, it assumes, as respects the promisors, the character of other promissory notes. Any competent evidence of the failure of consideration, illegality in the contract, or other ground of defense that would be open to the defendant in a suit against him upon an ordinary note signed on its face, would be equally open to him in the present case.

But oral evidence is not to be introduced by such party to vary and control the written promise contained in the note itself; as to show that the note was not to be paid according to its tenor; or that, although absolute on its face, yet it was given upon a condition, and to be void or not payable upon the happening of some future event; thus making an absolute promise a qualified or conditional one. If anything is settled by repeated decisions of this court, it is that oral evidence cannot be admitted to alter or vary a written contract, nor to annex thereto a condition or defeasance not appearing on the contract itself.

Nor is this rule rejecting oral evidence in such cases confined to negotiable notes transferred before due, and in the hands of

Digitized by Google

other parties than the original payee. The cases where it has been applied most frequently by this court have been cases between the original parties: *Hunt* v. *Adams*, 7 Mass. 518; *Adams* v. *Wilson*, 12 Met. 138 [45 Am. Dec. 240]; *Underwood* v. *Simonds*, 12 Id. 275; *Hanchet* v. *Birge*, Id. 545.

The case of *Riley* v. *Gerrish*, 9 Cush. 104, is much relied upon by the defendant as an authority for introducing oral evidence in a case where the signature of the second promisor is on the back of the note. It is true that some of the remarks in the opinion given in that case, taken abstractly and without reference to the facts of the case and the real point in controversy, would seem to support the views here taken by the counsel for the defense. It becomes necessary, therefore, to look at the facts in that case, and the point upon which questions of law were raised. It will appear from the facts stated in the report of that case that the plaintiff sought to charge the defendant as an original promisor. The defendant denied this form of liability, contending that it was only that of an indorser, that purpose being indicated by him in writing in connection with his signature. The note was payable to the order of the plaintiff, and signed on its face by William Canney, and on the back the name of the defendant written in blank, except that above it the word "indorser" had been written, and subsequently erased. The plaintiff attempted to explain the erasure, and to show that it was done lawfully, and before the note passed to him as his property; and the whole question was as to the competency of oral evidence to show that the defendant, when he signed the note, wrote the word "indorser" over his name, but the plaintiff refusing to accept the note in that form, that word was, by consent of the defendant, erased before delivery of the note to the plaintiff, and the note actually passed to the plaintiff with the word "indorser" erased. The only point in which the case can be deemed a judicial authority as to the competency of oral evidence is that oral evidence may be admitted to explain the circumstances under which an erasure was made; or in other words, to show whether it was made before or after the delivery of the note, and whether it was authorized by the party, and by proof of such facts to change or affect the relation of the party as an original promisor. In this respect the case was very like that of *Austin* v. *Boyd*, 24 Pick. 66, where such evidence was allowed to be competent to explain an erasure of the payee's name that had been indorsed on the back by mistake in such manner as would have shown the defendant in the

Digitized by Google

action to stand in the relation of a second indorser merely. In that case, while such evidence was held admissible to explain the erasure, it was very carefully stated by the court that the evidence was not offered to control or vary a written contract, but to account for a fact which might otherwise affect the note.

In cases of notes signed, as the present was, by the party on the back of the note, it is competent to show by parol evidence that the signature was placed there after the note had passed to the payee, and thus established the relation of guarantor and its liabilities only, which may materially affect the rights of the parties; but the fact that the signature of the defendant was made simultaneously with the other signature, and before the note was delivered to the payee, being uncontroverted, the liability of the party as an original promisor results therefrom, and exists in the absolute form indicated on the note itself, and is not to be controlled or varied by oral testimony of a conditional liability. It was not therefore competent in the present case to show by oral evidence that it was agreed between the plaintiff and defendant that if Ripley, the other signer, should arrive safely at California, the defendant was to be released from all further liability, and the plaintiff was not to look to them for the payment of the note. The proposed evidence was therefore properly rejected.

Exceptions overruled.

LIABILITY OF PARTY NOT PAYEE INDORSING NOTE BEFORE DELIVERY: See *Riggs* v. *Waldo*, 56 Am. Dec. 356, and note 358, 359; *Cook* v. *Southwick*, 60 Id. 181. In *Stack* v. *Beach*, 74 Ind. 574, the principal case is cited, and such indorsement held not to create any defined contract liabilty. It is said that the part of the paper on which the name is placed is of no consequence, the party being bound by his purpose in placing his name on the paper: *Rodoncanachi* v. *Buttrick*, 125 Mass. 137.

PAROL EVIDENCE TO VARY EFFECT OF INDORSEMENT: See *Cook* v. *Southwick*, 60 Am. Dec. 181, and note 185. Such evidence is not generally admissible for such purpose: *Essex Co.* v. *Edmands*, 12 Gray, 279; *Brown* v. *Butler*, 99 Mass. 180; *Way* v. *Butterworth*, 108 Id. 513; *Davis* v. *Randall*, 115 Id. 551, *Gilson* v. *Stevens Machine Co.*, 124 Id. 548.

HAYDEN *v.* SNELL.

[9 GRAY, 365.]

PROMISE TO PAY ANNUITY TO MAN AND HIS WIFE, "DURING THEIR NATURAL LIVES," is a promise to pay during their joint lives, and the life of the survivor.

ACTION by Anna Hayden, after the death of her husband, Charles Hayden, to recover the amount of an annuity due her

Digitized by Google

on the following note: "Bridgewater, October 20, 1842. For value received I promise to pay to Charles Hayden or his wife, Anna Hayden, the sum of eight dollars yearly during their natural lives. (Signed) Willard Snell."

E. Ames, for the defendant.

J. Brown, for the plaintiff.

By Court, BIGELOW, J. The contract declared on was in legal effect an agreement to pay the stipulated sum yearly to both of the persons named as promisees, and so long as both survived, an action might have been maintained in their names jointly: *Osgood* v. *Pearsons*, 4 Gray, 455; *Willoughby* v. *Willoughby*, 5 N. H. 244. Upon the death of either, the right of action would remain in the survivor: 1 Ch. Pl., 6th Am. ed., 21. It was therefore, legally interpreted, a promise to pay both and the survivor of them so long as they or either of them should live. The purpose of adding to the contract the words "during their natural lives" was not to change the legal effect of the promise to the two, so as to limit the liability to their joint lives, but to mark the period when the annuity should cease. Not being intended as an absolute promise to pay a certain fixed sum at all events, it was necessary to add a clause which should indicate the time when the yearly payment was to terminate.

Demurrer overruled.

BENT *v.* COBB.

[9 GRAY, 397.]

AUCTIONEER IS AGENT OF BOTH PARTIES, AND HIS MEMORANDUM OF CONTRACT OR AGREEMENT is generally binding on both, so as to satisfy the requirements of the statute of frauds; but this rule is not applicable where the auctioneer is himself the vendor.

GUARDIAN ACTING AS AUCTIONEER IN SELLING LAND OF HIS WARD under authority of the court is not authorized as such to sign for the purchaser a memorandum in writing to take the sale out of the statute of frauds.

ACTION by guardian to enforce sale made of lands of ward in pursuance of order of the court. The lands were sold at public auction, plaintiff, the guardian, acting as auctioneer. On the day of sale to defendant, plaintiff made a memorandum of such sale in writing, signed with his own name as guardian and auctioneer. Defendants now deny the sufficiency of the

Digitized by Google

memorandum under the statute of frauds, and refuse to accept deed or pay the price.

E. Ames, for the defendants.

J. A. Andrew, for the plaintiffs.

By Court, BIGELOW, J. The memorandum of the contract on which the plaintiff relies to take the case out of the operation of the statute of frauds is in our judgment insufficient, because it is not signed by the defendant, or by "any person thereunto by him lawfully authorized." In all cases of sales by auction, the auctioneer, acting only as such, is the competent agent of both parties, and his memorandum of a contract or agreement is binding on both. He is the agent of the vendor by virtue of his employment to make the sale, and he is made the agent of the vendee by the act of the latter in giving him his bid and receiving from him without objection the announcement that the property sold is knocked off to him as purchaser. But this rule is not applicable to cases where the auctioneer is also himself the vendor. The great mischief intended to be prevented by the statute would still exist if one party to a contract could make a memorandum of it which would absolutely bind the other. If such were its true construction, it would be a feeble security against fraud; or rather, it would open a door for its easy commission. A vendor could fasten his own terms on his vendee. If it was a written contract, binding on the purchaser, he could not show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated. He could not vary or alter it by the testimony of those present at the sale. The publicity of a sale by auction would be no safeguard against a false statement of the terms of sale made in the written memorandum signed by a party acting in the double capacity of auctioneer and vendor. The chief reason in support of the rule that an auctioneer acting solely as such may be the agent of both parties to bind them by his memorandum is, that he is supposed to be a disinterested person, having no motive to mistake the bargain, and entitled equally to the confidence of both parties. But this reason fails when he is the party to the contract and the party in interest also. The purpose of the statute was that a contract should not be binding unless it was in writing and signed by the party himself to be charged thereby, or by some third person in his behalf, not a party to the contract, who might impartially note its contents.

Nor can it make any difference as to the power of the vendor

Digitized by Google

to make a memorandum binding on the vendee that the sale is made by the former in a representative or fiduciary character as an executor, administrator, guardian, or trustee. He is still the party to the contract, the price is to be paid to him, he is to deal with the purchase money; his interest and bias would naturally be in favor of those whom he represented, and, what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to those of the vendee. He would stand in a relation which would necessarily disqualify him from acting as agent of both parties. We do not mean to say that a contract would not be binding, made by an auctioneer, where, from the form in which it was written, an action might be brought to enforce the contract in his name. In such case, if he was only the nominal party to the contract and the record, not being himself the vendor, and having no interest in the sale except as auctioneer, his memorandum might be sufficient to bind both parties to the contract. But we confine our opinion to the case at bar, where the auctioneer was the vendor and a party having an interest, greater or less, in the contract, as well as a party to it in terms: *Wright* v. *Dannah*, 2 Camp. 203; *Farebrother* v. *Simmons*, 5 Barn. & Ald. 333; *Rayner* v. *Linthorne*, 2 Car. & P. 124; *Bird* v. *Boulter*, 4 Barn. & Adol. 443; S. C., 1 Nev. & M. 313; *Smith* v. *Arnold*, 5 Mason, 417.

Exceptions sustained.

MEMORANDUM OF AUCTIONEER, SUFFICIENCY OF, TO TAKE CASE OUT OF STATUTE OF FRAUDS: See *Craig* v. *Godfrey*, 54 Am. Dec. 299; *Doty* v. *Wilder*, 60 Id. 756. Such a memorandum was held sufficient in *Sanborn* v. *Chamberlin*, 101 Mass. 416, citing the principal case. Where the auctioneer is a party to or interested beyond his commissions in the sale, his memorandum will not be sufficient as a charge upon the other party: *Tull* v. *David*, 45 Mo. 446; *Johnson* v. *Buck*, 32 N. J. L. 342, both citing the principal case.

FORD *v.* TIRRELL.

[9 GRAY, 401.]

IN ACTION ON AGREEMENT TO BUILD OCTAGONAL CELLAR WALL at an agreed price per foot, evidence is admissible of the usage of measuring the angles of such walls, and of the proper mode of measuring the angles of rectangular walls.

INTEREST IS RECOVERABLE ON MONEY DUE FOR LABOR, after a demand of payment made at the expiration of a reasonable time.

Digitized by Google

ACTION for value of work and labor in building an octagonal cellar wall. The facts appear in the opinion, except that the court instructed the jury that if they found for plaintiff, and that he had demanded payment at the expiration of a reasonable time, he should recover interest from the time of such demand.

P. Simmons, for the defendant.

D. U. Johnson, for the plaintiff.

By Court, MERRICK, J. The controversy between the parties at the trial of this action related entirely to the amount of money which the plaintiff had earned in the performance of his contract. He had built the cellar wall as he had agreed to do, and was entitled to receive therefor at the rate of eleven cents a foot in full compensation for his services. The jury had therefore only to determine the number of feet of which the wall consisted, in order to ascertain the sum to which the plaintiff was entitled, and for which they were to render a verdict. But how was this to be done? and in what manner was the admeasurement to be made? The meaning of the language used by the parties in their agreement being, in reference to the compensation to be paid for the work which was to be done, equivocal and obscure, it was certainly competent for the plaintiff to introduce proof of usage, in order to interpret the meaning of the language, and to ascertain the extent of the contract: 1 Greenl. Ev., sec. 292. "The true office of usages of trade," says Mr. Greenleaf, "is to interpret the otherwise indeterminate intention of the parties; . . . . and to fix and explain the meaning of words and expressions of doubtful or various senses:" 2 Id., sec. 251.

The evidence in relation to a general usage to make an allowance to the extent claimed by the plaintiff in the admeasurement of octagon walls beyond the mere inner surface of them, on account of necessary additional work at the angles, appears to have been put in without objection. And it was, we think, very properly admitted. But one of the witnesses who was called to prove this general usage testified also as to the mode in which he thought rectangular and octagon walls should both be alike measured. The defendant objected to the testimony relative to the rectangular wall, because the two were so dissimilar that they could not be compared with each other. We do not see any force in this objection. The angles in the two kinds of wall differ, it is true, in some degree, but they are not wholly unlike. And proof of the correct mode of measuring the former

Digitized by Google

to ascertain the number of feet of which it consists would afford some light and some aid in determining how, for a similar purpose, and under a similar contract, the latter ought to be admeasured. It was for the jury to say what weight ought justly to be allowed to it.

The instructions to the jury were right. They were to determine, upon the evidence in the first instance, whether there was sufficient proof of such a general usage as was contended for by the plaintiff. If they found it to exist, they were properly advised to take it as a guide in fixing upon the mode of measuring the wall; the computation according to which was to be adopted as the basis of their verdict. If there was no such general usage proved, then undoubtedly it was their duty, as they were further advised, to allow for such an admeasurement of the wall as they were satisfied, upon all the evidence in the case, was just and proper. This would be acting upon the most reasonable construction which could be given to the agreement between the parties; and since the language in which it was expressed was not precise and definite, but in some degree obscure or of doubtful meaning, a decision upon the conflicting pretensions of the parties upon any other interpretation would have been justly obnoxious to complaint.

As all these instructions, as well as that in relation to interest, appear to us to have been correct, the exceptions are overruled.

USAGES OF TRADE, COMPETENCY AS EVIDENCE: *Clark* v. *Baker*, 45 Am. Dec. 199; *Cox* v. *O'Reilly*, 58 Id. 633, and cases in notes.

GURNEY v. HOWE.

[9 GRAY, 404.]

RECORD KEPT AS REQUIRED BY POST-OFFICE DEPARTMENT REGULATIONS, in accordance with the act of congress providing therefor, of registered letters received at a post-office, is admissible in evidence without the testimony of clerk who actually kept it.

MISTAKE IN ENTERING DATE OF RECEIPT OF LETTER IN RECORD OF REGISTERED LETTERS kept by post-office will not conclude party endeavoring to prove sending of letter at certain time, and the mistake may be shown by testimony of the postmaster as to the ordinary course of the mails, or by other evidence.

LETTER CONTAINING MONEY SENT BY DEBTOR TO CREDITOR through the mail is at the risk of the debtor, unless the creditor, either expressly or by the usual course of dealing between the parties, authorized such mode of remittance.

Digitized by Google

ACTION on promissory note. Defendant pleaded payment. On the trial, defendant proved the deposit of a letter containing the amount due on the note in the post-office and directed to plaintiff. Evidence was introduced tending to show that the letter was forwarded in due course of mail. The postmaster at the post-office of the addressee of the letter was made a witness. He produced the record of registered letters required of him by law to be kept. Plaintiff objected to the record being read, because it was not a book kept by witness, but by one of his clerks, who was absent. The record was, however, admitted in evidence. It showed that a letter answering to that claimed to be sent by defendant had been received. The postmaster was further allowed to testify, against plaintiff's objection, that the entry of the date when such letter was received was erroneous, and should have been one day earlier, such testimony being based on his knowledge of the course of the mails and time of their arrival. The remaining facts appear in the opinion.

B. W. Harris, for the plaintiff.

B. Sanford, for the defendant.

By Court, BIGELOW, J. 1. The register of letters, received at the post-office at Taunton, being an official record authorized by law to be kept, was admissible in evidence: 1 Greenl. Ev., sec. 484.

2. The evidence of the postmaster as to the error upon the register in the date of the receipt of the letter was rightly received. The register was not conclusive as to this date. A party has always the right to prove that a fact is different from that which it would appear to be by a portion of his own evidence. If this were not so, he would be bound by the innocent mistakes of witnesses and third parties. He can be allowed to prove the exact truth, without impeaching the evidence offered by himself. The evidence in this case was not offered to contradict the register, but to show the regular and due course of the mail, which was clearly competent. Incidentally it also showed that a date in the register was probably erroneous. Besides, the exact date of the receipt of the letter in question was quite immaterial. The real and material inquiry was whether it was received at all.

3. The instructions given to the jury were not adapted to the case, and did not properly meet the request made by the plaintiff's counsel for a different ruling. The general rule of law is that the duty lies on the debtor to pay his debt to his creditor personally or to his authorized agent. The burden of proof to

Digitized by Google

show a payment of a debt is not sustained therefore by proof that a letter, containing the requisite amount, directed to the creditor, was duly deposited in the post-office. The debtor must go further. He must also show that the creditor authorized this mode of remittance, either by express assent or direction, or a usage and course of dealing from which such assent or direction may be fairly inferred. If this can be shown, then the transmission is at the risk of the creditor; otherwise, it lies upon the debtor: *Warwicke* v. *Noakes*, Peake, 67; *Hawkins* v. *Rut*, Id. 186; *Waller* v. *Haynes*, Ry. & M. 149; 2 Greenl. Ev., sec. 525; *Wakefield* v. *Lithgow*, 3 Mass. 249. The instructions given to the jury on this point did not state the rule of law with distinctness and accuracy. They seem to make the case depend on the question whether the proposition to transmit by mail came from the plaintiff or from the defendant's intestate. That was a fact wholly immaterial. The real question was whether the plaintiff authorized a remittance by mail, without qualification; or whether such authority was accompanied with any condition as to the risk of such transmission. As this question does not seem to have been passed on by the jury, the case must be tried anew.

Exceptions sustained.

PUBLIC RECORDS OF GOVERNMENT ARE GENERALLY CONCLUSIVE EVIDENCE: *Pells* v. *Webquish*, 129 Mass. 473, citing the principal case.

ROBINSON *v.* ROBINSON.

[9 GRAY, 447.]

BOND BY GRANTEE TO GRANTOR IN CONSIDERATION OF CONVEYANCE, and conditioned for the support of grantor during his life, and in case of neglect or failure in the condition, to reconvey the land, does not constitute a mortgage; in case of neglect or failure to so support, the grantor is entitled to relief in equity by a decree of reconveyance.

BILL for relief in equity. Plaintiff had conveyed certain land to defendant, and at the same time had taken from defendant a bond as consideration therefor, conditioned for the support of grantor and his wife during their lives, and in case of neglect or failure in the condition to reconvey the land. The jury found the conditions broken, and plaintiff asked for a reconveyance, and other relief. The remaining facts appear in the opinion.

E. Ames, for the plaintiff.

E. H. Bennett, for the defendant.

Digitized by Google

By COURT. The deed and bond set out in the declaration, and admitted by the answer, did not constitute a mortgage. There was no conveyance from the supposed mortgagor to the supposed mortgagee of any interest in the land. It is not as if the defendant, after receiving the plaintiff's deed, had made a conveyance back to the plaintiff, taking a bond for a reconveyance on the performance of certain conditions. In that case there would be a conveyance from the defendant to the plaintiff, which by reason of the bond of defeasance might be deemed conditional, and a mortgage. But in the case at bar the deed was made to, not by, the person by whom the conditions were to be performed.

The defendant's stipulation for the support of the plaintiff and his wife was not a limitation of his estate, nor a condition, according to the technical meaning of that word in conveyances of real estate, a breach of which would give the plaintiff a right of re-entry; but simply a covenant which may be specifically enforced in equity: 4 Kent's Com., 6th ed., 134–136; *Wheeler* v. *Dascomb*, 3 Cush. 285; *Doe* v. *Phillips*, 2 Bing. 18.

A decree may be entered that the defendant, within fifteen days, execute, acknowledge, and deliver to the plaintiff a deed of release and quitclaim in common form, with covenants of warranty against all persons claiming by, through, or under the defendant, of all the lands described in the deed of the plaintiff to him, dated June 15, 1854, and deliver up the possession of said lands to the plaintiff, so that the plaintiff may be revested and repossessed thereof, as of his former estate; and that in case of the neglect of the defendant within said fifteen days to execute, acknowledge, and deliver such a deed, and deliver up possession as aforesaid, and upon affidavit of the plaintiff or his counsel to such neglect filed with the clerk of this court, then at any time after the expiration of said fifteen days, and within a year from the entry of this decree, the clerk issue a writ of *habere facias*, with a copy of the decree annexed, to the plaintiff against the defendant for said lands, in order that, upon the plaintiff's being restored to the possession thereof under and by virtue of said writ, and due return and registration of said writ, and return in the registry of deeds, the plaintiff may be revested of and in said lands as of his former estate, and as he was seised and possessed thereof before the execution of his deed to the plaintiff; and that the plaintiff have his costs of the defendant, and his execution therefor in common form.

Decree accordingly.

Digitized by Google

BROWN v. STONE.

[10 GRAY, 61.]

DESCRIPTIONS IN DEEDS TO PERSON UNDER WHOM ADJOINING OWNERS CLAIM are admissible in evidence, in a controversy between such owners, as to the width of a passage-way between their estates.

OWNER OF RIGHT OF WAY OVER PASSAGE-WAY MAY DISTURB SOIL and pave or repair the way for the purpose of keeping it fit for use, provided in so doing he make no material change in the condition of the way nor interfere with the estates of others therein.

TORT for forcibly entering the plaintiff's close and digging up the soil and carrying away the pavement. The opinion states the facts.

J. H. Robinson, for the plaintiff.

A. A. Abbott, for the defendant.

By Court, MERRICK, J. The plaintiff's land is bounded on its westerly side by the land of Joseph C. Wooldredge; and the land belonging to the latter is bounded on its easterly side by a passage-way situate between the dwelling-houses on their respective estates. They disagree in relation to the extent and width of this way; and this disagreement constituted the subject of inquiry, and was the chief point in controversy upon the trial of this action. The question respecting which the parties were thus at issue was a mere question of fact; its determination depended wholly upon the effect to be allowed to the evidence in the case, and the inferences justly to be drawn from it, and not at all upon any contested construction of the contents of the several deeds which they had respectively produced, concerning which no difference of opinion appears to have been entertained or expressed. It was a matter, therefore, strictly within the province of the jury, and was of course very properly left to their decision.

The defendant contended that the way by which the estate of Wooldredge was bounded was located in the same place, and was of the same width and extent, as the passage-way mentioned in the deed from Daniel Felton to John Nutt, under whom both the parties to this suit derive their titles. For the purpose of proving the locality and the space which the last-mentioned way occupied, he was allowed to introduce the deeds of Felton to Nutt and to Felton, jun. This was correct; for the existence, extent, and width of that way constituted a part of the facts essential to the maintenance of the defense relied upon. And in reference to those deeds, and to all the evidence having any

Digitized by Google

bearing upon the particular question upon which the parties were at issue, the jury were rightly instructed that if a passage-way, marked and distinguishable on the ground, was in fact actually laid out there by Daniel Felton, and if that was the same passage-way which is referred to in the several deeds from Nutt and his assigns to Wooldredge, the plaintiff's estate would not extend beyond its westerly side, but would be defined and limited by it. Under such instructions, it is obvious that whatever tended to establish the precise locality and exact extent of the way laid out by Felton must have been admissible as competent and pertinent evidence.

The law in relation to the rights of tenants in common was accurately stated by the presiding judge. But as no such tenancy was shown to have at any time existed in which the parties had any interest, although the law upon that subject seems to have been somewhat considered and discussed, the principles laid down by the court had no bearing upon the final decision of the case, and of this the jury were fully and satisfactorily advised. Whatever was said upon that subject, therefore, affords the plaintiff no just cause of complaint.

As the right of way belonged to Wooldredge, it was lawful for him to do any work upon its surface which was necessary, fit, and proper to be done there to enable him to use and enjoy his right in it in a manner beneficial and advantageous to himself, provided he did not thereby make any material change in the state and condition of the soil, or disturb or interfere with the estate or privileges of other persons therein. For this purpose and within this limitation, his acts in the preparation, repair, or improvement of the way were justifiable, and could not be treated or resisted as a trespass by an owner of the land who held it in fee subject to such an easement: *Appleton* v. *Fullerton*, 1 Gray, 186. This is the right of Wooldredge; and if the defendant, acting under his license and authority, did in no particular exceed it, he was not liable to the plaintiff for any damage alleged to have been done by him. The instructions given to the jury upon this subject were to this effect, and were consequently unobjectionable.

Exceptions overruled.

OWNER OF RIGHT OF WAY MAY MAKE REASONABLE REPAIRS, if he does not interfere with the rights of others in the way: *Killion* v. *Kelley*, 120 Mass. 52, citing the principal case.

Digitized by Google

McGregor v. Wait.

[10 Gray, 72.]

Admissions Made by Wife without Knowledge of her Husband are not competent evidence of a way by prescription over land owned by them in her right.

Admissions of Right of Way over Land of Parents, by Son who resides with his parents and manages their estate, are not competent against the parents without proof of the extent of the son's agency.

Remainderman is not Estopped by Silence of Tenant for Life, when remarks are made in his presence in disparagement of his title.

Court may Order Production of Deed under Which Party to Suit Claims Title, where, on examination, he admits that it is in his possession, and such deed may be put in evidence without calling the attesting witness.

Tort for breaking plaintiff's close, tearing down a wall, and treading down the grass. Defendant set up, by way of answer, a right of way over the land from the adjoining premises. The facts are sufficiently stated in the opinion, except that on the trial defendant offered to prove that George Hobbs was a son of defendant's successors in interest, and that he was their principal agent, and had admitted that no right of way existed. The evidence was excluded. While William Wait, the defendant, was being examined, he admitted having in his possession the deed through which he claimed title. The court ordered him to produce it.

J. A. Gillis, for the defendants.

O. P. Lord and S. B. Ives, jun., for plaintiff.

By Court, Metcalf, J. 1. We are of opinion that the judge rightly declined to admit evidence that Mrs. Hobbs, without her husband's knowledge, applied to Mrs. Wait for leave to put a shop on a part of the ground over which the defendants claim a right of way. That evidence was offered for the purpose of proving a right of way over land owned in fee by Mrs. Hobbs, and of which her husband and herself were seised and possessed in her right. If it was admissible for this purpose, it must have been on the ground of her confessing or admitting that her land was subject to a servitude. Such a confession or admission by her alone would not bind either her or her husband, or her heirs, or the plaintiff, who is the grantee of her husband and herself. It is certain that she could not have made a valid grant of a right of way. Being under coverture, she was not competent to make a grant which would estop either herself or her heirs. And "to

Digitized by Google

say that one may, by acts in the country, by admission, by concealment or silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates:" *Lowell* v. *Daniels*, 2 Gray, 169.

2. Evidence of George Hobbs's application to Mrs. Wait for leave to place fagots on the land over which a right of way is now claimed had no legal tendency to prove such right, and was properly excluded. The nature and extent of his agency (if any) for his parents are not shown, and therefore his implied admission of a right of way cannot affect them or their grantee.

3. The statements made to Abraham Hobbs by Goodhue and "the neighbors" are not to be taken as true, or as admitted by Hobbs, by reason of his silence. Besides, if Hobbs were held to have admitted Wait's right of way, that admission would be evidence against himself only. He was merely tenant for life (his own life or that of his wife), and could not affect the rights of other parties by any admission, or even by a grant of a right of way over land so held by him: Gale & Whatley on Easements, pt. 1, c. 5, sec. 2; 3 Stark. Ev., 4th Am. ed., 1217, 1218; Peake Ev., 5th ed., 318.

4. We are of opinion that William Wait was rightly required to produce the deed under which he made claim, and that it was rightly allowed to be read in evidence without calling the attesting witness: See *Jackson* v. *Allen*, 3 Stark. 74; *Pearce* v. *Hooper*, 3 Taunt. 60; *Doe ex dem. Tyndale* v. *Hemming*, 9 Dow. & Ry. 15; *Jackson* v. *Kingsley*, 17 Johns. 158.

Exceptions overruled.

ESTOPPEL CANNOT OPERATE AGAINST MARRIED WOMAN TO BIND HER REALTY, because she is incapable of making contract in regard thereto: *Pelle* v. *Webquish*, 129 Mass. 472, citing the principal case.

PHILLIPS *v.* TUDOR.

[10 GRAY, 78.]

DEED BY TENANT IN COMMON OF "SIXTY-FOUR RODS, BEING PART OF" LOT held by the grantor in common with another, passes no title in common; nor will it pass any title in severalty unless grantee enters and takes possession of the quantity of land conveyed by the deed, and thus makes certain the part which he claims to hold in severalty.

TORT for breaking and entering plaintiff's close. The facts are stated in the opinion.

Digitized by Google

W. C. Endicott, for the defendant.

G. W. Phillips and O. P. Lord, for the plaintiffs.

By Court, BIGELOW, J. The deed of Samuel Tufts, under which the defendant claimed title and justified the act of trespass alleged in the declaration, cannot be construed to convey an estate in common and undivided with the other owners of the Robert Potter lot. There is nothing to indicate that the grantor intended to convey an undivided interest in the whole lot. On the contrary, it does not purport to convey the whole interest of the grantor, nor an undivided interest in the entire tract. It is only a grant of sixty-four rods, parcel of a larger lot. He owned a certain portion or fraction of the whole lot. This he does not grant, but he conveys sixty-four rods, and describes it as part of a lot, in the whole of which he was the owner of an undivided interest. The deed does not come within that class of cases where the owner of an entire tract conveys a certain part of the whole. In such cases there is no difficulty in construing the conveyance as a grant of an undivided interest in the proportion which the quantity granted bears to the whole parcel.

What was, then, the effect of the deed? A conveyance in severalty of sixty-four rods in a close containing a larger quantity and owned in common with others, without boundaries or other means to designate or fix the location of the land intended to be granted, if valid as against all persons except other owners in common of the whole close, cannot take effect until the grantee has entered and taken possession of the quantity of land conveyed by the deed, and thus made certain the part of the close which he claims to hold in severalty under his grant. Until such entry and possession, it is wholly uncertain what part of the close is comprehended within the grant, and the deed cannot take effect as to any specific part. There was no proof of any such entry in the present case upon the land where the trespass was committed. The defendant had no title to enter as a tenant in common, and he proved no entry upon any portion of the land to hold in severalty.

Exceptions overruled.

CONVEYANCE OF UNDIVIDED INTEREST IN PART OF CO-TENANT'S INTEREST in realty is good, and is entirely different from a conveyance of part of the property held by the co-tenants without any words to indicate the passing of an undivided interest: *Battel* v. *Smith*, 14 Gray, 497, distinguishing the principal case. In *Bogges* v. *Meredith*, 16 W. Va. 27, citing the principal case, it is held that a conveyance in the nature of the latter mentioned passes no title.

Digitized by Google

HEEBNER *v.* EAGLE INSURANCE CO. OF CINCINNATI.

[10 GRAY, 131.]

INSURER OF SHIP UNDER POLICY AGAINST "TOTAL LOSS ONLY," even if a time policy, may recover for a constructive total loss.

NOTICE TO UNDERWRITERS IS SUFFICIENT ABANDONMENT OF SHIP injured by perils of the sea, and therefore surveyed and condemned, on the west coast of the United States in time of peace, where such notice states that the assured "having received information of the condemnation of the ship at Humboldt, California, hereby abandons all in said vessel insured, and claims as for a total loss."

POLICY FROM FOREIGN INSURANCE COMPANY, SIGNED BY ITS HOME PRESIDENT AND SECRETARY, but not to be valid till countersigned by its agent in Massachusetts, is to be construed by the Massachusetts laws, and therefore one third new for old is to be deducted in estimating a constructive total loss under such policy.

EXEMPTION IN POLICY OF INSURANCE THAT INSURERS shall not be liable for breaking of the machinery unless occasioned by stranding will render insurers liable, where vessel is injured first by perils of the sea and afterwards by stranding, for so much of the injury only as the assured proves to have been occasioned by the stranding.

WHERE ASSESSOR IN COMPUTING CONSTRUCTIVE TOTAL LOSS allowed two months' interest on funds paid for repairs, the court cannot increase this assessment without evidence to overcome the assessor's report.

ACTION on insurance policy. The opinion states the facts.

G. S. Hillard, for the plaintiff.

F. C. Loring, for the defendants.

By Court, SHAW, C. J. Two questions are presented: 1. Whether the plaintiff can recover for a constructive total loss; and 2. Whether the plaintiff gave a seasonable and sufficient notice of abandonment.

1. The first question is, whether, under this policy, the defendants are liable for a constructive total loss caused by the perils insured against to more than half the value of the vessel.

The natural and grammatical construction of the language, "liable for a total loss only," is any total loss, as that term is known and understood by those conversant with the practice and law of insurance. The distinction between an actual and constructive total loss is well known and understood; and if the parties intended to qualify it, and limit the liability to either particular species of total loss, we think they would so have expressed it. But there is nothing in the policy to indicate that the insurers are not to be liable for a constructive total loss, if perfected as such by an abandonment; and we see nothing in

Digitized by Google

the principles of the law of insurance from which such a distinction can be implied against the letter of the contract.

The leading authority relied on is that of *Murray* v. *Hatch*, 6 Mass. 465. It is observable that that was an insurance on vessel, cargo, and freight, and against a total loss only. The vessel remained *in specie*, capable of being repaired, a few days' sail from the United States, and there was no abandonment. The case was argued and considered on the assumption that there was no abandonment; but the plaintiff insisted that, upon the facts then appearing, there was a total loss without abandonment. There was no adjudication, therefore, upon the proposition that in an insurance on vessel against total loss only, proof of a constructive total loss will not sustain the action. It is admitted by the eminent judge who gave the opinion, Mr. Justice Sewall, that no precedent like it had been cited; but his reasoning is founded upon the supposed analogy between the restriction in this policy, and the cases of exceptions and warranties against particular averages and partial losses on certain goods, as illustrated by reference to the case of perishable articles embraced in the common memorandum, being excepted from liability for losses on account of sea damage. These exceptions are manifestly founded on the impossibility or extreme difficulty of distinguishing, in the memorandum articles, damage arising from sea perils, and that arising from the natural tendency of the articles themselves to natural decay or deterioration. All the cases cited are those of perishable goods, whence he draws the conclusion that in cases arising under exceptions of particular average, or warranty against partial losses, the insurer is liable only for a total loss, where the subject-matter of the insurance is absolutely destroyed. The opinion is there expressed that where the policy is limited, as in that case, to be upon the risk of a total loss only, the same principles must govern the decision. The reasoning upon the evidence there goes to show that the vessel remained *in specie*, was capable of being repaired, and, according to one statement, might have been repaired for less than half her value, as expressed in the policy, and the court decide that the evidence did not prove an actual total loss. There was also a sufficient reason for setting aside the verdict of the jury and ordering a new trial, that in finding for the plaintiff for a total loss they had not deducted the salvage held by the plaintiff.

This case was no doubt decided right, because the assured had not complied with the indispensable condition of fixing a

Digitized by Google

constructive total loss, where the loss was not absolutely total in its nature, by a seasonable abandonment. This case was cited in the case of *Buchanan* v. *Ocean Ins. Co.*, 6 Cow. 331; but that was a case where the court had first decided that the plaintiff had no insurable interest, and where of course nothing would have passed to the underwriter by an abandonment. And the point was not necessary to the decision of the case then before the court.

The distinction between damage to goods to more than half their value, and damage to a vessel to more than half her value, as giving a right to abandon, and laying the foundation for a constructive total loss, is well illustrated by the case of *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch, 39. There it was held that where a constructive total loss is sought to be maintained, upon the ground of deterioration of the cargo, by some of the perils insured against, to more than half its value, all deteriorations of memorandum articles are to be excluded from the estimate of damages; and that in order to establish such a constructive total loss, damage from the perils insured against must be found to have been sustained by the residue of the cargo, as if the whole of the memorandum articles were sound, to warrant an abandonment. This construction is obviously necessary to carry out the rule that the insurers are to be exempted from all losses on memorandum articles, unless of a general nature specified, as by capture or stranding; and is plainly founded on the impracticability of proving whether the damage found in these perishable goods be attributable to perils of the sea, or to internal causes.

But we think this case establishes the principle that damage to more than half the value by sea perils to goods not in the memorandum, and *a fortiori* damage to a ship by perils of the sea to a like amount, does amount to a constructive total loss, and at the election of the assured, by a regular abandonment, becomes a legal total loss. That the distinction is limited to memorandum articles seems to be recognized in *Morean* v. *United States Ins. Co.*, 1 Wheat. 219, and the cases there cited and referred to.

There seems to be no reason in the nature of the contract, or of the business to which it refers, why the liability of the insurers should not extend as well to a constructive as to an actual total loss. It is true that no voyage is lost or defeated because no voyage was in contemplation, it being a policy on time; but by the perils insured against all further navigation of the vessel

Digitized by Google

was defeated and put an end to; the whole purpose of the enterprise, that of employing the vessel in profitable navigation during the year, was defeated. The court are therefore of opinion that under this policy the defendants were liable for a constructive total loss by the perils insured against, if followed by a legal abandonment.

2. The next question turns upon the form, legal effect, and sufficiency of the notice of abandonment.

It appears by the evidence that the vessel was damaged by the violence of the sea and stress of weather, and was at a small port on the western coast of America, and the evidence tended to show that if she could be repaired there, the expenses of such repairs, after making the customary and stipulated deductions, would amount to more than half her value as expressed in the policy. Damage of a vessel to more than half her value, as a ground of abandonment and constructive total loss, seems now to be settled as the rule of American law, conformably to that of some of the maritime states of Europe, contrary to the English rule, which requires proof of damage to such an extent that the repairs of the vessel in the place where it is would be equal in amount to the value of the vessel when repaired: *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch, 39. The master called a survey, and, in compliance with the report of the surveyors, sold the steamer at auction at Humboldt bay. These things occurred early in November, 1851; and on the sixth of February following notice of abandonment was given by letter by the plaintiff to the agent of the defendants, residing in Boston. In deciding on the character of this notice, we are to consider the relative situation of the parties, what they respectively knew and understood, and what was the subject-matter of the communication.

The Chesapeake was a steamer owned by the plaintiff, insured by the defendants about six months before, for no voyage to be made from one port or another to carry any particular cargo, but for the term of one year, at all ports and places, with the general purpose to trade on the west coast of America, insured against total loss only. The vessel was at a great distance from her home port by sea, but the communication by letter, by way of the isthmus of Panama, was between one and two months.

The notice and offer of abandonment is certainly brief, and in a form not to be recommended; still the question is, whether it is sufficient. The difficulty lies in the ambiguity of the word "condemnation," as a cause of loss, accompanied by a demand

Digitized by Google

for a total loss. The term, in its application to the subject-matter, may import a hostile capture, and condemnation consequent thereon, but it may also mean that the vessel has been condemned as innavigable, as incapable of keeping the sea, on account of damage, and so declared by persons of competent authority. In several insurance cases referred to in the course of this discussion for other purposes, we have seen the phrase, after describing the shattered condition of a vessel, "she was condemned to be sold." We are then brought to the question how it was used in the present case, what did the writer mean in using it, and how was it understood by the agents and officers of the company.

It was a time of profound peace; the place was Humbolt bay, on the west coast, described as in California, and of course within the limits and jurisdiction of the United States. The idea of capture and judicial condemnation as prize could hardly have arisen in the mind of the agent to whom this notice was addressed; and it is quite manifest that it was not so used by the writer. Under the circumstances, therefore, it must have been naturally understood that the vessel had been condemned as unfit for further purposes of navigation, according to the actual state of facts. Besides, it was not a positive assertion of the fact, but only "information," of course by letter; and if the company were actually in doubt, or desired fuller intelligence on the subject, it was only to ask for the letter, or other source of the information. It did not, and had no tendency to, mislead the company by stating one cause of loss, and afterwards attempting to recover by proof of loss from a different cause.

It was an explicit transfer and relinquishment of all the assured's right and interest in the vessel, in the proceeds if rightfully sold, and in any and all salvage which had been or could be obtained. In this respect, it differs essentially from the case of *Pierce* v. *Ocean Ins. Co.*, 18 Pick. 83 [29 Am. Dec. 567], in which the abandonment was held insufficient, because it was a mere notice to the company of the state of the vessel, and did not by any of its terms relinquish, transfer, and abandon claims for the proceeds of the vessel from the time of the loss, or other claims for salvage. The remarks made in giving the opinion in that case are made in reference to the subject-matter and circumstances of the case.

A subsequent case, more analogous to the present, came before this court, and the question of the sufficiency of the notice of abandonment was fully considered: *Macy* v. *Whaling Ins. Co.*:

Digitized by Google

9 Met. 354. The insurance was upon cargo, but the notice of abandonment was only that the ship was lost. But the court held that, under the circumstances, being a whaling ship, the loss of the cargo might well have been understood from the loss of the ship; and the plaintiffs having in form abandoned their interest in the cargo insured by the defendants, the abandonment was not rendered invalid by the informality in the notice. And in another clause the court say, where the insured makes his abandonment and claims for a total loss, under the policy, without stating the cause of loss, but refers to the intelligence he has received, the abandonment will not be defective, because the underwriter can call for the information on which it is grounded.

No form of abandonment is established either by law or the usage of this branch of business. Any form, therefore, which gives the underwriters information of the nature of the loss by one of the perils insured against, and of the readiness of the assured to abandon all rights, interests, and claims to the subject of the insurance, and the avails and proceeds thereof, is sufficient. In the present case, the assured, in their notice and offer of abandonment, by referring to their information of a fact which might have been caused by one of the perils insured against, and which the assured claimed was in fact so, by an explicit relinquishment of all rights to the vessel and the proceeds thereof, and all salvage, and by demand for a total loss, gave the defendants notice, or the means of knowing the nature and particulars of the loss as it actually existed; and as the company signified no desire to be put into possession of the information, the court are of opinion that the notice was sufficient.

Case referred to an assessor.

BIGELOW, J. 1. The contract of insurance was finally executed and delivered in this state. It was therefore a contract made here, and the law of this state is to govern its construction and interpretation without any reference to the domicile of the corporation liable upon it: *Kennebec Co.* v. *Augusta Ins. and Banking Co.*, 6 Gray, 208. By the well-settled rule of law in this commonwealth, applicable to policies of insurance, where an injury is sustained by a vessel, the loss is not total unless the expense of repairs exceed fifty per cent of the valuation in the policy, after the deduction of one third new for old: *Deblois* v. *Ocean Ins. Co.*, 16 Pick. 314 [28 Am. Dec. 245]. On this point the report of the assessor is confirmed.

2. The sum allowed by the assessor for injury to the machin-

Digitized by Google

ery is quite as large as the proof before him would warrant. The burden was on the plaintiff to establish the amount of his loss; and if two perils operated to cause an injury to the vessel, for one of which the insurers were liable, and from the other of which they are exempt, it was for the plaintiff to show definitely the amount of loss sustained by the peril insured against.

3. There are no facts in the assessor's report from which we can infer that any greater amount should have been allowed for interest on the sum raised to repair the vessel: *Orrok* v. *Commonwealth Ins. Co.*, 21 Pick. 469 [32 Am. Dec. 271]. As the presumption is in favor of his finding, in the absence of countervailing proof, his report on this point must stand.

The result is, that the plaintiff's exceptions to the assessor's report are overruled, and he fails to show a constructive total loss, and cannot recover in this action.

Judgment for the defendants.

VALIDITY OF ABANDONMENT DEPENDS ON CIRCUMSTANCES under which it was made. It must be for a loss arising from one of the causes insured against to be of effect: *Thwing* v. *Washington Ins. Co.*, 10 Allen, 451, 452, citing the principal case.

INSURED CAN ONLY RECOVER FOR LOSS FROM CAUSES INSURED AGAINST, where the loss is in part from several causes: *Insurance Co.* v. *Transportation Co.*, 12 Wall. 201, citing the principal case.

UNDER INSURANCE AGAINST TOTAL LOSS ONLY, INSURED MAY RECOVER for constructive total loss: *Greene* v. *Pacific Mutual Ins. Co.*, 9 Allen, 233; *Pierce* v. *Columbian Ins. Co.*, 14 Id. 322; *Snow* v. *Union Ins. Co.*, 119 Mass. 596, all citing the principal case.

INSURANCE POLICY REQUIRING SIGNATURE BY LOCAL AGENT becomes a contract only when so signed, and is therefore governed by the law of the place where so signed: *Thwing* v. *Great Western Ins. Co.*, 111 Mass. 109; *Todd* v. *State Ins. Co.*, 11 Phila. 357, both citing the principal case.

BURDEN OF PROOF OF LOSS IS ON INSURED: *Cory* v. *Boylston Ins. Co.*, 107 Mass. 147; *Borland* v. *Mercantile Ins. Co.*, 47 N. Y. Super. Ct. 447, both citing principal case.

ASSESSOR'S REPORT TO COURT IS GENERALY CONCLUSIVE, and has effect of verdict, and in the absence of further evidence or clear error, will not be set aside: *Paddock* v. *Commonwealth Ins. Co.*, 104 Mass. 531, 534, citing the principal case.

Digitized by Google

SMITH *v.* PHILBRICK.

[10 GRAY, 252.]

PRESENTMENT OF PROMISSORY NOTE AT PLACE OF DATE is sufficient, in the absence of proof that the holder at its maturity knew that the maker resided elsewhere.

ACTION on promissory note. The opinion states the facts.

B. Dean, for the defendant.

T. F. Nutter, for the plaintiffs.

By Court, MERRICK, J. This is an action brought by indorsers against a prior indorser to recover the contents of a promissory note. At its maturity the holder placed it in the hands of a notary public, who by his direction went with it to the place of business which the maker formerly occupied in the city of Boston, and there made inquiry for him, in order, if he were found, to present it to him for payment. He was not found, and no demand of payment was made. The defendant insists that he is not liable as indorser, and that this action cannot be maintained.

The note is dated and was made at Boston, where the maker then was on a visit for a temporary purpose only. He then and has ever since resided at Port Lavacca, in the state of Texas, where he had his only place of business. At the trial, no evidence was produced to show whether the plaintiff, or any of the subsequent holders of the note, knew that the maker's residence and place of business were in Boston, or elsewhere; there was no evidence whatever upon that question.

The indorser of a note is certainly never chargeable with its payment if there has been neither a demand of payment made on the maker, nor due diligence used to find him for the purpose of presenting it to him for payment. The inquiry then is, whether, under the particular circumstances of this case, due diligence is shown to have been used to find the maker, so that the note could be presented to him and its payment demanded. What was it the duty of the holder to do? It is laid down by Chancellor Kent, as a general rule, that "if there be no other evidence of the maker's residence than the date of the paper, the holder must make inquiry at the place of the date;" and he adds that "the presumption is, that the maker resides where the note is dated, and that he contemplated payment at that place:" 3 Kent's Com., 6th ed., 96; Story on Notes, sec. 236; *White* v. *Wilkinson*, 10 La. Ann. 394.

Assuming this to be the rule, there is no doubt that due dili-

Digitized by Google

gence was used by the holder. He was not required to carry or to send his note to Port Lavacca for presentment; but only to make all proper inquiries at the place where it bore date to find the maker. Those inquiries were made with sufficient fullness and carefulness at Boston. It is not pretended that anything was omitted, which, if done, would have been of the least utility in collecting the note, or protecting the rights of the indorser. Any further inquiry beyond that which was made by the notary would necessarily have been wholly fruitless.

If the place of the maker's residence had been known by the holder at the maturity of the note, it might perhaps have been incumbent on him to have forwarded it to Port Lavacca for presentment, or to have used all due diligence to have done so. That would be in conformity to the decision of the court in the case of *Taylor* v. *Snyder*, 3 Denio, 145 [45 Am. Dec. 457], which is relied on by the defendant. In that case it appeared that the plaintiff well knew the maker's place of residence, which was out of the state where the note was made and dated; and it was held that under such circumstances the indorser was discharged, because there was no demand of payment on the maker, and no inquiries or efforts were made to find him, except at the place where it bore date, in order to present the note to him for payment.

This fact of knowledge of the place of the indorser's residence distinguishes the present from the case of *Taylor* v. *Snyder*, *supra*, and leaves it to be determined upon the general rule laid down by Chancellor Kent. The defendant insists that the plaintiffs ought to have been required, if they would avail themselves of that rule, to show affirmatively that both they and all the subsequent holders of the note were ignorant of the fact that the maker of the note had no residence or place of business in the city of Boston. This is not so. The presumption is, as has been before stated, in the absence of all other evidence upon the subject, that the residence of the promisor is at the place where the paper to which he subscribes his name is dated. Either party may controvert this presumption and overcome it by proofs introduced. But no evidence to the contrary having been laid before the court, this presumption is to stand; and the defendant's exceptions must be overruled.

DEMAND OF PAYMENT OF NOTE, WHERE MUST BE MADE: See *Taylor* v. *Snyder*, 45 Am. Dec. 457, and cases in note 467. Where the residence is not known, and no place of payment named, no actual demand is necessary: *Bank of Orleans* v. *Whittemore*, 12 Gray, 472, citing the principal case.

Digitized by Google

CAYZER *v.* TAYLOR.

[10 GRAY, 274.]

IN ACTION BY SERVANT AGAINST MASTER FOR INJURIES SUSTAINED BY EXPLOSION OF STEAM-BOILER, where the statute required a fusible safety-plug on the boiler, and it was proved that there was no such plug on defendant's boiler, plaintiff was entitled to recover; and in such case there was no error in excluding evidence of a custom among engineers not to use such a plug, or in refusing to instruct the jury that the defendant was not liable if he used all the appliances ordinarily used on boilers for safety, but did not use such plug.

ORDINARY CARE IN PARTICULAR CASE DEPENDS on the character and risks and exposures of the business in which it is to be exercised, and the degree required is higher where life or limb is endangered, or a larger amount of property is involved, than in other cases.

MASTER IS LIABLE TO SERVANT FOR INJURIES CAUSED BY NEGLIGENCE OF INCOMPETENT FELLOW-SERVANT who was knowingly or negligently employed by the master.

MASTER IS LIABLE TO SERVANT FOR INJURIES RESULTING FROM DEFECT IN MACHINERY, although a fellow-servant's negligence contributes to the injury.

TORT by plaintiff, a servant of defendant, for injuries caused by explosion of a steam-boiler used by defendant in his business. The opinion states the facts.

C. Browne, for the defendant.

C. G. Thomas, for the plaintiff.

By Court, THOMAS, J. 1. The defendant excepts to the admission of evidence that his boiler was not provided with the fusible plug prescribed to be used by the statutes of 1850, chapter 277, and 1852, chapter 247, and the instructions of the court as to the use of such evidence when admitted. The obvious, and we think conclusive, answer to this exception is that the evidence was admitted without objection and without any qualification or limitation, and when thus admitted, it was competent evidence upon the question of the defendant's liability arising under the statute or at common law. The evidence being thus admitted, if the objection had been taken that the declaration was imperfect, an amendment would have been allowed, almost as a matter of course. But the objection was not taken, the exception was not made, and the point is not open.

2. The defendant sought to break the force of the testimony, and offered to show that it was not the custom among persons using such boilers as his to have and use such fusible plugs.

Digitized by Google

The court rightly held that a custom not to observe the law could not be shown.

3. The exception to the instructions of the presiding judge as to what was meant by ordinary care cannot be sustained. The instructions were good sense and good law, well expressed. What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done, and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers, and responsibilities, and then say, What would and should a reasonable and prudent man do in such an exigency? The word "ordinary" has a popular sense, which would greatly relax the rigor of the rule. The law means by "ordinary care" the care reasonable and prudent men use under like circumstances.

4. The next ground of exception upon which the defendant relies is the refusal of the presiding judge to instruct the jury that if the accident would not have happened without negligence on the part of the engineer the defendant was not liable. We think such instruction could not have been given. The default of the defendant might have been not only in having a boiler imperfectly constructed and guarded, but an incompetent and habitually careless and negligent engineer. It is now well-settled law that one entering into the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-workmen in the course of the employment: *Farwell* v. *Boston & Worcester R. R.*, 4 Met. 49 [38 Am. Dec. 339]; *King* v. *Boston & Worcester R. R.*, 9 Cush. 112; *Gillshannon* v. *Stony Brook R. R.*, 10 Id. 228. It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant, or use of a defective instrument. If the defendant employed a competent engineer, and used a boiler properly constructed and guarded, he would not be liable for injuries resulting from an act of carelessness or negligence of such engineer. But we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be responsible for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury. The very object and purpose of a

Digitized by Google

safeguard like the fusible plug are protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance—to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened had a safeguard required by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it.

The case of *Hayes* v. *Western Railroad Co.*, 3 Cush. 270, relied upon by the defendant, proceeds upon the ground that the injury was caused by the negligence of the workman, his failure to be in his place and discharge his duty, and that the train being short of hands was wholly immaterial. Otherwise it would be difficult to sustain it: See language of the court, p. 274.

The instructions of the presiding judge upon the liability of the master as affected by the relation of the defendant as fellow-servant of the engineer, are not, in our judgment, liable to just exception. The counsel for the defendant asks of us a liberal application of the principle by which the servant is presumed to assume the risks of the business, and among others the negligence of his fellow-servants for the protection of the master. The principle should not be so extended as to impair in the least degree the obligation resting upon the master in the prosecution of a business involving unusual risk of health, or life, or limb, to employ well-guarded instruments and competent agents.

Exceptions overruled.

ORDINARY CARE, WHAT CONSTITUTES: See *Frerr* v. *Cameron*, 55 Am. Dec. 663, and cases collected in note 672.

MASTER IS BOUND TO EXERCISE DUE AND ORDINARY CARE toward his servant: *Hill* v. *Gust*, 55 Ind. 49; and *St. Louis & S. E. R. R. Co.* v. *Valirius*, 56 Id. 518, citing the principal case; the care he is bound to exercise being such as he would use in his own business if he be a prudent business man: *Maynard* v. *Buck*, 100 Mass. 47. The master must provide suitable machinery and implements to conduct the business, and must keep them in repair: *Murray* v. *S. C. R. R. Co.*, 36 Am. Dec. 268, and note 283; *Noyes* v. *Smith*, 65 Id. 222, and cases in note; and see *Lake Shore & M. S. Co.* v. *McCormick*, 74 Ind. 447; *Boyce* v. *Fitzpatrick*, 80 Id. 529; *Snow* v. *Housatonic R. R. Co.*, 8 Allen, 446; *Walse* v. *Peet Valve Co.*, 110 Mass. 25; *Morse* v. *Glendon Co.*, 125 Id. 286; *Holden* v. *Fitchburg Co.*, 129 Id. 276, all citing the principal case; he is also bound to furnish a suitable place to work in: *Coombs* v. *New Bedford Cordage Co.*, 102 Id. 584, citing the principal case. If the master is negligent and the servant is injured, he is liable, and the con-

Digitized by Google

tributory negligence of a fellow-servant will not excuse him: *McMahon* v. *Henning*, 1 McCr. 519, citing the principal case.

LIABILITY OF MASTER FOR INJURY CAUSED BY NEGLIGENCE OF INCOMPETENT FELLOW-SERVANT: See *Brown* v. *Maxwell*, 41 Am. Dec. 771, and note 773. The master is bound to select competent fellow-servants: *Gilman* v. *Eastern R. R. Co.*, 10 Allen, 238; S. C., 13 Id. 445, citing the principal case.

DUNLAP v. BARTLETT.

[10 GRAY, 282.]

ASSAULT AND BATTERY IS BAILABLE OFFENSE, and bail cannot be refused on such a charge because there is danger of death of the assaulted person in consequence of the assault.

HABEAS CORPUS to admit a prisoner charged with assault and battery to bail.

J. H. Bradley, for the petitioner.

G. W. Cooley, for the commonwealth.

By COURT. This party not being held for a capital offense, nor it appearing that he ever will be, it is a case for bail. The fact that there is danger that the act may result in a homicide is to be considered by the court in fixing the amount of bail. But not having, as yet appears, committed an offense which is not bailable, he is entitled to bail.

Prisoner admitted to bail.

Digitized by Google

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

ALDERMAN *v.* PEOPLE.

[4 MICHIGAN, 414.]

COMMUNICATION TO ATTORNEY, UNDER IMPRESSION THAT HE HAD CONSENTED TO ACT AS ATTORNEY OF PARTY, IS PRIVILEGED, even though the attorney himself may not have so understood the agreement; but the communication must have been made to the attorney as such, and for the purpose of obtaining his advice and opinion relative to some legal right or obligation.

ACCOMPLICE BECOMING WITNESS FOR PEOPLE IS NOT ALLOWED BENEFIT OF PRIVILEGED COMMUNICATIONS, for in entering the witness-box to escape punishment himself, he contracts to give a full and complete statement of all that he and his associates may have done or said relative to the crime charged, no matter where or when done or to whom said.

TO CONSTITUTE INDICTABLE CONSPIRACY, THERE MUST BE COMBINATION OF TWO OR MORE PERSONS to commit some act known as an offense at common law, or that has been declared such by statute.

DESCRIPTION OF OFFENSE BY TERM BY WHICH IT IS GENERALLY KNOWN IS SUFFICIENT, if the nature of the offense is clearly indicated thereby, and the charge is a conspiracy to commit an offense known and recognized as an offense at common law.

MEANS SUCH AS TO CONSTITUTE AN OFFENSE, EITHER AT COMMON LAW OR BY STATUTE, MUST BE PARTICULARLY SET FORTH, in an indictment for a conspiracy to do an act not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means.

OFFENSE IN CONSPIRACY IS UNLAWFUL COMBINATION AND AGREEMENT, and no overt acts need be done, in pursuance of such combination and agreement, to constitute the offense, nor need such acts be alleged.

INDICTMENT FOR CONSPIRACY TO CHEAT AND DEFRAUD MUST SET OUT FALSE PRETENSES, TOKENS, AND DEVICES AGREED TO BE USED; false pretenses, tokens, or devices alone render "cheating" and "defrauding" punishable, and the conspiracy must be to cheat and defraud in some of the modes made criminal by statute.

Digitized by Google

INDICTMENT for conspiracy to defraud, against the defendants and one H. P. Bush, who consented to and did become a witness for the people, for the purpose of escaping punishment. On cross-examination, the witness Bush was asked as to a conversation had by him with Mr. Baldwin, an attorney, and testified that he had employed Baldwin as his attorney, and he had agreed to act as such, but Baldwin testified that he had declined to act as attorney for Bush. The court refused to require Bush to testify as to this conversation, holding that it was a privileged communication. In addition to the circumstances constituting the alleged fraud stated in the opinion, it appeared that the mortgage to be given by Bush to Alderman was to be for a sum about equal to the value of the land, and that after the sale of the goods to Alderman, Bush was to refuse to pay his creditors, and Alderman was to buy in the claims against Bush. What they could make on the operation they were to divide. The defendants, being convicted and sentenced, brought the case to this court on writ of error, accompanied by a bill of exceptions, signed by the judge, and assigned as errors the insufficiency of the indictment, and an instruction to the jury that the indictment was sufficient, and also the ruling of the court refusing to require Bush to testify to the conversation with Baldwin.

Wilcox and Gray, and J. M. Howard, for the plaintiffs in error.

L. Bishop, for the people.

By Court, COPELAND, J. Waiving for the present the consideration of the assigned causes which relate to the insufficiency of the indictment, we will proceed to notice those brought up by the bill of exceptions. Of this class are the seventh and eighth, and they relate to the exclusion on the trial below of the impeaching evidence sought to be obtained from the witness Bush, on his cross-examination, on the ground that the statements were privileged, having been made to Mr. Baldwin, an attorney, under the supposition, as Bush himself testified, that Baldwin was his counsel. And it was upon the ground of belief on the part of Bush that Baldwin was his counsel that the court refused to have the question answered. Leaving the question as to whether the relation of attorney and client actually existed or not, and in regard to which there was a conflict of testimony between Baldwin and Bush undetermined, we have no doubt that if a communication should be made to an attorney in fact, by a party under an impression that such attorney had

Digitized by Google

consented or agreed to act as the attorney of such party, such communication would be privileged, although the attorney himself may not have so understood the agreement. But to make the communication a privileged one, either in that case or where the relation of attorney and client exists, it must have been made to the attorney by the party or client as his legal adviser, and for the purpose of obtaining his legal advice and opinion relative to some legal right or obligation.

But there is a broader ground upon which the admission of the excluded evidence may be based; and that is, the witness Bush was an accomplice in the crime, for which the defendants, his associates, were on trial. He had been led to give evidence for the people under an an express or implied promise of pardon, or that he should not be prosecuted, on condition that he should make a full and fair confession of the truth. It is a rule of law that no witness shall be required to answer any question that may tend to criminate himself, yet the accomplice, when he enters the witness-box with the view of escaping punishment himself by a betrayal of his co-workers in crime, yields up and leaves that privilege behind him. He contracts to make a full statement; to keep back nothing; although in doing so he may but confirm his own guilt and infamy. If he fails to do so in full, if he knowingly keeps back any portion of the history of the crime he undertakes to narrate, he forfeits his right to pardon, and may be proceeded against and convicted upon his own confession already made: *Rex* v. *Rudd*, Cowp. 331; *Commonwealth* v. *Knapp*, 10 Pick. 477 [20 Am. Dec. 534]; 2 Russell on Crimes, 958, note *a*. We think an accomplice who makes himself a witness for the people should be required to give a full and complete statement of all that he and his associates may have done or said relative to the crime charged, no matter when or where done, or to whom said. He should be allowed no privileged communications. These he has voluntarily surrendered. The enforcement of such a rule may be the only protection the party on trial has left—the only means remaining to him to meet, it may be, the perjury of the criminal upon the witness-stand.

We are of opinion that the rulings of the court below upon this point were erroneous, and that, for this cause, the verdict must be set aside, and a new trial granted, provided it shall be found that the objections to the sufficiency of the indictment are not well founded; and to the consideration of which we will now proceed.

Digitized by Google

An indictment has been defined to be a plain, brief, and certain narrative of an offense: 2 Hale P. C. 167. And it is a general rule of criminal law that every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the necessary facts by which it is constituted: 1 Ch. Crim. L. 169. This is essential, and is required for the safety and protection of the defendant, and for the information and correct action of the court, who are to apply the judgment, and administer the punishment prescribed by law. This rule, however, has not, in all cases, been applied to the offense of conspiring with as much strictness as to other offenses. It was remarked by the late Justice Talfourd, that "the offense of conspiring is more difficult to be ascertained precisely than any other for which an indictment lies." Notwithstanding, however, the apparent diversity of judicial opinion exhibited in the earlier authorities in respect to this subject, there is a very general concurrence of authority as to the general definition of the offense; that to constitute an indictable conspiracy there must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means: 3 Greenl. Ev., sec. 89; 3 Ch. Crim. Pl. 616.

The expressed doubts upon the subject seem to have arisen from the difficulty in determining what acts should be regarded as unlawful, in the sense in which that term is used as describing the offense of conspiracy. As Mr. Chitty remarks: "There are perhaps few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal." "It might," he says, "be inferred from the decisions, that to constitute a conspiracy it is not necessary that the act intended should in itself be illegal, or even immoral; that it should affect the public at large, or that it should be accomplished by false pretenses; and, though it is agreed that the gist of the offense is the union of persons, it is impossible to conceive a combination, as such, to be illegal." "We can rest, therefore," he says, "only on the individual cases decided, which depend in general upon particular circumstances, and which are not to be extended." And, by way of summing up the result of the cases, citing from Hawkins, Mr. Chitty continues: "In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his person, his property, or his character."

Digitized by Google

A leading English authority touching the question under consideration is that of *Rex* v. *Gill*, 2 Barn. & Ald. 204, where the indictment charged the defendants with having conspired, by divers false pretenses and subtle devices, to obtain and procure for themselves divers large sums of money of persons named, and to cheat and defraud them thereof, etc. Abbott, C. J., in his opinion sustaining the indictment, and in answer to the objection that the particular devices were not stated, says: "It is possible to conceive that persons might meet together, and might determine and resolve that they would, by some trick and device, cheat and defraud another, without having fixed upon the particular means and devices." While the decision in that case appears to have been adhered to in subsequent cases, it has been regarded as the extreme of laxity. Lord Denman, in *Regina* v. *Parker*, 3 Ad. & El., N. S., 292, says: "This form of indictment is the most general which has been held admissible." And Williams, J., in the same case, said: "It has always been thought that in *Rex* v. *Gill* the extreme of laxity was allowed."

In *Rex* v. *Seward*, 1 Ad. & El. 706, it was held "that an indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means. Then, when it is held that such a proceeding is a conspiracy, because it is to be carried into effect by unlawful means, we must see in the means stated something which amounts to an offense."

The case of *Rex* v. *Eccles*, 3 Doug. 337, has been frequently cited in support of a general charge of conspiracy, without any allegation of illegal means. So also of the early case of *Rex* v. *Spragg*, 2 Burr. 993. Lord Ellenborough, subsequently commenting upon those cases, says that the case of *Rex* v. *Spragg*, *supra*, was a conspiracy to indict another of a capital crime, which no doubt is an offense; that *Rex* v. *Eccles*, *supra*, was considered a conspiracy in restraint of trade, and therefore an indictable offense. "But I should be sorry," he says, "that the cases in conspiracy, which have gone far enough, should be pushed still further. I should be sorry to have it doubted whether persons agreeing to commit a civil trespass should be in peril of an indictment which would subject them to infamous punishment:" *Rex* v. *Turner*, 13 East, 228.

In this last case cited the indictment charged the defendants with conspiracy to snare, take, kill, and carry away hares from a certain preserve, and to procure divers bludgeons and other offensive weapons, and to go to the said preserve armed there-

Digitized by Google

with for the purpose of opposing any person who should endeavor to apprehend them or obstruct them in the execution of their wicked and unlawful purposes. Thus presenting a very strong case, and, as has been said, having the double aggravation of being done in the night when honest men are asleep, and with weapons avowedly prepared to break the peace, in case they were attacked within the preserve. It may also be noted that the destruction of game in England, by unqualified persons, subjects them to a penalty on conviction before a magistrate.

So again, in *Rex* v. *Jones*, 4 Barn. & Adol. 345, the indictment stated that a commission of bankruptcy had issued against A, by virtue of which the commissioners adjudged him a bankrupt, thereby giving them authority to proceed with the body of said A, and also all his lands, which he had in his own right before he became a bankrupt, etc. It then charged that all the defendants, contriving and intending to cheat the creditors of A, unlawfully did conspire to conceal, embezzle, etc. It was held by all the judges to be bad. They say: "The indictment ought to charge a conspiracy either to do an unlawful act, or a lawful act by unlawful means; that the indictment charges a conspiracy to remove and conceal the goods of A, but if the commission was bad A had a right to remove them." "There is nothing stated," says Denman, C. J., "on the face of the indictment to constitute an offense." Taunton, J., says: "The indictment ought to contain averments of all matters necessary to constitute an offense; it is not enough to allege matters which make it probable that an offense has been committed."

And in the case of *King* v. *Regina*, in the exchequer chamber, 7 Ad. & El., N. S., 795, Tindal, C. J., says: "If we examine the allegations in this indictment, there is no sufficient description of any act done after the conspiracy which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable."

The cases cited, and other modern English authorities, indicate a strong disposition to hold to a much greater strictness in indictments for conspiracy than was formerly supposed to be necessary. And the doubt and uncertainty in which the earlier cases and the elementary writers professedly leave the question as to where a combination of several persons in a common object becomes illegal, has been in a great degree removed. And while the doctrine of the case of *Rex* v. *Gill*, 2 Barn. & Ald. 204, has been steadily adhered to, that in an indictment for a conspiracy to obtain, falsely and fraudulently, by false pretenses and subtle de-

Digitized by Google

vices, the property of another, the pretenses and devices need not be alleged, there have not been wanting, says Lord Denman, "occasions where learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid. All who have watched the proceedings in our courts are aware that there is danger of injustice from calling for a defense against so vague an accusation; and judges of high authority have been desirous of restraining its generality within reasonable bounds. The ancient form, however, has kept its place; and the expedient now employed in practice of furnishing defendants with a particular of the acts charged upon them, is probably effectual for preventing surprise and unfair advantages:" *Rex* v. *Kenrick*, 5 Ad. & El., N. S., 49; *Rex* v. *Hamilton*, 7 Car. & P. 448.

It has been said, as we have already seen, and there is to be found in both the English and American authorities of an early date *dicta* that a combination for the commission of acts illegal in a moral sense, or for the commission of acts not in themselves morally wrong or unlawful, by means morally wrong, constitutes an indictable offense. But I apprehend that the more recent adjudicated cases do not support that proposition.

In the case of *State* v. *Hewett*, 31 Me. 396, the indictment charged that the defendants, "devising and intending to injure and defraud, did unlawfully conspire, combine, confederate, and agree together the said O. L. to injure, cheat, and defraud of a certain horse, the property of said O. L.," etc. The court in that case say that "to constitute an indictable conspiracy at common law there must have been an unlawful confederacy of two or more persons, to accomplish either an unlawful or criminal purpose, or a purpose not unlawful, by criminal or unlawful means. This indictment assumes to charge a conspiracy to accomplish an unlawful purpose, and falls within the first class of conspiracies mentioned if it falls within either class. The purpose only is stated; the inquiry then is, whether the purpose, as charged in the indictment, was criminal or unlawful at common law or by statute. Cheating and defrauding a person of property, though never right, was not necessarily an offense at common law. The transaction might be dishonest and immoral, and still not be unlawful in the sense in which the term is used in criminal law." The indictment was held to be bad, not charging an offense at common law.

In a prior case, *State* v. *Ripley*, 31 Me. 386, the same court

Digitized by Google

says: "If the conspiracy is to do an act which if done would be criminal, the offense is perfect without reference to the means used; and it is necessary that this criminal purpose should be so specifically alleged as to be well understood. If the conspiracy consists in the unlawful means to be employed, according to the well-established rules of pleading, those means which are relied upon as giving the wrongful agreement a criminal character should be specifically stated." See also *State* v. *Roberts*, 34 Id. 320. Such is also now the established doctrine in Massachusetts: *Commonwealth* v. *Hunt*, 4 Met. 111 [38 Am. Dec. 346]; *Commonwealth* v. *Eastman*, 1 Cush. 190 [48 Am. Dec. 596]; *Commonwealth* v. *Shedd*, 7 Id. 514. In the latter case, the court remark: "It is well settled that a general allegation that two or more persons conspired to effect an object criminal in itself, as to commit a misdemeanor, or a felony, is quite sufficient although the indictment omits all charges of the particular means to be used. It is equally well settled that a general charge of a conspiracy to effect an object not criminal is not sufficient. The charge of such a conspiracy is to be accompanied with the further statement of the means the conspirators concerted and agreed to use to effect the object; and those means must appear to be criminal." So also in Pennsylvania, *Hartmann* v. *Commonwealth*, 5 Pa. St. 60, the indictment charged that the defendants conspired falsely and fraudulently to cheat and defraud persons named, by removing and secreting divers goods and merchandise belonging to the defendants, thereby preventing said goods from being made liable for the debts of defendants, etc. Gibson, C. J.: "The conspiracy as charged, is not to do an act illegal in itself, or by combination of numbers and means in the execution of it, but to do an act thought to be specifically prohibited by statute. It is certainly not criminal by the common law to obtain a false credit by any other means than the use of a false token, or to secrete a debtor's property with the design to keep it from his creditors. But such acts are penal by the statute to abolish imprisonment for debt. Now, to constitute a conspiracy, the purpose to be affected by it must be unlawful, either in respect to its nature or in respect to the means to be employed for its accomplishment; and the intended act, where it has not a common-law name to import its nature, must, in order to show its illegality, be set forth in an indictment for conspiracy with as much certainty as would be necessary in an indictment for the perpetration of it; otherwise it would not be shown to be criminal, nor would the confederates be shown to

Digitized by Google

be guilty." "The English courts," he says, "are beginning to regret the laxity of description that has been tolerated in these indictments for conspiracy; and policy requires that the judges here, as well as there, should begin to retrace their steps."

Again: in New Jersey, *State* v. *Rickey*, 9 N. J. L. 293, Ford, J., in an elaborate opinion, in which he reviews the earlier authorities, says: "It may be laid down as a settled rule that an indictment will not lie for conspiracy to commit a civil injury of any description that is not in itself an offense."

A leading American authority upon this subject is that of *Lambert* v. *People*, 9 Cow. 578. In that case the questions we are considering were involved, and the indictment was held to be bad in the court of errors by the casting vote of the president. Two distinguished senators, members of that court, Spencer and Stebbins, having taken opposite sides of the question, the preceding authorities were reviewed, and the whole subject elaborately discussed. Chancellor Jones concurred with Senator Spencer, in holding the indictment insufficient. The object stated in that indictment, was very like the object stated in the indictment we are considering, "by wrongful and indirect means to cheat and defraud the company and unknown persons."

As an evidence of the marked change, or more properly, perhaps, of the greater clearness and certainty, exhibited in the later authorities upon this subject, we find Senator Stebbins, in a partial summing up upon the point in question, making this remark: "We have the opinions of the courts of Maryland, Pennsylvania, and Massachusetts, the opinions of the elementary writers, all going to show, in my estimation, that such a conspiracy as that charged is an indictable offense." Still, in view of the uncertainty and doubt, in his own mind, in which the question was left by preceding authorities, he further observes: "It would probably be too much to say that every conspiracy to defraud an individual, or to do an unlawful act, is indictable." It should be observed that the decision in that case was made in 1827, long prior to the making of the decisions in Massachusetts and Pennsylvania, which, as we have seen, now establish a doctrine directly the opposite of that contended for by Senator Stebbins. The only case in our own court, where questions similar to those now under consideration were raised, is that of *People* v. *Richards*, 1 Mich. 216 [51 Am. Dec. 75].

The adoption in that case of the views of the supreme court and of the minority of the court of errors, as expressed by

Digitized by Google

Senator Stebbins in the preceding case, and some remarks of the learned judge who delivered the opinion in that case, may undoubtedly be regarded as sustaining the views of the counsel for the people in the case before us. But in that case the court probably did not give the principal question here raised any considerable consideration, for the reason that it was not necessary to do so in determining the validity of the then pending indictment, wherein the alleged means of executing the conspiracy were criminal in their character. Finally, from the whole current of present authorities, I think the following principles are clearly deducible:

1. That to constitute an indictable conspiracy, there must be a combination of two or more persons to commit some act, known as an offense at common law, or that has been declared such by statute.

2. If the conspiracy be to commit an offense known and recognized as an offense at common law, so that by describing it by the term by which it is generally known the nature of the offense is clearly indicated, then it will only be necessary to use such term in describing the object of the conspiracy.

3. If, on the contrary, the combination be to do an act not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means, then those means must be particularly set forth, and be such as constitute an offense, either at common law or by statute.

The gist of the offense in conspiracy is the unlawful combination and agreement. It is not necessary, to constitute the offense, that any overt acts should be done in pursuance of such combination and agreement, nor that such overt acts should be alleged.

The combination and agreement, the intent to commit the illegal act, constitutes the offense, and in this respect it diverges from the general rule of criminal law. But there seems no good reason for going further, and judicially determining, in cases as they arise, acts to be an offense which are not such at common law, nor have been declared such by any statute, and for departing entirely from the general rule of pleading in criminal cases, that such facts must be stated upon the record as, in the judgment of law, are sufficient to constitute an offense.

We will now proceed to examine the indictment in this case in the light of the principles stated. The first count charges that the defendants "did conspire, combine, confederate, and agree, falsely and fraudulently, to cheat and defraud said persons and

Digitized by Google

mercantile houses, and others doing business as aforesaid, etc., of divers large quantities of goods, and the prices and value thereof." This charge is more general than that which has, in any case which has come under our notice, received the sanction of the English courts; more general than that in *Rex* v. *Gill*, 2 Barn. & Ald. 204, which has always been regarded as the extreme of laxity, as we have seen in *Regina* v. *Parker*, 3 Ad. & El., N. S., 292. The only words in the object stated indicating an offense are the words "cheat and defraud;" but those words, say the courts in *Commonwealth* v. *Eastman*, 1 Cush. 190 [48 Am. Dec. 596], *Commonwealth* v. *Shedd*, 7 Id. 514, and *State* v. *Hewett*, 31 Me. 396, "do not import any known common-law offense. If punishable at all as a crime, it is only when the cheat is effected by false tokens or false pretenses. To make such an object of conspiracy a criminal act, the combination or agreement must be to cheat and defraud in some of the modes made criminal by statute, and the indictment must contain allegations which show that the cheat and fraud agreed upon are embraced in such statute provisions, and that, if perpetrated, would be punishable as a criminal offense."

But it is claimed that the object of the conspiracy was agreed to be accomplished by criminal means. What, then, are the means by which the alleged object of the conspiracy was to be accomplished? Bush and his wife were to convey to Alderman one hundred and thirty acres of land, together with forty acres then held in Alderman's name. As a consideration for such conveyance, Alderman was to give up to Bush notes and securities he then held against him, amounting to eight hundred dollars; was to sign a note to one Bassey for one hundred and eighty dollars, as security for Bush, and advance him money to keep up his credit, as alleged, to the amount of two hundred and fifty dollars, being something more than the land, as alleged in the indictment, was worth, subject to certain liens; that Bush should go to Detroit, and on his sole credit and account purchase goods, take them to White Lake, and there expose them to sale; that subsequently Bush should sell the remainder of the goods so purchased, with any others he might have on hand, to Alderman, who was to convey to Bush the one hundred and seventy acres of land, and take back a mortgage.

None of these alleged means are in themselves immoral, even. There is no allegation whatever that in obtaining the goods any false pretense, false token, or other device was to be used; nothing, certainly, tending to support the alleged object of the conspiracy—to cheat and defraud.

Digitized by Google

It is said the alleged means are criminal, in that they come within the provisions of section 17 of chapter 142, revised statutes, which makes it a misdemeanor for any person to secrete, assign, convey, or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property from being made liable for the payment of his debts, or for any person to receive such property with such intent. Admitting that to be so, it affords no support to this indictment; for none of the offenses named in said section are alleged as the object of this conspiracy. There are no allegations in either part of either count which show that the cheat and fraud agreed upon are embraced in any statute provision.

The judgment must be reversed.

Present, COPELAND, DOUGLASS, GREEN, PRATT, and MARTIN, JJ.

JOHNSON, J., decided the cause in the court below, and did not participate.

DOUGLASS, J. I concur in the opinion that the indictment is insufficient, and that the judgment below should be reversed on that ground; but it being unnecessary for the determination of the case, I decline expressing an opinion upon any of the other questions presented by the bill of exceptions.

WITNESS CANNOT DECLINE TO TELL ALL FACTS, on the ground that his answer might criminate himself, when he has told a part without claiming exemption: *Foster* v. *Pierce*, 59 Am. Dec. 152, and note collecting prior cases. And a person, to escape punishment, making himself a witness against his confederates, cannot refuse to answer questions as to communications made by him to his attorney: *Hamilton* v. *People*, 29 Mich. 134, citing the principal case.

IT IS UNLAWFUL COMBINATION THAT CONSTITUTES CRIME OF CONSPIRACY: *People* v. *Saunders*, 25 Mich. 124, citing the principal case. This question is fully discussed in the note to *People* v. *Richards*, 51 Am. Dec. 82, where all the cases are collected. See also *Commonwealth* v. *Eastman*, 48 Id. 596, and note.

INDICTMENT FOR CONSPIRACY MUST SET OUT MEANS AGREED TO BE EMPLOYED, when the thing to be done is lawful but the proposed means of doing it are unlawful: *Commonwealth* v. *Hunt*, 38 Am. Dec. 346, and note; *Cole* v. *People*, 84 Ill. 219; and as the words "cheating" and "defrauding" do not necessarily import a thing forbidden by law, or unlawful, it is necessary for the indictment to state the means proposed to be used, in order that the court may see whether the means are in fact illegal: *United States* v. *Cruikshank*, 92 U. S. 559; *State* v. *Parker*, 43 N. H. 88—all three of which cases last mentioned cite and approve the principal case.

THE PRINCIPAL CASE IS REFERRED TO in *Shannon* v. *People*, 5 Mich. 52, as an example of the practice of accompanying a writ of error by a bill of exceptions.

Digitized by Google

COMMISSIONERS *v.* MARTIN.

[4 MICHIGAN, 557.]

TOWNS ARE NOT LIABLE FOR DAMAGES CAUSED BY NON-REPAIR OF BRIDGES AND HIGHWAYS, being, like counties, *quasi* corporations, whose corporate powers and functions are conferred without their solicitation, for the benefit, not of themselves, but of the public at large.

TOWNS CANNOT BE INDIRECTLY SUBJECTED TO LIABILITY FOR DAMAGES FOR NON-REPAIR OF BRIDGES AND HIGHWAYS, by a suit, under the Michigan revised statutes, c. 119, against the commissioners of highways; this chapter does not authorize any action to be brought against township officers, by their name of office, except for acts done, or upon contracts made by them while acting within the scope of their official duty and authority.

LIABILITY FOR NEGLECT OF OFFICIAL DUTY BY OFFICER OF TOWN IS INDIVIDUAL, if at all, and not official.

CASE brought against the commissioners of highways of the township of Niles, as a *quasi* corporation, under chapter 119 of the revised statutes, to recover damages by reason of the non-repair of a bridge on the public highway. The plaintiff recovered judgment, and the cause was brought to this court on a writ of error. The provisions of chapter 119 of the revised statutes are sufficiently given in the opinion.

E. Bacon, for the plaintiff in error.

F. Muzzey, for the defendant in error.

By Court, DOUGLASS, J. In England the liability to keep highways in repair is of common right incumbent in general upon the parishes in which they respectively lie, but in some cases it attaches (by prescription) to particular townships or other divisions of parishes, and occasionally to private individuals or corporations, bound *ratione tenuræ*, or in right of their estates or franchises, to repair some particular highway. The case of bridges is differently provided for. The expense of maintaining these is incumbent, not on the parishes, but on the counties at large in which the bridges are situate: 3 Steph. Com. 257; 1 Russell on Crimes, 352, 388. The civil divisions of England into counties is of remote and undefined antiquity. So also is the division originally ecclesiastical, but now partly civil, into parishes. And the obligation of the former to repair bridges, and of the latter to repair highways, is founded upon prescription, which presupposes a legal origin beyond the memory of man, and is absolute and unqualified. Any county, parish, corporation, or other party thus bound to repair a bridge or highway, and neglecting the duty, is liable at the common law to an

Digitized by Google

indictment: 3 Steph. Com. 259; 1 Russell on Crimes, 352, 388. Against an individual or corporation bound to repair *ratione tenuræ*, or in right of their estates or franchises, an action on the case may be maintained by any individual who has suffered peculiar injury by any neglect to repair. But ever since the case of *Russell* v. *The Men of Devon*, 2 T. R. 667, it has been the settled law in England that no such action would lie against a county or parish: *Makinnon* v. *Penson*, 18 Eng. L. & Eq. 509; S. C., 25 Id. 457. As will appear, however, on an attentive perusal of these cases, they virtually concede that, on the general principles of the English common law, counties and parishes ought to have been suable for neglect of duty as such, but have been held not to be suable on grounds of convenience and justice: because it was impossible to bring them into court; because they were fluctuating bodies, and individuals might be made responsible for omissions of which not they but others had been guilty; because if the damages were levied upon one or two, as they might be, there would be no practicable or effective way of compensating them by contribution from the rest; and because, at the common law, they had no common property out of which the damages could be paid.

In this country the construction of roads and bridges is for the most part accomplished through our township organizations; the counties contributing towards the construction of bridges in cases where the expenses would be too onerous to be wholly borne by the townships in which they are situated. Towns, with us, are bodies politic and corporate, capable of suing and being sued: R. S. 84, 85; but they have no corporate fund out of which a judgment may be satisfied, and there is no statute, that I am aware of, which provides any mode for obtaining satisfaction of a judgment directly against a township. So that here some, though not all the technical difficulties would exist in enforcing against them an obligation to repair by civil action for damages, which exist in England, in enforcing such an obligation against parishes and counties. But is any such obligation imposed on the townships? Towns, with us, are mere political organizations, created wholly by statute for certain purposes of local government. They are vested with no franchises or special privileges for their own benefit. They have only such powers as the statute confers, and are subject to no obligations, except such as are derived from statutory provisions. It is difficult to see how any common-law obligation, the sole foundation of which is prescription and imme-

Digitized by Google

morial usage, can be made to attach to them. An obligation to construct and repair roads and bridges can only be derived from the possession of such powers over their construction and repair as the statute has conferred upon them. And the law will not impose an unqualified obligation where the means of performing it do not exist. Now, the towns have power to choose commissioners of highways; but the statute, in express terms, gives to these commissioners when elected, the care and superintendence of the highways and bridges of the towns, and confers upon them all the powers requisite for the execution of their trust. They are in no way responsible to the town, but are themselves a species of *quasi* corporation, with power to sue and be sued, having legal succession, and deriving their authority, not through the town, but directly from the statute. The towns have no power to give the slightest direction or instruction to these officers as to the performance of their duties. So the towns have power to raise money for constructing and repairing roads and bridges, but this power is limited to the raising of only two hundred and fifty dollars in any one year, R. S., c. 22, sec. 4, and can only be exercised at the annual township meeting. So highway labor may be annually assessed upon persons and property within the township, but the amount to be assessed in any one year is limited: Id., c. 23, secs. 4, 5; and the power to assess is vested exclusively in the commissioners of highways. Further, the power to raise money for the construction of bridges is vested in part in the boards of supervisors of the counties: Id. c. 27. Looking at all the statutory provisions on the subject, we think they furnish no ground for the inference that it was intended that townships should be subject to any such broad and onerous obligation as is contended for.

The existence of any such obligation upon towns in the state of New York was denied in *Morey* v. *Town of Newfane*, 8 Barb. 645, and in *Hickok* v. *Trustees etc. of Plattsburgh*, 15 Id. 427, and the doctrine of these cases was recognized and approved by the court of appeals in a decision of the latter case on appeal, which is not yet reported, but which I have had an opportunity of examining. These decisions were regarded as settling the law on this subject in the state of New York, and they ought to have great weight in determining it with us, because our statutes respecting townships are almost identical with theirs.

In all the New England states towns have from an early period been made liable by statute, in certain cases, to civil actions, for injuries sustained by individuals on account of the

Digitized by Google

non-repair of highways and bridges; but the uniform course of decisions there has been that no such liability existed independently of express statutory enactment: *Mower* v. *Inhabitants of Leicester*, 9 Mass. 247 [6 Am. Dec. 63]; *Holman* v. *Inhabitants of Townsend*, 13 Met. 297; *Harwood* v. *Lowell*, 4 Cush. 310; *Brailey* v. *Inhabitants of Southborough*, 6 Id. 141; *Sawyer* v. *Northfield*, 7 Id. 494; *Ried* v. *Belfast*, 20 Me. 246; *Chidsey* v. *Town of Canton*, 17 Conn. 475; *Noyes* v. *Town of Morristown*, 1 Vt. 353; *Fairbanks* v. *Town of Antrim*, 2 N. H. 105; and *Hill* v. *Richmond*, 2 Woodb. & M. 337, where Judge Woodbury says such is the law in Rhode Island. A contrary doctrine prevails in Pennsylvania: *Dean* v. *Milford Township*, 5 Watts & S. 545; *Erie City* v. *Schwingle*, 22 Pa. St. 384 [60 Am. Dec. 87]. My researches, which have been somewhat extended, have disclosed scarcely a trace of the doctrine of these last decisions elsewhere; and when we consider the frequency of injuries resulting from defects of highways and bridges, the absence of authority in most of the states upon the subject of the liability of towns for such injuries furnishes the strongest evidence that they have not been generally understood to be liable. In deciding the case of *Morey* v. *Town of Newfane*, 8 Barb. 645, in New York, the court say that up to that period (1850) no precedent was known to exist of an attempt to assert any such liability in that state. Until now, we are not aware that any such attempt has been made here.

There is a long course of decisions tending to establish the the doctrine that a municipal or other corporate body, vested with powers and enjoying franchises and privileges for its own benefit, is liable to a civil action for any injury resulting either from its misfeasance or that of its officers, or for the neglect of any duty which its charter or the law imposes: *Henly* v. *Mayor of Lyme Regis*, 3 Barn. & Adol. 77; S. C., 5 Bing. 91; and *Mayor etc. of Lyme Regis* v. *Henley*, 1 Bing. N. C. 222; *Riddle* v. *Proprietors etc.*, 7 Mass. 169 [5 Am. Dec. 35]; *Hutson* v. *Mayor of New York*, 5 Sandf. 289; *Smoot* v. *Mayor of Wetumpka*, 24 Ala. 112. And it is the extent to which some of those cases have gone, especially in New York, in subjecting municipal corporations to such liability, which has created the only doubt I have entertained in regard to the present case.

But the cases which have gone furthest in this direction distinctly assert that no such liability exists on the part of those minor political organizations, or *quasi* corporations, such as towns and counties, whose corporate powers and functions are conferred without their solicitation, for the benefit, not of them-

Digitized by Google

selves, but of the public at large. In *Hickok* v. *Trustees etc. of Plattsburg, supra*, the New York supreme court, after a review of the authorities, say that it is the acceptance of a special charter that makes the incorporated body liable to this action, and it is the want of such a charter that exempts the towns, unless they are especially made liable by statute under certain circumstances, as in Massachusetts.

If, as we think, towns are not by the common law liable in actions directly against them for damages sustained in consequence of the non-repair of bridges and highways, we are clearly of opinion that they cannot, under chapter 119 of the revised statutes, be subjected to any such liability through the means of an action like the present against the commissioners of highways. That chapter provides that in certain cases actions may be brought by and against certain county and township officers therein mentioned, and among them the commissioners of highways of the several townships, by their name of office, without naming them individually. They are authorized to sue in that capacity "upon any contract lawfully made with them or their predecessors in their official character, and to enforce any liability or any duty enjoined by law to such officers, or to the body which they represent, or to recover damages for any injuries done to the property or rights of such officers, or of the bodies represented by them." This language would bear criticism on account of its want of perspicuity; yet I think the the meaning is discernible. Section 4, which assumes, rather than declares, that actions may be brought against such officers by the same names in which they are authorized to sue, does not prescribe what actions may be brought against them; but section 5 sheds some light upon the intention of the legislature upon this subject. It provides that when any contract shall have been entered into, or any liability incurred by or in behalf of any county or township, by any officer thereof, within the scope of his authority, the same remedies may be had after the termination of his office, and process may be served in the same manner upon any successor of such officer, as if he had continued in office.

Reading these provisions in connection with the seventh section already referred to, which provides that if any judgment shall be recovered against any township officers in any action prosecuted by or against them in their name of office, no execution shall issue thereon, but the same shall be levied and collected as other township charges, it is quite clear that it was not

Digitized by Google

the intention of the statute to subject the townships to any new liability, but merely, so far as it relates to claims against townships, to remove doubts, difficulties, and inconveniences, which before existed in their enforcement. We think it does not authorize any action to be brought against township officers by their name of office, except for acts done, or upon contracts made by them, while acting within the scope of their official duty and authority. The present action is brought to recover damages caused by alleged neglect of official duty by the defendants, for which, if liable at all, they are liable individually, and not officially, as a *quasi* corporation: See, *per* Tallmadge, senator, in *Flower* v. *Allen*, 5 Cow. 670; *Supervisors etc. of Galway* v. *Stimson*, 4 Hill, 136; *Palmer* v. *Vandenbergh*, 3 Wend. 193.

This view of the statute will be found to derive some confirmation, if confirmation it needed, from the opinions delivered in *Makinnon* v. *Penson*, 18 Eng. L. & Eq. 509, S. C., 25 Id. 457, which involved the construction of an English statute providing that counties might sue and be sued in the name of the county surveyor.

For these reasons, we are of the opinion that the judgment below ought to be reversed, with costs.

Present and concurring, GREEN, COPELAND, JOHNSON, MARTIN, and PRATT, JJ.

LIABILITY OF CITIES FOR NEGLECT TO REPAIR STREETS: *Savage* v. *Bangor*, 63 Am. Dec. 658, and *Browning* v. *City of Springfield*, Id. 345, and the notes thereto, in which the question of liability of towns and *quasi* municipal corporations is discussed at length. The general rule exempts towns, townships, and such *quasi* corporations from liability, and places it upon the officers individually whose duty it is to make the repairs: *Leoni* v. *Taylor*, 20 Mich. 153; *Detroit* v. *Blackeby*, 21 Id. 106, both of which cite and approve the principal case. In *Marathon* v. *Oregon*, 5 Id. 379, the principal case is referred to as containing appropriate remarks upon the impropriety of subjecting towns to actions for the faults of their officers.

PEOPLE v. DENNIS.

[4 MICHIGAN, 609.]

SURETIES ON RECOGNIZANCE ARE BOUND SEPARATELY FROM THEIR PRINCIPAL, a recognizance being simply a common-law obligation.

OMISSION OF NAME OF PRINCIPAL IN DECLARATION ON RECOGNIZANCE CANNOT BE AVAILED OF ON MOTION IN ARREST OF JUDGMENT, as such motion is based solely on defects apparent on the face of the record; but non-joinder of a co-contractor can only be taken advantage of when the record does not show it by plea in abatement.

Digitized by Google

RECOGNIZANCE TO ANSWER INDICTMENT FOR LARCENY, WITHOUT DESCRIBING WHAT LARCENY, IS SUFFICIENTLY DESCRIPTIVE OF OFFENSE; the naming of an offense, which belongs to a class which has a definite and well-understood general name, by such general name is sanctioned by long and uniform usage.

FAILURE TO RECITE SPECIAL CIRCUMSTANCES UNDER WHICH RECOGNIZANCE IS TAKEN DOES NOT INVALIDATE IT if the officer had authority in cases of that general description to take it; and it is not necessary in declaring upon a recognizance to aver the existence of the particular facts showing that the officer had authority to take it.

PAROL EVIDENCE OF CONTENTS OF DESTROYED INDICTMENT IS ADMISSIBLE the same as with any other document, where the case does not, from its nature, disclose the existence of other or better evidence.

DESTRUCTION OF INDICTMENT BEFORE TERM AT WHICH PERSON IS RECOGNIZED TO APPEAR IS NO DEFENSE TO ACTION ON RECOGNIZANCE, the condition of which is that the person shall appear at a day certain and abide the order of the court; for until discharged by order of the court, he must appear to any other indictment that may be found against him for the offense.

DEBT on a recognizance given by the defendants, conditioned "that one Seth P. Benson, jun., should personally appear" at a specified term of the circuit court for the county of Lenawee, "then and there to answer to a certain indictment against him for larceny, and then and there to abide the order of the said court." The recognizance was duly taken before a commissioner having authority to take it, but contained no recitals of the circumstances under which it was taken or of the authority of the commissioner. Prior to the term of the court at which Benson was to appear, the indictment against him and also the recognizance were destroyed by the burning of the office of the clerk of the court in which they were on file. The indictment contained two counts, one for larceny in having stolen a span of horses, and one as accessary before the fact; but the recognizance contained no reference to this second count. Benson did not appear at the term of court specified, and the recognizance was declared forfeited. The case was certified from the Lenawee circuit; and the questions discussed in the opinion were raised on the trial, and on motion made by the defendants in arrest of judgment.

S. S. Wilkinson and C. A. Stacey, for the people.

A. R. Tiffany, for the defendants.

By Court, DOUGLASS, J. The first question reserved is, whether, as Benson was a party to the recognizance, this should not have been stated in the declaration.

The declaration does not show on its face whether he was a

Digitized by Google

party or not. From a reference, on the brief of the defendant's counsel, to revised statutes, c. 134, secs. 42, 43, which provide that in the case there mentioned the circuit court commissioner shall be authorized to take the recognizance of a person imprisoned, and of two sufficient sureties, we suppose it is insisted that it is essential to a valid recognizance that the person bound to appear should be recognized jointly with his sureties; and that therefore the declaration does not show a valid recognizance. But a recognizance is a common-law obligation, and by the common law the sureties may be bound separately from their principal, or without this principal being bound at all: *Minor* v. *State*, 1 Blackf. 236. Therefore the alleged omission cannot be availed of on motion in arrest of judgment, which is based solely upon defects apparent on the face of the record.

The evidence on the trial showed that in this case Benson, the principal, recognized jointly with the defendants; but it is well settled that in actions *ex contractu* the non-joinder of the co-contractor is not a ground of variance, and unless it appear on the face of the declaration, can only be taken advantage of by plea in abatement: *Rice* v. *Shute*, 1 Smith's Lead. Cas. 287, 292, 296, and note thereto; *Cabell* v. *Vaughan*, 1 Wm. Saund. 291. And this rule applies to actions on recognizances and judgments, viz.: *Wilson* v. *State*, 6 Blackf. 212; *Burgess* v. *Abbott*, 1 Hill (N. Y.), 475; S. C., 6 Id. 135; *Cocks* v. *Brewer*, 11 Mee. & W. 51; *Needham* v. *Heath*, 17 Vt. 224, 225; *McGregor* v. *Balch*, Id. 563, 567.

The second question is whether the recognizance was valid because it did not contain a sufficient description of the offense. It was a recognizance to answer to an indictment for larceny, without describing what larceny; in this respect the recognizance was in the form sanctioned by long, and as far as our knowledge extends almost uniform, usage, both here and elsewhere; and we have no doubt that the naming of the offense, where it belongs to a class which has a definite and well-understood general name, is sufficient: See *Fowler* v. *Commonwealth*, 4 T. B. Mon. 128. We can see no good reason for requiring greater particularity, and the authorities do not seem to require it: *Gildersleeve* v. *People*, 10 Barb. 35; *Hall* v. *State*, 15 Ala. 431; *State* v. *Weaver*, 18 Id. 293; *State* v. *Hamer*, 2 Ind. 371.

What we have said on this point is a sufficient answer to the third question, which is, whether the recognizance was void, inasmuch as it took no notice of the count in the indictment charging Benson as accessary before the fact.

Digitized by Google

The fourth question is, whether the recognizance was void because it did not state the circumstances under which it was taken. Although at one time some doubts seem to have existed upon the subject, we think it is now well settled that where the recognizance has a condition to do some act, for the doing of which such an obligation may properly be taken, and the court or officer before whom it was acknowledged had authority by law to act in cases of that general description, the recognizance is valid, although it does not recite the special circumstances under which it was taken; and that in declaring upon such a recognizance it is not necessary to aver the existence of the particular facts which show that the court or officer had authority to take it: *People* v. *Kane*, 4 Denio, 530; *People* v. *Millis*, 5 Barb. 511; *Archer* v. *Commonwealth*, 10 Gratt. 638; *Champlain* v. *People*, 2 N. Y. 82; *Gildersleeve* v. *People*, 10 Barb. 35.

The fifth question is, whether parol evidence was admissible of the contents of the indictment, it having been destroyed. Although there has been some conflict in the authorities, this question also seems to be very well settled. Mr. Greenleaf, in the first volume of his Evidence, section 509, says: "If a record is lost and is ancient, its existence and contents may sometimes be presumed; but whether it is ancient or recent, after proof of the loss, its contents may be proved like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence. And the cases there cited, and in note 2 to section 84, fully sustain this proposition: See also *Davies* v. *Petit*, 11 Ark. 349; *Osborne* v. *Ealkin*, 10 Smed. & M. 549; *Derrett* v. *Alexander*, 25 Ala. 265; *Hill* v. *Parker*, 5 Rich. L. 87; *Harris* v. *McRea*, 4 Ired. L. 81; *Jackson ex dem. Taylor* v. *Cullum*, 2 Blackf. 228 [18 Am. Dec. 158].

The sixth question is, in substance, whether the destruction of the indictment before the term at which Benson was recognized to appear was not a good defense to this action on the recognizance.

We think not. The condition of the recognizance was that Benson should appear at the then next term of the circuit court and answer to an indictment against him for larceny, and then to abide the order of the court. A man's bail are his jailers, and they are bound to have him as much in the power of the court as if he were within its prison walls. Without appearance or an order of court to that effect, they are never discharged. It would have been no defense to this action if it had appeared

Digitized by Google

that a *nolle prosequi* had been entered to this indictment. Hawkins, Bacon, and Chitty lay down the law to be that "if one bound in recognizance for the appearance of another in the court of king's bench at a fixed day, to answer to a particular information against him, and not depart until discharged by the court, and a *nolle prosequi* is entered on that information, and another exibited whereto the defendant refuses to appear, the recognizance is forfeited:" Hawk. P. C., tit. Bail, b. 2, c. 15, sec. 84; Bac. Abr., tit. Bail on Criminal Cases; 1 Ch. Crim. L. 105. The reason of the rule as given by Hawkins is: "For, being express that the party shall not depart until he be discharged by the court, it cannot be satisfied until he be forthcoming, and ready to answer to any other information to be exhibited against him, while he continues undischarged, as much as to that which he is particularly bound to answer." The subject under consideration was very ably and fully considered by the supreme court of New Jersey, in *State* v. *Stout*, 11 N. J. L. 124. That was *scire facias*, on a recognizance conditioned for the appearance of one Merseran before the supreme court "to stand the traverse of a certain indictment against him for a misdemeanor, stand to and abide the judgment of the court, and not depart the court without leave." The defendant pleaded that there was not, and never had been, any indictment pending against him in the supreme court. But it was held that this was no defense to the action; that the recognizance was forfeited by the non-appearance of Merseran in the supreme court, whether there was any indictment then pending against him or not, and that it could only be discharged by an order of that court. In *Adair* v. *State*, 1 Blackf. 200, it was held that a recognizance for the principal's appearance on the first day of a term of court was forfeited by his failure to appear on that day; and that the sureties would continue liable, unless he appeared during the term, although no indictment should be found against him. And *State* v. *Cooper*, 2 Id. 226, is another case to the same effect.

Present and concurring, PRATT, GREEN, COPELAND, MARTIN, JOHNSON, WILLSON, and BACON, JJ.

RECOGNIZANCE NEED NOT CONTAIN RECITAL OF FACTS OF JURISDICTION OF OFFICER TAKING IT, if in fact he had jurisdiction: *Daniels* v. *People*, 6 Mich. 387, citing the principal case; and also referring to the principal case in the same decision at page 386 as giving the rules governing the practice and necessity of describing the offense in recognizances.

LOST INDICTMENT CANNOT BE REPLACED, but a new indictment must be found: Note to *State* v. *Sexton*, 14 Am. Dec. 585.

Digitized by Google

CASES

IN THE

SUPREME COURT

OF

MINNESOTA.

BREWSTER *v.* WAKEFIELD.

[1 MINNESOTA, 352.]

RATE OF INTEREST SPECIFIED IN PROMISSORY NOTE CONTINUES AFTER MATURITY AND UNTIL JUDGMENT OR NOTE IS PAID, notwithstanding the rate specified is greater than that established by law upon notes in which the rate is not specified.

CONTRACTS IN WRITING TO PAY SPECIFIED RATE OF INTEREST ARE NO EXCEPTION TO RULE OF CONSTRUCTION OF CONTRACTS IN WRITING; the manifest intention of the parties controls the legal effect, and where the intention is doubtful, the contract is construed most strongly against the promisor.

LEGAL RATE OF INTEREST APPLIES ONLY WHEN NO RATE IS SPECIFIED IN PROMISSORY NOTE; the agreement fixing the rate overrides and supersedes the application of the general statutory rate.

ERROR to the district court of Ramsey county. The opinion states the facts.

Brisbin and Bigelow, for the plaintiffs in error.

Ames and Van Etten, for the defendant in error.

By Court, CHATFIELD, J. Wakefield, the defendant in error, brought his action and obtained judgment in the district court against Brewster and others, the plaintiffs in error, for the foreclosure of a mortgage and sale of the mortgaged premises. The mortgage was given to secure the payment of two promissory notes bearing date July 11, 1854, and payable twelve months after date. One of the notes was for the sum of five thousand five hundred and eighty-three dollars and seventy-five cents, with interest at the rate of twenty per centum per annum; the other

Digitized by Google

note was for the sum of two thousand dollars, with interest at the rate of two per centum per month. Upon the assessment of the amount due upon the notes, the plaintiff below claimed to be entitled to interest on the notes at the rates specified in them, respectively, from their date to the time of judgment. To the allowance of such interest, Brewster, who was the mortgagor, objected, and insisted that interest on each of the notes should be computed at the rate specified in it, from the date of the notes to maturity, and that after maturity interest should be computed at the general legal rate of seven per centum per annum. The district court overruled the objection, and allowed to the plaintiff below interest on each of the notes at the rate specified in it from the date thereof to the time of judgment. Brewster excepted, and removed the case to this court by writ of error. The exception stated presents the only question to be determined by this court in the case, and is simply this: Does the rate of interest specified in a promissory note cease at the maturity of the note?

The question must be solved by the application of the provisions of the statute, "of the interest of money," to the terms of the contracts contained in the notes. That statute contains only two short sections, in these words: "Section 1. Any rate of interest agreed upon by the parties in contract specifying the same in writing shall be legal and valid. Section 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per centum per annum shall be the legal rate."

The two prominent ideas that strike one in analyzing this statute are these: that the legal or general rate of interest—seven per centum per annum—is to be applied only "when no rate of interest is agreed upon or specified in a note or contract;" and if any rate is specified in the contract or note, it matters not what it may be, it is valid, and consequently to be applied to the demand. The statute contains no limit as to the time during which the rate agreed upon in the contract shall run. Consequently, if there is any such limit, it must result from the operation of some controlling legal principle. Is there any any such principle properly applicable under the provisions of our statute?

Interest is but an incident to the debt that bears it—a rent that the debtor pays for the use of his creditor's money. The power and influence which money confers upon its owner has hitherto induced restrictions upon the rates of use, and even absolute prohibitions beyond certain rates under severe penalties

Digitized by Google

and forfeitures by legislative enactment. It seems to have been the purpose and design of our statute to sweep away all such obstacles in the way of contracts for interest, and to leave parties making them free from all legislative guardianship. It is based upon the principle that if a person is competent to contract at all, he is as competent to contract for the rate of interest as for the use of a horse, or for rent of land, or any other matter within the scope of legal and moral contracts between one person and another. In my view of the design and effect of our statute, contracts in writing, by which one person agrees to pay a specified rate of interest on a debt due or to become due to another, should be construed by the same rules of legal construction which are applied to every other contract in writing between parties. The intention of the parties should, when clearly manifest upon the face of the contract, control its legal effect, and the rights of the parties under it; but when the intention is not clear, the contract is to be construed most strongly against the promisor, and especially so if a different construction results in allowing a person to derive a benefit from his own breach of faith and moral delinquency.

What was the intention of the parties to the notes in this case in regard to the time when the rate of interest specified in them should cease? Did the maker of the notes intend or expect that the rates of interest mentioned in the notes should cease at their maturity? I cannot think so. But suppose he did. How was it with the other party—the payee? Is there anything in the contract to show that he designed or anticipated that his rate of interest on the debt was to be reduced to a lower rate after maturity than it bore before it was due? Such an idea is hardly supposable. If any such conclusion is to be drawn from the contract, it must be by implication; for certainly it is not so expressed; and the implications to be drawn from the construction must be against, not the promisee, but the promisor; and the implication to be made against him in solution of any doubt arising out of the terms of the contract is that the parties intended that the rates of interest specified in the contract should run upon the debt until it should be paid. Such construction is not at all inconsistent with our statute, but, in my view, strictly conformable to it. It is the rate agreed upon by the parties —the stipulated value of the use of the money—the specified rate of interest in the notes, which excludes the application of the general legal rate.

The rate of interest on money is a proper and lawful subject

Digitized by Google

of contract. It always has been so, but generally under more or less statutory restrictions. Now, here it is as free from such restrictions as is the price or use of property of any kind. In this state of the subject of interest, a written promise to pay a given sum of money, with a specified rate of interest, on some future day, certainly seems to bear a twofold aspect: first, that the debt, the incident as well as the principal, shall be paid by the day; second, that the debt shall bear a specified rate of interest as its incident. The debt and its incident are co-existent. No change is to be presumed. In the absence of any action of the parties, no rule of law should—nor do I think any does—intervene to sever one from the other. The agreement fixing the rate of interest on the debt overrides and supersedes the application of general statutory rate, so long as the debt to which the agreed rate is fixed, or any part of it exists; for the statute is, by its terms, subservient to and must be controlled by the agreement of the parties.

This construction is directly supported by the rule for computing interest upon contracts for the payment of money bearing interest at a maximum rate allowed by statute. In computing interest on such demands, no rest is made at their maturity. If the contract to pay interest ceases at the maturity of the debt, and the subsequent interest is allowed only in virtue of the statute, then a rest should be made at such maturity, and the whole amount of the debt and interest then due should bear interest from the time at the statutory rate. Such has never, to my knowledge, been the rule of computation of interest on such demand; but the rule has been to compute the interest on the principal debt from its date to the time of payment or judgment, a rule founded upon the contract, and not on the statute allowing interest.

As well might it be said that a tenant holding over after the expiration of his term should not pay rent at the rate reserved in the lease under which he entered, and should be liable to pay only the reasonable value of the use, as that the maker of the note, under our statute, be liable to pay the rate of interest on his debt overdue which he by his written promise agreed it should bear before maturity. They both stand upon the same principle. The tenant refuses to surrender at the expiration of his term, and for that reason he will not pay the rate of rent agreed upon in the lease, and insists upon a right to be discharged by payment of a less rate upon a mere legally implied promise to pay the value of the use and occupation; the maker

Digitized by Google

of a note refuses to pay it at maturity, and for that reason insists that he is discharged from his agreement to pay interest, and the payee entitled only to the legal and less rate. Such a principle and rule has never been tolerated between landlord and tenant, and never should be allowed to prevail between the promisor and promisee in a contract for the payment of interest for the use of money.

The moral influences and effects of such a rule, if allowed to prevail, are in all respects deleterious and reprehensible. The rule, if applied to contracts made in view of our statute, offers a premium upon bad faith, and allows persons to reap rich harvests of wealth out of their own violated promises and forfeited pledges; it allows them to avail themselves of benefits derived from their own wrongs, and to enjoy them. To such a doctrine I cannot assent, in whatever form it may arise.

The cases cited by the plaintiff in error upon the argument seem to have arisen under the influence of statutory limitations and restrictions upon contracts for the interest of money, an influence the like of which does not prevail here. There, it would seem that the statutes control the contract beyond the specified limit of interest; here, the statute has no application to or effect upon the agreement to pay interest, for it is only in the absence of any agreement that the statute has any operation. I am constrained to think that agreements made in view of our statute of interest stand upon another and different principle from the cases cited and which arise under statutory restrictions. There the statutes controlled the agreement; here the agreement prevails over the statute.

The only case cited that bears any close analogy to this is that of *Ludwick* v. *Huntzinger*, 5 Watts & S. 51. That case would seem to be within the principle contended for by the plaintiff in error. While I hesitate and regret to differ with the eminent court who pronounced that decision, I am constrained to question the correctness and propriety of the principle upon which it rests—a principle that changes the terms of a lawful contract between parties; and I seriously doubt whether that court would have applied the doctrine and rule of that case to one like this, to a case in which the effect would be to diminish the liability of the promisor, and give him a direct and material benefit as the result of a violation of his promise. If that case is to be considered as founded upon an established doctrine fixing an inflexible rule applicable to all cases, whatever the consequences may be, and upon whomsoever they may fall—overriding the

Digitized by Google

old sacred and salutary maxim that no man shall be allowed by the law to derive a benefit by the commission of a wrong or neglect of a duty—then I cannot consent to adopt or follow it as a precedent, or sanction its moral, or strengthen its force.

In my opinion, the judgment of the district court should be affirmed.

NOTE CONTINUES TO BEAR INTEREST AT RATE SPECIFIED THEREIN so long as the principal remains unpaid: *Phinney* v. *Baldwin*, 61 Am. Dec. 62, and cases cited in the note. But the principal case was taken to the supreme court of the United States upon appeal, and its doctrine was denied, the court holding that the note could bear interest after maturity only at the legal rate, and that the rate specified in the note referred only to the time prior to maturity: *Brewster* v. *Wakefield*, 22 How. 118. The supreme court of Indiana, in *Burns* v. *Anderson*, 68 Ind. 205; *Smith* v. *Tatman*, 71 Id. 176, and *Richardson* v. *McPherson*, 74 Id. 163, cite and follow this decision of the United States supreme court; but in *Shaw* v. *Rixby*, 84 Id. 377, the three preceding cases are expressly overruled, and the doctrine of the principal case is reasserted. The supreme courts of Illinois, in *Etnyre* v. *McDaniel*, 28 Ill. 203, and of Massachusetts, in *Union Institution for Savings* v. *Boston*, 129 Mass. 92, refer to and decline to follow this decision, and assert the doctrine of the principal case. In the District of Columbia and the territories, however, the rule established in 22 How. 118, remains in force: *Holden* v. *Trust Co.*, 100 U. S. 72; but in cases going up from state courts the supreme court of the United States will follow the ruling of the state court: *Ohio* v. *Frank*, 103 Id. 697.

THE PRINCIPAL CASE IS REFERRED TO in *Hollinshead* v. *Von Glahn*, 4 Minn. 191, as being authority for holding that the damages on breach of a money contract are the same as the interest agreed to be paid on the contract before breach.

Digitized by Google

CASES

IN THE

HIGH COURT OF ERRORS AND APPEALS

OF

MISSISSIPPI.

ROGERS *v.* SAMPLE.

[33 MISSISSIPPI, 310.]

AGREEMENT TO PAY INTEREST FROM DATE OF NOTE, IF NOTE IS NOT PUNCTUALLY PAID AT MATURITY, is not usurious, and may be enforced.

ACTION on a promissory note. It was contended that the contract for interest was usurious. The opinion states the facts.

Dyer and Bosters, for the plaintiff in error.

Fults and Reil, for the defendant in error.

By Court, HANDY, J. This was an action brought by the defendant in error upon a promissory note, made by the plaintiffs in error in December, 1853, whereby they promised to pay, on the first day of January, 1855, three hundred and ten dollars for the hire of certain slaves, the note containing an agreement that it should bear six per cent interest from the date if not punctually paid. The makers failed to pay the note, and this action was brought to the next term after its maturity, and judgment rendered for the defendant in error for the principal, with interest from the date of the note, according to its terms.

The only question presented is, whether the plaintiff could legally recover interest in the suit from the date of the note.

This point has been differently decided by several courts of the states of this Union. In Virginia it has been held that such interest is not recoverable, because it is to be regarded in the nature of a penalty, which, upon principles of equity, cannot be enforced: *Waller* v. *Long*, 6 Munf. 71.

On the contrary, it is held in Kentucky that such interest is

Digitized by Google

recoverable, because it is a contract made between competent parties, and fairly in violation of no statute or principle of sound policy or of morals: *Rumsey* v. *Matthews*, 1 Bibb, 242. And this view is also sanctioned in South Carolina and in Indiana: *Satterwhite* v. *McKie*, Harp. 397; *Gulley* v. *Renney*, 1 Blackf. 69.

We consider the rule held in the latter cases as the most just and reasonable, and as calculated to promote better faith and greater punctuality in the performance of such contracts. As to the validity of the agreement to pay interest accruing before the maturity of the note, in point of consideration, it cannot be questioned that the note might be drawn to bear interest absolutely from its date, though the consideration for which it was given might not be complete until its maturity. If such an agreement would be valid, why might not the parties stipulate, as a part of the contract, that the interest should be paid from the date in the event that the debtor should fail to make punctual payment? If the parties could contract for the payment of interest absolutely from the date, there appears to be no good reason why they should not agree, as a part of the contract, that it should be paid from the date on condition. This case is substantially one of a contract to pay principal and interest from the date of the contract, at a stated time, with an agreement that if the principal be punctually paid the interest shall be remitted; and in such a case it has been held that full interest may be recovered in case of default.

There is nothing illegal or unconscientious in such a contract; for the debtor can readily avoid the payment of interest by doing that which law and good faith require him to do, viz., paying the principal at maturity. He is therefore subjected to no loss, except what he has occasioned by his own wrong.

The judgment below was in accordance with this view, and it is therefore affirmed.

SMITH, C. J., dissented.

STIPULATION TO PAY INTEREST FROM DATE OF NOTE, if note is not paid at maturity, is not usurious: See *Gower* v. *Carter*, 66 Am. Dec. 71, and note 76, collecting the prior cases in this series; note to *Davis* v. *Garr*, 55 Id. 392.

Digitized by Google

MILLER v. STATE.

[33 MISSISSIPPI, 356.]

BET UPON RESULT OF ELECTION, THOUGH MADE AFTER ELECTION HAS BEEN HELD, is indictable under a statute providing an indictment for a bet upon the result of any election.

TIME OF COMMISSION OF OFFENSE MUST BE PROVED AS LAID IN INDICTMENT only when time is of the essence of the offense, or a necessary ingredient in the description of it; and then it must be proved, at least so far as may be necessary to identify the offense charged.

INDICTMENT FOR BETTING ON ELECTION WHICH CHARGES BET TO HAVE BEEN MADE BEFORE ELECTION, is supported by proof that the bet was made after the election upon the unknown result thereof, for time is immaterial since the statute draws no distinction.

GRAND JURY COMPOSED OF NINETEEN JURORS IS ILLEGAL IN MISSISSIPPI under the statute of 1830, which is not repealed by the statute of 1854.

WHERE GRAND JURY WHO FOUND INDICTMENT APPEARS FROM RECORD TO HAVE BEEN ILLEGALLY CONSTITUTED, a motion in arrest of judgment on this ground should be granted.

INDICTMENT for betting on the result of an election. The opinion states the case.

J. A. P. Campbell, for the plaintiff in error.

D. C. Glenn, attorney-general, for the state.

By Court, SMITH, C. J. This was a conviction, in the circuit court of Attala, for betting on an election. The indictment under which the defendant was tried charged that said defendant, "on the twenty-eighth day of October, 1856, bet a fifty-dollar bank note against a horse, with one McSharkey, upon the result of a certain election to be held on the fourth day of November, A. D. 1856, in the state of Kentucky, for" presidential electors, etc. On the trial, it was proved that the bet was made on the fifth or sixth day of November, 1856, and, of course, after the presidential election had been held in the state of Kentucky. Upon this evidence, under the instructions of the court, the defendant was found guilty and sentenced. Whereupon he prosecuted this writ of error.

On the trial, at the instance of the prosecuting attorney, the court charged, amongst other instructions given to the jury, that "if they believed from the evidence the bet was made either before or after the election mentioned in the indictment, within twelve months next before the finding of the indictment, the indictment will be sustained." And the court refused the instructions requested by the defendant, which were in the words following, to wit: "If the jury believe from the evidence that

Digitized by Google

the bet was made after the election was held, and after the time laid in the indictment, they should find the defendant not guilty." "If they believe the bet was made after the time laid in the indictment, they will acquit." And "if they believe the bet was made after the election had been held, they will acquit."

The last instruction raises the question whether a bet made upon the result of an election, after the election was held, is a violation of the statute under which the indictment was framed; and which applies to all persons who "shall wager or bet, or who shall promote or encourage the wagering or betting of any money, or other valuable thing, upon any cock-fight or duel, or upon the result of any election of any kind soever."

This language is certainly broad, and is sufficiently comprehensive to include any wager or bet upon the uncertain result of any election, whether made before or subsequent to the time of holding such election. The evils resulting to the commonwealth may be, and doubtless are, greater from the practice of betting upon future elections than [those] which would result from the same practice if confined to elections which had previously taken place. But for that reason alone we are not authorized to restrict the plain and express language of the statute to the practice of betting on elections to be held after the bets are made. And that, too, in the face of the manifest object of the legislature, which was to suppress entirely the evil practice of gaming of all kinds. In our opinion, therefore, the court was correct in refusing the instructions.

Generally, it is not incumbent upon the prosecution to prove that the offense charged was committed on the precise day alleged in the indictment. It is sufficient, as a general rule, that the offense charged be proved to have been committed before the finding of the indictment. But there are some exceptions to this rule. And it is laid down that whenever time is of the essence of the offense, or a necessary ingredient in the description of it, the time must be proved as laid in the indictment, at least so far as may be necessary to identify the offense charged: Whart. Crim. L. 220; 2 Russell on Crimes, 802; Archb. Crim. Pl. 90. And counsel insist that the present case comes within this exception to the rule.

A bet on the result of a future election, it is argued, is materially different from a bet on the result of an election which has been held. And hence, that the time stated in the indictment is an essential part of the description, so as to distinguish the one from the other.

Digitized by Google

This argument proceeds upon the assumption that the statute has created two distinct offenses, one of which is committed when a bet is made on the result of an election to be held after the bet is made; and the other when a party bets upon the unknown result of an election previously held. In our opinion, the statute draws no such distinction. It has created but a single offense, which is consummated where a party bets on the result of an election, either before or after it has been held. Upon this construction of the act, it is clear that time is not of the essence of the offense, nor a necessary ingredient in the description of it. And it follows, hence, that the words "to be," inserted in the indictment before the words "held on the fourth day," etc., which designate the election as a future event, were mere surplusage, and might have been stricken out without affecting the charge, or disregarded in the proof. In our opinion, therefore, there was no error in granting or refusing the instructions requested by either party.

It appears from the record that nineteen persons, by order of the court, were impaneled and sworn as grand jurors for the term at which the indictment was found. This is made the ground of another exception in this court. The objection was made in the court below by motion in arrest of judgment. Under the law as it existed prior to the adoption of the act, approved March 1, 1854, and of the act of the twentieth of February, 1856, which extended the provisions of the former to all of the counties of the state, the circuit judge, at his discretion, might select any number of the venire in attendance on court, not under thirteen nor over eighteen, to be drawn by lot to serve as grand jurors.

We do not doubt, if the former law be still in force, that a grand jury composed of less than thirteen grand jurors or more than eighteen would be illegal, and its acts void. It hence becomes necessary to determine whether that law, in respect to the number of which a grand jury should be composed, has, by the acts above referred to, been altered or repealed.

The act of 1854, local in its operation, but made general by that of 1856, is silent as to the number of the grand jury. And it does not in express terms repeal the provisions of the sixth section of the statute of 1830, which declares that the grand jury shall be constituted of not less than thirteen nor more than eighteen persons. It seems, therefore, justly inferable that the legislature in requiring the sheriff to summon twenty men to serve as grand jurors did not thereby intend to designate the

Digitized by Google

number of which the grand jury should be composed, but only to provide a body of men out of whom a grand jury should be selected. Indeed, the act itself leaves this a matter of inference. The second section of the act directs that the grand jurors thus summoned should be impaneled, sworn, and charged in the manner then prescribed by law. Another consideration renders this construction still more probable. It is evident, upon an examination of the language employed in the same section, that the legislature proceeded upon the supposition that the number of the grand jury was prescribed in the act itself, or by some antecedent law, which it was not its intention to repeal. It directs that in case a sufficient number shall not be in attendance to constitute a grand jury, it shall be lawful immediately to summon others. This language appears to indicate, and very clearly, too, that the whole number (twenty) directed to be summoned should not be requisite to the due constitution of the grand jury. For if the legislature, by providing that twenty men should be selected and summoned by the sheriff, intended to fix the number of the grand jury at twenty, it would have directed that if any of the twenty summoned should fail to attend, others to supply their places should be summoned. And this construction of the statute was applied in the case of *Weeks* v. *State*, 31 Miss. 490.

The statute, as above remarked, is silent in reference to the number of the grand jury. It results, therefore, from the decisions in Weeks's case, that if the act of 1830 in this respect be repealed, the legislature intended to leave it to the discretion of the judge to order any number of persons, not exceeding twenty, to be impaneled and sworn as a grand jury. It is unnecessary to say that this construction is not to be tolerated. Upon every view which we can take of the subject, it is our opinion that in the act under consideration the legislature did not intend to interfere with the pre-existing law which designated the number of which the grand jury should be composed.

The result of this conclusion is, that the grand jury who found the indictment in this case were illegally constituted; and hence that the judgment should have been arrested on the motion of the plaintiff in error.

TIME AND PLACE SHOULD BE ALLEGED TO EVERY MATERIAL FACT IN INDICTMENT: *State* v. *Thurston*, 58 Am. Dec. 695, note 696; *Nicholson* v. *State*, 54 Id. 168; *Mau-zau-mau-ne-kah* v. *United States*, 39 Id. 279. The offense may be charged on any day prior to the finding of the indictment, and the crime may be proved on any day within the statute of limitations: *Cook* v.

Digitized by Google

State, 56 Id. 410, note 418. But the indictment will be fatally defective if it charge the crime on a day subsequent to the finding of the indictment, or upon an impossible date: *State* v. *Ray*, 33 Id. 90. The principal case is cited to the point that time is not material except where it is of the essence of the offense, or a necessary ingredient in the description of it; and that it may be laid any day previous to the finding of the indictment during the period within which the offense may be prosecuted: *Miazza* v. *State*, 36 Miss. 616. It may be proved that the offense was committed after the date laid, but before the finding of the bill: *McCarty* v. *State*, 37 Id. 422, citing the principal case.

ILLEGALITY OF GRAND JURY.—In Illinois it is held that the illegality of the grand jury must be presented by a motion to quash, or by challenging the array, and cannot be taken advantage of by motion in arrest of judgment, as was done in the principal case, the court stating that no defect appeared of record, and citing the statute of that state, which provides that no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense: *Barron* v. *People*, 73 Ill. 259. In *Box* v. *State*, 34 Miss. 615, 616, the principal case is approved upon the point that, under the statutes of Mississippi, the grand jury must be composed of not less than thirteen jurors nor more than eighteen.

BETTING ON ELECTION, WHAT CONSTITUTES: See *Commonwealth* v. *Shouse*, 63 Am. Dec. 551.

KIRKLAND *v.* LOWE.

[33 MISSISSIPPI, 423.]

ASSIGNMENT UNDER LAWS OF ONE STATE OF CHOSE IN ACTION NOT ASSIGNABLE IN ANOTHER STATE does not enable the assignee to sue thereon in his own name in the latter state.

LAW OF FORUM DETERMINES WHO SHALL BE PARTIES TO ACTION.

ASSIGNMENT UNDER INSOLVENCY LAWS OF ONE STATE of chose in action not assignable in another state vests only the equitable title in the assignee in the latter state; the legal title still remains in the insolvent in that state, and he may sue thereon.

ACTION by B. M. Lowe, W. H. Pattison, and A. Pattison, formerly partners under the firm name of Lowe, Pattison, & Co., against J. B. Kirkland & Co., to recover the amount of an open account for goods sold and money lent to the defendants. Judgment for plaintiffs, and error assigned by the defendants. The opinion states the facts.

W. C. Harper, for the plaintiffs in error.

D. Shelton, for the defendants in error.

By Court, HANDY, J. The defendants in error, as partners, brought this action against the plaintiffs in error to recover a sum of money due upon an open account.

It appears that prior to the institution of the suit, Pattison,

Digitized by Google

one of the partners, under the insolvent laws of the state of Louisiana, where he resided, made a surrender of his property and effects for the benefit of his creditors, including the claim here sued on, in the proper court in that state, and that a syndic was there appointed, who, under the operation of the laws of that state, became an assignee of his property and effects for the benefit of his creditors. These proceedings were taken in relation to his individual rights, and did not in terms embrace the firm of Lowe, Pattison, & Co.

The question presented by the record is, whether, under such a state of facts, the suit could be maintained in the name of the firm of Lowe, Pattison, & Co., or whether the syndic of Pattison was not a necessary party, together with the other partners of the firm.

It is to be observed that the alleged assignment to the syndic is in virtue of the laws of another state, which can have no force of themselves to pass legal titles to property in this state; and such assignments can only be valid and effectual here, to enable the assignee to sue in his own name, when they relate to rights or property which are assignable under our laws. The rule which applies to the question who shall be parties to the action is established by the law of the forum, and is said to belong rather to the form of the remedy than to the right and merit of the claim: Story's Confl. L., sec. 565. The question in such cases is, What shall constitute a sufficient legal title to enable the party to sue in our courts? And if the thing assigned be not such as is assignable under our laws, so as to transfer the legal title, upon clear principle the assignee cannot maintain an action upon it in his own name in a court of law. And this rule applies as well to assignments made in virtue of the laws of other states of this Union as to those made under the laws of foreign states: *Orr* v. *Amory*, 11 Mass. 25; *Raymond* v. *Johnson*, 11 Johns. 488.

Hence it is clear that as the account sued on here was not assignable under our laws, so as to enable the syndic to sue in his own name, the suit could not have been maintained in his name, either solely, if the cause of action had been the sole individual property of the insolvent, or jointly, with the copartners of the insolvent in this case.

It is also well settled, upon principle and authority, that the suit could be maintained in the name of the insolvent notwithstanding the appointment of the syndic: *Blane* v. *Drummond*, 1 Brock. 62; *Raymond* v. *Johnson*, 11 Johns. 488.

Digitized by Google

The case of *Sims* v. *Ross*, 8 Smed. & M. 557, is relied upon in behalf of the plaintiffs in error as settling the question that the syndic was a proper party to this action. That was a question arising under the bankrupt law of the United States, the operation of which extended to this state, and had the same effect upon the rights involved in it in this state as if it had been one of our own statutes. It is, in this, manifestly different from a statute of one of the states, which can have no effect upon remedies and modes of judicial proceeding here not recognized by our laws.

But it is said that Pattison had no interest in the cause of action when the suit was instituted, and therefore that it could not be maintained. It is true that his interest passed to the syndic as trustee for his creditors. But so far as is cognizable by our laws, and for the purpose of maintaining the action, the legal title remained in him, subject to whatever claim the syndic might have against the other partners, in virtue of his interest in the debt.

The case of *Eckhardt* v. *Wilson*, 8 T. R. 140, was a case of bankruptcy in England, and under the laws there, in virtue of which the assignee succeeded to the legal title of the bankrupt, and was, therefore, held to be competent to sue with the other plaintiff. The same reason which gave the assignee the right to sue in his own name also rendered the bankrupt incompetent to sue in his own name. The bankrupt could not maintain the suit, because all his interest, both legal and equitable, had passed to the assignee. But such is not the case here. The equitable interest was in the syndic, but the legal title, under our laws and modes of proceeding, remained in the bankrupt: *Blane* v. *Drummond*, 1 Brock. 62; and we do not consider that the case of *Sims* v. *Ross*, 8 Smed. & M. 557, is in opposition to this rule, under the facts presented in this case.

Let the judgment be affirmed.

LEX FORI GOVERNS REMEDY: *Roosa* v. *Orist*, 65 Am. Dec. 679, and cases cited in the note 682.

Digitized by Google

HAMBLEN v. HAMBLEN.

[33 MISSISSIPPI, 455.]

NEGLECT OF SHERIFF TO RETURN ON EXECUTION LEVY ON LAND SOLD will not vitiate sale.

LEVY ON PROPERTY SOLD IS ESSENTIAL TO VALID SALE UNDER EXECUTION.

LEVY ON LAND SOLD IS PRESUMED WHERE LAND HAS BEEN ADVERTISED and sold under a valid judgment and execution, and a deed made to the purchaser, whether the advertisement be held tantamount to an actual levy, or as evidence of a levy previously made.

EJECTMENT. Judgment for the defendant, and writ of error sued out by the plaintiff. The opinion states the case.

H. A. H. Lawson, for the plaintiff in error.

D. Mayes, C. C. Shackelford, George Fearne, and T. C. Tupper, for the defendant in error.

By Court, SMITH, C. J. This was an action of ejectment, brought in the circuit court of Madison county by the plaintiff in error against the defendant, to recover the possession of the south-west quarter of section 22, township 11, range 4 east.

The plaintiff, on the trial, claimed title, through several intermediate conveyances, forming a connected chain, from the party to whom the land in dispute was originally sold by the United States.

The defendant relied on a deed conveying the land to him in fee-simple, executed by Charles C. Shackelford, who was the subvendee of James S. Ewing, who claimed under a deed bearing date the fourth of May, 1840, purporting to have been executed by the marshal for the southern district of Mississippi, in virtue of a sale made by him, under an execution from the circuit court of the United States for said district, in favor of one J. B. Diggs, against the parties to this suit, Henry and Edwin Hamblen. The deed recites the levy of the execution on the land in controversy, the due advertisement of the sale, and the sale to Ewing on the day appointed.

The record of a judgment in the circuit court of the United States for the southern district of Mississippi was read in evidence by the defendant, from which it appeared that said Diggs had recovered a judgment therein, on the twentieth of May, 1839, for two thousand seven hundred and sixty-three dollars and fifty-five cents, against said Henry and Edwin Hamblen, on which judgment, an execution having issued, was levied on the property of the defendants; that these parties gave a forthcoming bond, with one Harold as surety, which was returned for-

Digitized by Google

feited; and that an execution was issued December 20, 1839, on the forfeited forthcoming bond, returnable to the May term of said court, in 1840.

It appeared, also, by an indorsement upon the execution of the date of the fourth of March, 1840, that the execution was levied upon personal property and several tracts of land, including the south-west quarter of section 20. But it is not stated in the indorsement or return that said execution was levied on the south-west quarter of section 22, which is the subject-matter of this suit. In the return, dated the fourth of May, 1840, and indorsed upon the execution, it is stated that "the land was bid off [by] C. C. Shackelford, the plaintiff's attorney, for one thousand and fifty-two dollars." The levy and the return of the sale were made by different deputies of the marshal.

It was further proved by the defendant that the south-west quarter of section 22 was advertised by the marshal for sale under the execution. The advertisement was inserted in the Madison Whig Advocate, and published for the period of thirty days before the day appointed for the sale. This advertisement described property not embraced in the levy of the fourth of March, 1840, as the same is indorsed upon the execution, and does not mention or describe the south-west quarter of section 20 as property levied on and for sale at the appointed place and time.

From the facts thus stated, three conclusions may be drawn: 1. That the south-west quarter of section 22 was not levied on by the deputy who made the return on the fourth of March, 1840, or if a levy was in point of a fact made upon that quarter-section, he failed to state it on the execution; 2. That a subsequent levy was made on the land in dispute, and no return made of it by the officer; or 3. That the land was not levied on by either one of the deputies, but was advertised and sold pursuant to the advertisement.

The questions which necessarily arise from these conclusions are: 1. Whether it is essential to the validity of a sale of land under execution that the return made by the marshal or sheriff should show that a levy was made on the land sold; and 2. Whether an actual levy is necessary; and if essential to the validity of the sale, may it not be presumed?

1. In all cases where a levy has been made, unless there has been a failure to sell before the return day of the execution, the levy and sale must of necessity precede the return. It is hence certain that the return entered upon the execution does not con-

Digitized by Google

fer the right to sell. If the levy and sale be valid when made, the title of the purchaser could not be defeated by the subsequent neglect of the marshal or sheriff to enter his return on the execution. This is clearly so, unless by statute it is expressly declared that such failure or neglect shall avoid the sale. It is unquestionably the duty of the marshal or sheriff to enter the levy upon the execution, and it is desirable that he should do so as the means of preserving the evidence of it. But our statute has no provision which declares that the sale shall be void unless the sheriff returns on the execution the property levied on and sold. The omission, therefore, to do so, would be merely one of those irregularities which, according to all of the authorities, will not vitiate the sale made under it. This doctrine is well sustained by authority. In North Carolina the purchaser of land sold under execution is only bound to show a judgment, execution, and sheriff's deed. As against the defendant in the execution, he is not required to show a levy by the sheriff: *Den ex dem. McEntire* v. *Durham*, 7 Ired. L. 151 [45 Am. Dec. 512]. In South Carolina the same principle is held to apply to both real and personal property: *Gassaway* v. *Hall*, 3 Hill (S. C.), 289. And the courts of Maryland, Kentucky, Illinois, and Indiana recognize the same doctrine: *Boring's Lessee* v. *Lemmon*, 5 Har. & J. 223; *Barney* v. *Patterson's Lessee*, 6 Id. 182; *Sneed* v. *Beardon*, 1 A. K. Marsh. 217; *Evans* v. *Davis*, 3 B. Mon. 346; *Doe* v. *Heath*, 7 Blackf. 157; *Bybee* v. *Ashby*, 2 Gilm. 166.

2. The authority of the marshal or sheriff to sell is derived from the judgment and execution issuing thereon. And it is conceded that there cannot be a sale legally made under execution unless there has been a levy of the property sold. The title of "the purchaser depends upon the judgment, the levy, and the sale;" and in all cases in which titles derived under execution sales are upheld, the courts proceed on the presumption that there was a levy of the execution.

In order to constitute a valid levy on personal property, it is said the sheriff must have it in his possession or under his control, or perform some act with the intent of taking possession of it, which, if the judgment and execution under which he acts were void, would make him liable as a trespasser. But in regard to lands, what will amount to a levy is not so clearly understood. The levy does not transfer the property or pass the title to lands. And as the sheriff, in virtue of the execution, cannot rightfully enter and take possession of the lands, the levy cannot divest the possession of the defendant in the execution.

Digitized by Google

At most, therefore, he can only make known, by some overt act or declaration, his intention to levy or raise the money by a sale of the land. This might be done by giving notice to the defendant of such intention, or by entering on the execution a description of the land. In the latter case, the indorsement on the execution would be nothing more than evidence of the levy previously made. Or if in law, the entering the description on the execution would of itself constitute a levy, the act of advertising the land for sale would be equal evidence of the levy, and should, for manifest reasons, be held tantamount to an actual levy. For if it be assumed that the entering the description of the land on the execution amounts to an actual levy, until it is made a part of the sheriff's return, and until it is actually returned into the clerk's office, it remains a mere matter *in pais*, an official act of the sheriff, like that of advertising the land, which the law authorized and required him to perform. And if any part of the object of a levy on land be to give notice, either to the defendant in the execution or to the public, that purpose would be more effectually subserved by an advertisement in the mode prescribed by law than by the officer's writing a description of the land upon the back of the execution.

But it is not material whether the advertisement be held tantamount to an actual levy, or whether it be regarded as evidence of a levy previously made, as in all cases in which lands have been advertised and sold under a valid judgment and execution and a deed made to the purchaser, a levy will be presumed: *Ware* v. *Bradford*, 2 Ala. 682 [36 Am. Dec. 427]; *Work* v. *Hunter*, 1 Cam. & N. 527; *Patterson* v. *Carneal's Heirs*, 3 A. K. Marsh. 619 [13 Am. Dec. 208], and cases above cited.

The decisions upon this subject are based upon the policy of the law to encourage purchasers at execution sales, who would be deterred from buying, to the detriment both of the debtor and creditor, if sales made by an officer of the law and appearing to have been conducted in conformity with its requirements should be avoided on account of some irregularity which could not be known at the time; and also upon the general principle of reposing faith in the acts of ministerial officers. The principle above laid down, of course, would not apply if the conduct of the purchaser be fraudulent.

It follows, from what we have above said, that the sale under the execution and the marshal's deed to Ewing were valid, and vested in him whatever title and interest the plaintiff in error held in the land, as fully as if he himself had made the deed

Digitized by Google

The defendant's was, therefore, the superior title; or, to speak more appropriately, the plaintiff showed no title whatever.

Judgment affirmed.

PURCHASER'S TITLE NOT AFFECTED BY ABSENCE OF OR IRREGULARITIES IN RETURN ON EXECUTION: *Phillips* v. *Coffee*, 63 Am. Dec. 357, and cases cited in the note 361.

NECESSITY OF LEVY TO SUSTAIN EXECUTION SALE: *Waters* v. *Duvall*, 33 Am. Dec. 693, and note 697–699.

EXECUTION SALE IS PRESUMED TO BE REGULAR: See *Brooks* v. *Rooney*, 56 Am. Dec. 430; *Howard* v. *North*, 51 Id. 769.

MOUNT v. BROWN.

[33 MISSISSIPPI, 566.]

WHERE PURCHASER AT ADMINISTRATOR'S SALE REFUSES TO COMPLETE PURCHASE according to the terms of the sale, by executing a bond for the payment of the purchase price, the administrator may resell the property and hold the original purchaser responsible for the difference between his bid and the diminished purchase price obtained at the resale.

ADMINISTRATOR CANNOT TREAT SALE TO PURCHASER WHO REFUSES TO COMPLETE PURCHASE AS VALID, and sue him for the amount of his bid.

ADMINISTRATOR'S SUIT FOR DEFICIENCY IN PURCHASE PRICE OBTAINED AT RESALE against a purchaser at the first sale who refuses to fulfill his bid need not be delayed until the expiration of the term of credit allowed by the terms of the first sale.

ACTION by Brown, administrator, etc., to recover the difference between the amount bid by the defendant at an administrator's sale and the amount obtained at a resale. The opinion states the facts.

T. J. and F. A. R. Wharton, for the plaintiff in error.

Johnston and Shelton, for the defendant in error.

By Court, HANDY, J. The declaration in this case alleges that on the second of July, 1855, the plaintiff below, as administrator of one Warner, under a decree of the probate court, exposed to public sale to the highest bidder, on a credit of six months, a slave of the intestate, when the defendant became the highest bidder, for the sum of two hundred and ten dollars, and the slave was thereupon struck off to him as the purchaser, but that the defendant afterwards refused to receive the slave and to execute bond for the payment of the purchase money, according to the terms of sale; and that the plaintiff thereupon, in due time, and within lawful hours on the same day, again exposed

Digitized by Google

the slave for sale, when another person became the highest bidder at the sum of eighty dollars, and took possession of the slave, and executed bond for the purchase money. The declaration demands judgment for the sum of one hundred and thirty dollars, the difference between the sum bid by the defendant and that for which the slave was afterwards sold. The defendant filed a demurrer to the declaration, which was overruled.

The first position taken in behalf of the plaintiff in error is, that the administrator had no further power than either to treat the sale as valid, and sue the purchaser for the amount which he bid for the property, or to treat the sale as ineffectual and resell the property; and this view seems to be founded on the idea that he has no other powers in relation to his duties than such as are expressly conferred upon him by statutes and the orders of the court of probates. But this view is manifestly untenable. It is true, the administrator derives his powers from his appointment, and is subject to the legal direction of the court, and is bound to conform to such rules of action as are prescribed by the statutes in relation to his duties. But he has many incidental powers proceeding from his duty to protect the interests of the estate under his charge, and derived from the general rules of law; and generally he has power to do such acts, in protecting the interests of the estate, as an individual may do with regard to his own property, unless restricted by positive law. One of his primary duties is to sell the chattels of the estate under order of the court, and to see that the estate suffers no detriment therein, and that all the rights and remedies which the law gives against purchasers should be enforced, unless from the nature of his office he is incapable of enforcing them, in some particular mode.

It appears to be just that sales by administrators should have the protection of the same rules which apply to sales at public auction by individuals; and no reason can be perceived why they should be placed in a worse position. They are a part of the administration of justice of the country, and it would appear that every security known to the law should be thrown around them. The rule has been long sanctioned, in regard to public sales, that where the vendee becomes bound for the purchase, as by having the article struck off to him as the highest bidder, and refuses to complete the purchase, the vendor may resell and hold the purchaser responsible, in case of a deficiency of the purchase money upon the resale, for the difference between the two sales: 2 Kent's Com. 504; *Sands* v. *Taylor*, 5 Johns. 395; *Girard* v. *Taggart*, 5 Serg. & R. 32 [9 Am. Dec. 327]; *Mo-*

Digitized by Google

Combs v. *McKennan*, 2 Watts & S. 216 [37 Am. Dec. 505]. And this rule has been applied to sheriff's sales: *Lamkin* v. *Crawford*, 8 Ala. 153.

The objection that the administrator should treat the sale as valid and complete, and sue the purchaser for the money, will not bear examination.. Such a course could not be pursued without a plain violation of his duty. It could not be taken without a delivery of the property to the purchaser; and he is expressly required by law to sell the property and to deliver possession only upon receiving bond with surety from the purchaser. He must then deliver the property contrary to law, and have no remedy but against the purchaser, who might become insolvent. Such a rule would work great mischief and loss to estates, by enabling purchasers to evade the positive provisions of law requiring security on such purchases.

Nor is the administrator bound to treat the sale as void, and resell the property, without remedy against the first purchaser for the loss occasioned by his failure to complete his purchase. The purchaser has bound himself in law by the contract of purchase; and by his failure to complete it has acted in bad faith, and caused a loss to the estate by depriving it of the benefit of the last sum bid before the property was struck off to him. The administrator is entitled in law and good morals to hold him to his obligation, and to compel him to perform that which he undertook. If he sustains a loss thereby, it is in consequence of his own bad faith, and he has no right to complain. He is not to be permitted to make experiments at official sales, and thereby interfere with their regularity, disturbing the course of administration of the laws, and jeopardizing the interests of estates. If he becomes a purchaser of property at such sales, he does so with all the responsibilities which attach in cases of sales at public auction, and strong considerations of public convenience render the general rule of law applicable to such cases.

Again: it is objected that the action could not have been brought before the expiration of six months, the time of credit allowed to the purchaser by the terms of the sale as stated in the declaration; and that this action, having been instituted before that time, was premature.

This objection is founded on a misapprehension of the nature of the action. It is not an action to recover upon the contract of purchase, but for a failure of duty to comply with the terms of the contract, in consequence of which damage ensued to the plaintiff. The right of action, therefore, became complete so soon

Digitized by Google

as the defendant refused to do his duty, and comply with the obligation he had incurred in bidding off the property at the sale.

We think that the judgment overruling the demurrer was correct, and it is affirmed.

REMEDIES AGAINST PURCHASERS AT JUDICIAL SALES.—1. EXECUTION SALES—ACTION TO RECOVER AMOUNT OF BID.—When a bidder at an execution sale fails or refuses to pay the amount of his bid, the sheriff in his official capacity may maintain an action against him to recover the amount of the bid. The form of the action is generally *assumpit*: *Glenn* v. *Black*, 31 Ga. 393; *Sharman* v. *Walker*, 68 Id. 148; *Armstrong* v. *Vroman*, 11 Minn. 220; *Jones* v. *Null*, 9 Neb. 254; *Chappell* v. *Daun*, 21 Barb. 17; *Grier* v. *Youtz*, 5 Jones L. 371; *McKee* v. *Lineberger*, 69 N. C. 217; *Robinson* v. *Garth*, 6 Ala. 204; S. C., 41 Am. Dec. 47; see *Alna* v. *Plummer*, 4 Me. 258; *Hunt* v. *Gregg*, 8 Blackf. 105; *Hand* v. *Grant*, 5 Smed. & M. 508. The sheriff only, and not the plaintiff in execution, can maintain this action, for the contract is with the sheriff: *Adams* v. *Adams*, 4 Watts, 160. At least the sheriff is the proper party plaintiff rather than the execution plaintiff, even conceding a right of action in the latter: *Robinson* v. *Garth*, 6 Ala. 204, S. C., 41 Am. Dec. 47, 50; *Bell* v. *Owen*, 8 Ala. 312. The sheriff may bring this action without first making his return on the execution: *McKee* v. *Lineberger*, 69 N. C. 217. Although a contract for the purchase of land at a sheriff's sale cannot be enforced if not in writing, signed by the party, yet it is not necessary to aver this fact in the declaration: *Bell* v. *Owen*, 8 Ala. 312. In *assumpsit* by a sheriff to recover the price of land sold on execution, his return on the execution was held to be a sufficient memorandum to take the case out of the statute of frauds: *Hand* v. *Grant*, 5 Smed. & M. 508. The certificate of sale prescribed by the statute is sufficient for this purpose: *Armstrong* v. *Vroman*, 11 Minn. 220. But in *Robinson* v. *Garth*, 6 Ala. 204, S. C., 41 Am. Dec. 47, it was held that a sheriff cannot introduce his own memorandum of sale to take the case out of the statute of frauds, when suing the purchaser for breach of his contract, for the sheriff is a party to the record, and cannot introduce his own written declarations or admissions for this purpose; but if the suit had been brought by the plaintiff in execution, then the sheriff's memorandum would have been admissible.

In order to recover the purchase price of land, the sheriff must have first tendered a deed to the purchaser: *McKee* v. *Lineberger*, 69 N. C. 217; *Hunt* v. *Gregg*, 8 Blackf. 105; *contra*: *Holdship* v. *Doran*, 2 Penr. & W. 9. In *Negley* v. *Stewart*, 10 Serg. & R. 207, it is said that it is not necessary to aver a tender of deed in a suit to recover the purchase money of land sold at sheriff's sale, for it will be presumed to be a cash sale, in which delivery of the deed is an act subsequent to the payment. The contract of sale and purchase is complete when the bid is accepted, and the bidder is liable for the purchase money, and not another person for whom he said he was bidding, and whose name the sheriff, at the bidder's suggestion, entered upon the sales-book as the purchaser: *Gray* v. *Case*, 51 Mo. 463; *Chappell* v. *Daun*, 21 Barb. 17. And the sheriff cannot recover against the latter: *Gray* v. *Case*, 51 Mo. 463. So where the purchaser has assigned his bid he still remains liable: *Wimer* v. *Obear*, 23 Id. 242.

In some states it is provided by statute that the sheriff may move for and obtain judgment for the amount bid against the defaulting purchaser: *Harvey*

Digitized by Google

v. *Fish*, 9 Cal. 93; *Hunt* v. *Gregg*, 8 Blackf. 105. A sheriff's notice of an intended motion against a purchaser of land on execution to recover the purchase money need not state that the contract is in writing: *Hunt* v. *Gregg*, *supra;* and where the execution plaintiff bids in excess of the amount of the execution, the sheriff may recover this excess on motion: Id.

REMEDY BY RESALE.—The purchaser at sheriff's sale must pay his bid at once, or it may be disregarded and the property resold: *Durnford* v. *Degruys*, 8 Mart. (La.) 220; S. C., 13 Am. Dec. 285. The sheriff may ignore the bid of one who refuses to comply with the terms of the sale, and immediately re-offer the property for sale: *Thompson* v. *McManama*, 2 Disney, 213; *Bisbee* v. *Hall*, 3 Ohio, 449; *Roberts* v. *Westbrook*, 1 Coldw. 115.

RECOVERY OF DEFICIENCY ON RESALE.—Where property is sold at auction and the bidder refuses to complete his purchase, the property may be resold, and if it brings less at the second sale than the amount bid at the first sale, the difference between these amounts may be recovered from the defaulting bidder, though the jury is not bound by this measure of damages, but may award more or less as the circumstances of the case may demand: *Girard* v. *Taggart*, 5 Serg. & R. 19; S. C., Id. 539; *Adams* v. *McMillan*, 7 Port. 73. And this remedy of resale is possessed by all vendors upon a breach of contract by the vendee: Benjamin on Sales, Bennett's ed., sec. 788, and note; Corbin's ed., 1019, and note, 1020, et seq. In *Adams* v. *McMillan*, *supra*, the sale was at auction, by an executor under a power, and the court said: "When the right to resell lands for a failure to comply with the contract is one of the conditions of the sale, the difference between the two sales is the measure of damages agreed on by the parties for a failure to perform the contract, and is in the nature of stipulated damages. But if no such condition be entered into as one of the terms of the sale, the vendor, upon a breach of the contract, would certainly be entitled to recover such damages as he had sustained by the violation of the contract of sale; and we think the difference between the price at which the land was first bid off and the price at the second sale would afford a good criterion of the damages sustained by the vendor; not, however, as binding on the jury, but as fit and proper testimony to be received by them as a medium of coming to a correct conclusion:" Id. 88. This rule of auction sales is in some states said not to apply to sales on execution: *Roberts* v. *Westbrook*, 1 Coldw. 115. In North Carolina the sheriff cannot resell land and hold the first purchaser liable for the deficiency in the price obtained at the second sale: *Grier* v. *Youtz*, 5 Jones L. 371; *McKee* v. *Lineberger*, 69 N. C. 217, 240. But generally this rule of auction sales applies to execution sales, and if the purchaser refuses to fulfill his bid, the sheriff may resell the property and recover from such purchaser the deficiency between the amount of his bid and the price obtained at the second sale: *Robinson* v. *Garth*, 6 Ala. 204; S. C., 41 Am. Dec. 47; *Lamkin* v. *Crawford*, 8 Ala. 153; *Glenn* v. *Black*, 31 Ga. 393; *Sprang* v. *Schneider*, 10 Pa. St. 193. He may, in addition, recover the costs of the resale; but the jury are not bound by this measure of damages if they can discover any other more agreeable to the truth: *Coffman* v. *Hampton*, 2 Watts & S. 377; S. C., 37 Am. Dec. 511.

In Pennsylvania the sheriff is not bound to give notice to the purchaser of the time and place of the resale; it is sufficient to notify him that unless he pays his money the property will be resold: *Gaskell* v. *Morris*, 7 Watts & S. 32; *Coffman* v. *Hampton*, 2 Id. 377; S. C., 37 Am. Dec. 511. In Illinois, however, to hold a purchaser of real estate at sheriff's sale on execution liable for not completing the sale, and for the loss on the resale, he must have notice that a resale will be made, and he held liable for any loss, so that he

Digitized by Google

may protect his interest at the second sale as best he may. But the rule is different in the case of a resale of personal property: *Maulding* v. *Steele*, 105 Ill. 644; see also Freeman on Executions, sec. 301.

In order to hold the purchaser for the deficiency on a resale of land, the sheriff must, before the resale, tender a deed to the purchaser, and demand the purchase money: *State* v. *Lines*, 4 Ind. 351; *Williams* v. *Lines*, 7 Blackf. 46; *Jennings* v. *Hodges*, 16 La. Ann. 321; *Phillips* v. *Goldman*, 75 Mo. 686. Unless a bidder is notoriously insolvent, the sheriff cannot, before the return day of his writ, make a return that the purchaser has not paid, and therefore that the property is "unsold" for want of buyers; and if he does so, and has made no demand, and has no evidence to justify him in so doing, the bidder is not liable for a difference in price: *Holdship* v. *Doran*, 2 Penr. & W. 9.

The second sale must be conducted with fairness, and no means be resorted to which would impair the value of the land in the estimation of the public: *Adams* v. *McMillan*, 7 Port. 73, 88. The sheriff cannot wait until the sale is closed, and the bidders have departed, before again offering the property for sale: *Jones* v. *Null*, 9 Neb. 254. A count on an implied contract to pay the damages resulting from a resale is good: *Lamkin* v. *Crawford*, 8 Ala. 153; but see *Adams* v. *McMillan*, 7 Port. 73.

The sheriff is the proper party to sue for the deficiency on the resale, and the judgment creditor cannot maintain this action: *Galpin* v. *Lamb*, 29 Ohio, 529 (foreclosure sale); *Gaskell* v. *Morris*, 7 Watts & S. 32; for the sheriff and the purchaser are the only parties to the contract. In *Holdship* v. *Doran*, 2 Penr. & W. 9, it is said that the action must be brought either in the name of the sheriff on the privity of contract, or in the name of some one who was injured. The sheriff cannot have judgment for the deficiency on a resale of the property against one in whose behalf the bid is alleged to have been made, but the judgment must be against the actual bidder: *Gray* v. *Case*, 51 Mo. 463; *Wimer* v. *Obear*, 23 Id. 242. Where the conditions of a sheriff's sale are that the purchaser shall pay in ten days, and the deed shall be delivered thereafter, the property to be resold at the purchaser's risk if he fail to comply with the conditions, and the purchaser gives a bond to comply with such conditions, he is liable on the bond without a resale: *Friedly* v. *Scheetz*, 9 Serg. & R. 156; S. C., 11 Am. Dec. 691.

Statutes in some states allow the sheriff to resell the property when the purchaser refuses to comply with his bid, and on motion to have judgment against him for the deficiency. There is such a statute in Missouri: *Phillips* v. *Goldman*, 75 Mo. 686; *Gray* v. *Case*, 51 Id. 463; *Hensley* v. *Baker*, 10 Mo. 157. In this state it is held that the sheriff may resell without giving the statutory notice by advertisement required at the first sale: *Illingworth* v. *Miltenberger*, 11 Id. 80. Where the purchaser had until five o'clock P. M. to pay the purchase money, the law requiring the sale to be before five, the sheriff had no right to resell a few minutes before five, and a tender of the money on the next morning by the first purchaser is sufficient: *Conway* v. *Nolte*, 11 Id. 74. To authorize a sheriff to resell land struck off at execution sale, it is essential that the purchaser shall have "refused" to pay the amount of his bid. Simple neglect to pay is not always tantamount to refusal. Unless he either positively refuses or does some act which amounts to a repudiation of his obligation to pay, the sheriff, before making a resale, should not only demand the purchase money, but should also tender a deed. Merely stating that the deed was ready is not a tender: *Phillips* v. *Goldman*, 75 Id. 686. The sheriff's return is competent evidence in this statutory proceeding by motion: *Hensley* v. *Baker*, 10 Id. 157. In the statutory proceeding of

Digitized by Google

Indiana, by notice and motion against the first purchaser for the difference in the amount between the first and second sales, the notice must aver an offer by the sheriff to convey the land to the defendant before the second sale: *Williams* v. *Lines*, 7 Blackf. 46. Where the sheriff, not having tendered a deed to the purchaser, has for an omission of the latter to pay the purchase money resold the land, the first purchaser is not liable for the deficiency, but the sheriff is liable to the execution defendant for the deficiency: *State* v. *Lines*, 4 Ind. 351. The Missouri statutory process for the summary collection of the bid by motion to the court is intended as a protection for the creditor only, and when, upon a resale, the property brings enough to satisfy the execution, the sheriff cannot have judgment on motion against the first purchaser for the deficiency between the two bids: *Reed* v. *Sheppard*, 38 Mo. 463. Of this authority it is said in Freeman on Executions, sec. 301: "If this be so, there is an obvious defect in the statute. For while, in such a case, the plaintiff suffers no injury, it is clear that with the defendant it is otherwise, and his interests ought to be guarded as jealously as those of the plaintiff." In *Hunt* v. *Gregg*, 8 Blackf. 105, however, it is held that, under the Indiana statute, if the execution plaintiff buy land at a sheriff's sale at a price exceeding the amount of the execution, and refuse to make payment, the sheriff may, by motion against the purchaser, recover the excess, with ten per cent damages.

2. SALES UNDER DECREE IN EQUITY—COURT IS VENDOR, AND PURCHASER IS QUASI PARTY TO SUIT.—Where the sale is made under a decree in equity, the power of the court to enforce the contract of purchase is much broader than where the sale is at law. In fact, at law, the court issuing the execution has no power whatever over the purchaser at the sale, except where a statute gives it power to enter judgment on motion against the defaulting purchaser. Before execution issued it has rendered final judgment, and the cause is determined. And in the absence of statute prescribing a different method, the bidder's liability must be enforced by an action *de novo* in the name of the sheriff. In equity, however, even after final decree rendered, the court still retains jurisdiction to enforce the bidder's liability under its general power to enforce its decrees against the parties to the suit. This power is inherent in a court of equity, for two reasons: 1. Because the court is regarded as the vendor; and 2. Because the purchaser is considered a party to the suit as far as his rights as purchaser are concerned.

In the first place, a court of equity is regarded as in some sense the vendor: *Long* v. *Weller*, 29 Gratt. 347. It is the principal in making the sale, while the officer of the court who conducts the sale is regarded as its agent: *Williams* v. *Blakey*, 76 Va. 254, 258. Or, as the distinction is stated in *McKee* v. *Lineberger*, 69 N. C. 217, the bidder at a sheriff's sale occupies a relation altogether different from a bidder at a sale made by order of a court of equity, for a court of equity takes the matter into its own hands, and makes the sale for the parties, taking the bidder under its protection and control, and managing the whole proceeding, whereas the sheriff acts by himself, without any confirmation by the court, acts by force of a statutory power, and the court has no privity or control over the bidder. Secondly, where a person becomes a purchaser under a decree in equity, he submits himself to the jurisdiction of the court in that suit as to all matters connected with the sale or relating to him in the character of purchaser, and he becomes a *quasi* party to the suit: *Requa* v. *Rea*, 2 Paige, 339, 341; *Cazet* v. *Hubbs*, 36 N. Y. 677 (foreclosure); *Shann* v. *Jones*, 19 N. J. Eq. 251 (foreclosure); *Mosby* v. *Hunt*, 9 Heisk. 675; *Clarkson* v. *Read*, 15 Gratt. 288; *Thornton* v. *Fairfax*, 29 Id. 677; *Ogilvie* v.

Digitized by Google

Richardson, 14 Wis. 157 (foreclosure); *Wood* v. *Mann*, 3 Sumn. 318, *per* Story, J.; *Stimson* v. *Mead*, 2 R. I. 541; *Blackmore* v. *Barker*, 2 Swan, 340. Neither the sheriff nor the plaintiff in a foreclosure suit can maintain an action upon an instrument signed by the purchaser, by which he agrees to comply with the conditions of the sale; for it is not a contract, but a mere submission to the jurisdiction of the court, and through the court the remedy must be sought: *Willets* v. *Van Alst*, 26 How. Pr. 325; *Miller* v. *Collyer*, 36 Barb. 250.

MODES OF ENFORCEMENT OF LIABILITY OF BIDDER AT EQUITY SALE.—The are three modes of procedure in a court of equity when a purchaser fails to comply with his bid. They are thus stated by Mr. Jones: "On the failure of the purchaser, without good cause, to comply with the terms of the sale, if it appears that he is unable to perform his contract, the parties interested in the sale may, upon motion, obtain an order discharging the sale and directing a resale; but if he is responsible, the court may order him to pay the money into court, and may enforce his submission by attachment, or order to stand committed, or may order a resale of the estate, and that the defaulting purchaser pay the expenses of it and any deficiency in price arising from it:" Jones on Mortgages, sec. 1642; see also 2 Daniell's Ch. Pr. 1281, 1282. That is to say, the court may, upon application: 1. Set aside the sale, release the purchaser, and decree a resale; or 2. Ratify the sale, and decree a specific performance of the contract, enforcing its order by attachment and commitment of the person of the purchaser for contempt; or 3. Order a resale, holding the purchaser responsible for any deficiency, and for the costs of the resale: See *Wood* v. *Mann*, 3 Sumn. 318, 330, 331; *Clarkson* v. *Read*, 15 Gratt. 288; *Gross* v. *Pearcy*, 2 Patt. & H. 483; *In re Yates*, 6 Jones Eq. 212; *Miller* v. *Collyer*, 36 Barb. 250; *Goodwin* v. *Simonson*, 74 N. Y. 133; *Graham* v. *Bleakie*, 2 Daly, 55; *Farmers' and Planters' Bank* v. *Martin*, 7 Md. 342; S. C., 61 Am. Dec. 350, 352; *Municipality* v. *Hennen*, 14 La. 559; *Miltenberger* v. *Hill*, 17 La. Ann. 52; *Murdock's Case*, 2 Bland, 461; S. C., 20 Am. Dec. 381; *Shaefer* v. *O'Brien*, 49 Md. 253. There are also two other modes of enforcing the bidder's liability, but these are remedies at law. First, action at law may be brought upon the purchaser's notes or bonds given for the payment of the purchase money: *Farmers' and Planters' Bank* v. *Martin*, 7 Md. 342; S. C., 61 Am. Dec. 350, 352; secondly, the sheriff, commissioner, administrator, executor, or other officer of the court who makes the sale, may sue at law to recover the amount bid, or the deficiency arising upon a resale, for the remedy in equity to compel, by summary process, the purchaser to complete his purchase or pay the deficiency on a resale is cumulative, not exclusive: *Townshend* v. *Simon*, 38 N. J. L. 239; *Shinn* v. *Roberts*, 20 Id. 435; S. C., 43 Am. Dec. 636; *Municipality* v. *Hennen*, *supra*; *Miltenberger* v. *Hill*, *supra*; see *Galpin* v. *Lamb*, 29 Ohio, 529; *contra*: *Richardson* v. *Jones*, 3 Gill & J. 163; S. C., 22 Am. Dec. 293. But the remedy at law is more lengthy and costly than the summary process of equity, and is consequently seldom pursued. There are also other processes peculiar to certain states. Thus in Virginia and West Virginia it is customary in conveying land to a purchaser to retain the title or a lien on the land as security for the unpaid balance of the purchase money, and this retention of security varies the mode of enforcing the purchaser's liability for the balance of the purchase money: See *infra*. In other states there are statutory liens for the purchase money. There is an early English case which holds that a forfeiture of his deposit made upon the purchase is the only redress against the defaulting purchaser: *Savile* v. *Savile*, 1 P. Wms. 745; but this case has never been followed, and cannot now be considered as authority. The above-mentioned remedies at

Digitized by Google

law are pursued in the ordinary way. The summary remedies in equity, however, require further treatment.

SETTING ASIDE SALE AND ORDERING RESALE.—When the sale is set aside, the court may impose upon the purchaser the costs of the sale as a condition of his release from the purchase: *Shaefer* v. *O'Brien*, 49 Md. 253. In ordering a resale by a trustee, the court may direct the highest bid at the previous sale to be rejected, where it appears that the bidder is unable to comply with his bid, or has acted fraudulently, or has attempted to baffle the court: *Murdock's Case*, 2 Bland, 461; S. C., 20 Am. Dec. 381.

ATTACHMENT TO ENFORCE PAYMENT OF BID.—Courts of equity have jurisdiction over purchasers to compel payment of purchase money: *Stimson* v. *Mead*, 2 R. I. 541. Upon the death of the purchaser at a trustee's sale before completing payment, his representatives having assets may be compelled summarily to bring in the residue of the purchase money: *Coombs* v. *Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236. The purchaser may be attached or committed as for a contempt for disobedience to an order to pay into court the purchase money: *Lansdown* v. *Elderton*, 14 Ves. 512; *Gross* v. *Pearcy*, 2 Patt. & H. 483; *Goodwin* v. *Simonson*, 74 N. Y. 133; *Graham* v. *Bleakie*, 2 Daly, 55; *Anderson* v. *Foulke*, 2 Har. & G. 346. And a surety on the purchaser's bond for the purchase money makes himself thereby a party to the proceedings, and liable to like process of attachment: *Wood* v. *Mann*, 3 Sumn. 318. The court will exercise its discretion, under the circumstances of the case, in coercing the purchaser by attachment: *Brasher* v. *Cortlandt*, 2 Johns. Ch. 505. Upon a foreclosure sale the court may compel the completion of the purchase: See *Merchants' Bank* v. *Thomson*, 55 N. Y. 7; *Seaman* v. *Hicks*, 8 Paige, 655; *Fryer* v. *Rockefeller*, 63 N. Y. 268; *Riggs* v. *Pursell*, 66 Id. 193; *Coulter* v. *Herrod*, 27 Miss. 685. The payment of a bid at a foreclosure sale may be enforced by attachment: *Lyon* v. *Elliott*, 3 Ala. 654; *Graham* v. *Bleakie*, 2 Daly, 55.

Practice in Obtaining Order to Pay Purchase Money.—The party must be accepted as a purchaser and the sale ratified before he can be proceeded against for the enforcement of the contract of purchase: *Shaefer* v. *O'Brien*, 49 Md. 253; *Anderson* v. *Foulke*, 2 Har. & G. 346; *Vance* v. *Foster*, 9 Bush, 389. The purchaser is then put under an order to show cause why he should not be required to comply with the terms of the sale: *Anderson* v. *Foulke*, 2 Har. & G. 346; *Shaefer* v. *O'Brien*, 49 Md. 253. See, however, *Richardson* v. *Jones*, 3 Gill & J. 163, S. C., 22 Am. Dec. 293, where it is said that an order ratifying the sale is equivalent to a decree for the payment of the money: *In re Yates*, 6 Jones Eq. 212; *Gordon* v. *Saunders*, 2 McCord Ch. 151; *Barrett* v. *Churchill*, 18 B. Mon. 387; *Vance* v. *Foster*, 9 Bush, 389; *Williams* v. *Blakey*, 76 Va. 254; and upon his failure to show sufficient cause to the contrary, he may be ordered to pay the purchase money, and upon his failure to do so may be compelled by attachment and commitment: Id., and cases *supra*. Under another practice, the court on motion will make an order to compel the payment of the amount of the bid: *Ogilvie* v *Richardson*, 14 Wis. 157 (foreclosure); *Cazet* v. *Hubbell*, 36 N. Y. 677 (foreclosure). And in Tennessee the court, upon motion and without notice to the purchaser, will enter judgment and award execution for the balance of the purchase money due; and this, upon the ground that as the purchaser is a party he is bound to take notice of all proceedings concerning him: *Blackmore* v. *Barker*, 2 Swan, 340; see *Mosby* v. *Hunt*, 9 Heisk. 675. In Maryland it is held that where the purchaser has given notes or bonds for the purchase money the court will not compel the purchaser to bring the money into court by a summary order, but

Digitized by Google

the trustee must proceed at law upon the notes or bonds; but where no notes or bonds have been given, the court will act: *Richardson* v. *Jones*, 3 Gill & J. 163; S. C., 22 Am. Dec. 293; see *Anderson* v. *Foulke*, 2 Har. & G. 346. But though the notes or bonds are given to the trustee by name as the obligee, and though he may have his action at law upon them, he should be considered as the agent of the court in making the sale, and the court should be regarded as still retaining its power to enforce, summarily, the purchaser's contract of purchase after he has failed to meet his obligations; for these are merely written promises to do what he is in any event obliged to do, and they should be considered merely as furnishing an additional means of enforcing that obligation. The purchaser should be regarded as under a double obligation: one to the court to pay his bid, the other to the trustee to pay his note or bond. And in other states the purchaser's obligation is enforced summarily by decreeing a resale, and holding him liable for the deficiency, notwithstanding his notes and bonds: See *infra;* see also *Clarkson* v. *Read*, 15 Gratt. 288; *Stephens* v. *Magruder*, 31 Md. 168. However, even in Maryland, the court finds it necessary to say that where, by the fraud and improper conduct of a purchaser under a decree in chancery, the legal remedy on his bond is barred, he may be compelled to pay the purchase money by a proper bill in chancery: *Richardson* v. *Jones*, 3 Gill & J. 163; S. C., 22 Am. Dec. 293. Where, in bankruptcy proceedings, part of the bankrupt's estate was sold to the bankrupt upon his giving a bond with sureties to obey any order of the court for the payment of the purchase money, or any part thereof, or for the return of the property, the assignee may proceed summarily by petition in the bankruptcy proceedings to enforce the bond against the sureties, and is not bound to bring a plenary suit upon the bond: *Re Mayo*, 4 Hughes, 377. Bidding in his own name in behalf of another will not relieve the bidder from the obligation of the contract: *Ogilvie* v. *Richardson*, 14 Wis. 157.

Death of Party.—When a motion is made by those having an interest in the fund that the money be paid into court, it constitutes no valid objection that one of the original parties is dead, and that the action has not since been revived, for the order simply secures the fund by placing it in the custody of the law: *Cazet* v. *Hubbell*, 36 N. Y. 677; *Puckett* v. *Jankins*, 2 Baxt. 484.

ORDER OF RESALE, CHARGING PURCHASER WITH DEFICIENCY.—Where the purchaser at an equity sale refuses to complete his bid, the court upon proper application will order a resale of the property, and charge the first purchaser with the deficiency between the amount obtained at the resale and the amount of the original bid, and with the costs of the resale: See cases cited *supra*, "Modes of Enforcement," etc.; *Miltenberger* v. *Hill*, 17 La. Ann. 52; *Townshend* v. *Simon*, 38 N. J. L. 239; *Knight* v. *Moloney*, 4 Hun, 33; *Graham* v. *Bleakie*, 2 Daly, 55; *Wright's Appeal*, 25 Pa. St. 373. The earliest instance of such an order of resale is that made by Lord Cottenham, after consultation with his associates, in *Harding* v. *Harding*, 4 Myl. & Cr. 514, in which he decided that the order of resale should not discharge the defaulting purchaser from his purchase. This order is now of common occurrence. A resale may be ordered upon the purchaser's death before payment: *Coombs* v. *Jordan*, 3 Bland, 284; S. C., 22 Am. Dec. 236.

Practice in Obtaining Order is the same as when an order for the payment of the purchase money is sought; namely, first to secure a confirmation or ratification of the sale, which constitutes an acceptance of the bid and makes the purchaser a party to the proceeding, and then to serve him with an order or rule to show cause why he has not complied with his contract and completed his purchase: *In re Yates*, 6 Jones Eq. 214; S. C., Id. 306; *Harding*

Digitized by Google

v. *Yarbrough*, Id. 215; *Hill* v. *Hill*, 58 Ill. 239; *Gross* v. *Pearcy*, 2 Patt. & H. 483; *Williams* v. *Blakey*, 76 Va. 254; *Shaefer* v. *O'Brien*, 49 Md. 253. See *Goodwin* v. *Simonson*, 74 N. Y. 133.

The purchaser should have notice of a proceeding for a resale of the property, and this is usually given by a rule to show cause, but where a petition is filed in the cause for this purpose, and the purchaser had notice of the proceeding, though not made a party thereto, and came forward and opposed it, there is no necessity for a rule; for the purchaser might have moved the court for leave to answer the petition, or he might have filed a supplemental bill, or an original bill in the nature of a supplemental bill, and thus put the matters in issue on which he relied: *Thornton* v. *Fairfax*, 29 Gratt. 669. Before making an order of resale at the purchaser's risk, he should be called upon to show cause why he has failed to complete his purchase, and allowed an opportunity to do so: *Hill* v. *Hill*, 58 Ill. 239. But if after due notice, by service of the rule or otherwise, he shows no sufficient cause for his breach of contract, and fails or refuses to pay the amount of his bid, a final order may then be made directing a resale at his risk: *Shaefer* v. *O'Brien*, 49 Md. 253. In *Brundige* v. *Morrison*, 56 Id. 407, it was held that where a petition and order requiring the purchaser to bring the balance of the purchase money into court was duly served, but no answer was filed and no cause to the contrary shown, and the money was not brought into court pursuant to the order, an order of resale of the property at the purchaser's risk is proper. The order of resale, upon failure to pay the purchase money or show cause therefor, should direct the property to be resold at delinquent bidder's risk and expense: *Hill* v. *Hill*, 58 Ill. 239. Where an order for a resale of mortgaged premises is made in a foreclosure suit on account of a certain named person as first purchaser, and requiring him to pay any difference in price, no action can be maintained on the order against another person on the ground that he was the real purchaser. The order concludes the owners of the fee: *Paine* v. *Smith*, 2 Duer, 298. When the purchaser fails to pay the bonds or notes given for the balance of the purchase money due on a sale in equity, he may be proceeded against after confirmation by a rule to show cause why the property shall not be sold for the payment of the purchase money, and upon that proceeding a decree may be made for a sale of the property, charging the purchaser with the deficiency in case the price obtained is not large enough to pay what is due on the bonds or notes: *Clarkson* v. *Read*, 15 Gratt. 288 (overruling the doubts expressed upon this point in *Gross* v. *Pearcy*, 2 Patt. & H. 483); *Re Pettillo*, 80 N. C. 50; *Brundige* v. *Morrison*, 56 Md. 407. It is not necessary to file an original bill for this purpose, for the original decree is still operative to enforce the payment of the credit installments: *Stephens* v. *Magruder*, 31 Md. 168.

In Tennessee a different practice prevails. Here a judgment in chancery may be taken by motion against defaulting purchaser and his surety without notice, and a resale ordered, but the decree should allow sixty days within which to pay the purchase money before the resale is advertised: *Munson* v. *Payne*, 9 Heisk. 672; *Mosby* v. *Hunt*, Id. 675; see also *Blackmore* v. *Barker*, 2 Swan, 340. In this state a lien is sometimes retained for the payment of the purchase money: *Lucas* v. *Moore*, 2 Lea, 1.

In Virginia and West Virginia it is customary upon a judicial sale of land to retain the title as security for the purchase money remaining unpaid. And in those states it is bad practice upon the confirmation of a sale of land to order the commissioner to convey the legal title to the purchaser, retaining only a lien on the land. The title should be retained until the purchase money is all paid: *Glenn* v. *Buckford*, 23 W. Va. 182. For where the legal

Digitized by Google

title is not retained as security for the purchase money, but only a lien on the land, a resale cannot be decreed on a rule to show cause, but the lien must be enforced by an original or supplemental bill: *Glenn* v. *Blackford*, 23 W. Va. 185, 186. Before making a decree of resale, where the title has been retained as security, the court should ascertain how much of the purchase money is due, and should in the decree give the purchaser a day in which to pay it; and if not paid in that time, order the commissioner to sell. For the rule of giving the purchaser a day to redeem, which applies in the case where a vendor is enforcing his lien for the purchase money, applies also in this case, for the court is regarded as the vendor: *Long* v. *Weller*, 29 Gratt. 347; *Gross* v. *Pearcy*, 2 Patt. & H. 483; *Kyles* v. *Tait*, 6 Gratt. 44. A purchaser at a judicial sale who pays the purchase money to a commissioner who has not executed the bond required by the decree, or whose bond has been disapproved by the clerk, pays in his own wrong, and the land is liable for the purchase money received by the commissioner and misapplied, though the commissioner has conveyed the land to the purchaser: *Lloyd* v. *Erwin*, 29 Id. 598. In this case the title was retained in the decree as security; and the purchaser was also held to be personally liable. Where a judicial sale is confirmed, and the court directs the commissioner to convey the land to the purchaser, retaining in the deed a lien for the purchase money, and the conveyance is so made, and the purchaser sells and conveys the land to a third person, who conveys it to others, and the purchaser fails to pay the balance of the purchase money, the lien should be enforced by an original bill if the original cause is ended, or if still pending for any purpose, by a supplemental bill filed in the cause, and the purchaser and his immediate and remote vendees should be made defendants, and the land should be sold according to the equities between these defendants: *Glenn* v. *Blackford*, 23 W. Va. 182. In North Carolina, also, the title of land sold is retained *in custodia legis* as security for the purchase money: *Flemming* v. *Roberts*, 84 N. C. 532.

Resale, how Conducted.—A resale of land, upon the failure of the purchaser to comply with the terms of the first sale, must be made upon the same terms as the first, as near as may be, in order to render the first purchaser liable for the difference between the sales: *Shinn* v. *Roberts*, 20 N. J. L. 435; S. C., 43 Am. Dec. 636 (orphans' court sale); *Riggs* v. *Pursell*, 74 N. Y. 370 (foreclosure); and where the terms of the resale differed materially, an order restraining plaintiffs from collecting from the former purchasers a deficiency arising on the second sale was properly granted. And it was competent for the court to direct the said purchasers to be relieved from their purchase, and from paying any deficiency: *Riggs* v. *Pursell*, *supra*. Whether the whole or only a part of the land should be sold on the resale, or whether as a whole or in parcels, must be referred to the discretion of the court: *Long* v. *Weller*, 29 Gratt. 347.

Rights of Purchaser on Resale of Property Purchased.—If on the resale a higher price is obtained, the first purchaser has no claim for the excess, but he is not liable for the costs: *Miltenberger* v. *Hill*, 17 La. Ann. 52. But upon a resale for a balance due after paying this balance and interest and the costs of the resale, the surplus belongs to the original purchaser: *Stephens* v. *Magruder*, 31 Md. 168; *Brundige* v. *Morrison*, 56 Id. 407. Where none of the parties elected to proceed against the purchaser for not completing his purchase, and the referee, without any further order of court, made a resale, at which the property was struck off to the same purchaser, he was entitled to have the purchase completed upon the payment of the amount bid at the second sale, though this was less than the amount bid at the first sale; and

Digitized by Google

in doing so, he is entitled to credit for all moneys he has paid: *Home Ins. Co.* v. *Jones*, 45 How. Pr. 498. The portion already paid upon bid will be applied toward the payment of the deficiency occurring on a resale: *Willets* v. *Van Alst*, 26 Id. 325; see *Wright's Appeal*, 25 Pa. St. 373. After a resale to pay the balance of the purchase money due, the first purchaser has no right of redemption: *Holman* v. *Green*, 4 Baxt. 135. A purchaser's remedy to prevent a resale, on the ground that he has in fact paid the purchase money, is by petition for a confirmation of the original sale, and not by an original bill to enjoin: *Haralson* v. *George*, 56 Ala. 295.

PARTITION SALES.—After the confirmation of a partition sale, interested parties have a right to the specific execution of the contract, which may be enforced by the court: *Burgin* v. *Burgin*, 82 N. C. 196; *Hore's Estate*, 11 Phila. 63, citing *Bell's Appeal*, 71 Pa. St. 465. Courts of equity have jurisdiction over a defendant in a suit for partition who has purchased the property, and may compel him to pay the purchase money; but it will not issue compulsory process against his person or property until he shall have failed to conform to a special order to pay: *Cowell* v. *Lippitt*, 3 R. I. 92. Upon the purchaser's failure to pay, the land may be resold at his risk: *Mullikin* v. *Mullikin*, 1 Bland, 538, 541. But the deficiency can be recovered only by the commissioners appointed to make partition. Hence, where the first purchaser was a co-tenant, the deficiency can constitute no legal set-off against his claims for his share of the proceeds of the second sale: *Michener* v. *Lloyd*, 16 N. J. Eq. 38. Before resale, a deed must be tendered to the purchaser, in order to hold him liable for the deficiency on the second sale: *Jennings* v. *Hodges*, 16 La. Ann. 321. In South Carolina a lien is given by statute to secure the payment of the purchase money of lands of an intestate sold for partition: *Daniels* v. *Moses*, 12 S. C. 130; *Brown* v. *Coney*, Id. 144.

ADMINISTRATOR'S AND EXECUTOR'S SALES.—Whether the sale is to pay debts or for distribution, in Alabama the personal representative must secure the purchase money by taking two sufficient sureties, and the sale will not be confirmed until sufficient sureties are given: *Cruikshank* v. *Luttrell*, 67 Ala. 318. An accepted bidder may be compelled by rule to comply with the terms of purchase: *Vance* v. *Foster*, 9 Bush, 239. An administrator's sale is a judicial sale, and by statute of North Carolina the court may, on motion and after notice, enter summary judgment against the purchaser and his sureties as soon as the money becomes due: *Mauney* v. *Pemberton*, 75 N. C. 219. The legal title to lands sold under the orders of the probate court of Alabama remains in the heir or devisee until a conveyance is executed to the purchaser, under the decree of the court, and they may, until that time, recover the possession from the purchaser by ejectment: *Cruikshank* v. *Luttrell*, 67 Ala. 318. In order to charge the purchaser with the deficiency arising on the resale, the first sale should be reported to the court, the report confirmed, and a notice of motion should be served on the purchaser, that he may be ordered to pay the purchase money within a given time, or in default thereof, that the property would be resold at his risk. And where an administrator makes a resale without an order of court, the first purchaser cannot be charged with the deficiency arising on such resale: *Greenwalt* v. *McClure*, 7 Ill. App. 152; but see the principal case. In Alabama such a resale is void, the original sale remains valid, and a succeeding executor or administrator may enforce the payment of the purchase money: *Cruikshank* v. *Luttrell*, 67 Ala. 318. Tender of a deed must be made by the administrator before making a resale: *Smith* v. *Kinney*, 30 La. Ann., pt. 1, 332; and the purchaser will then be liable for the costs and deficiency on the resale: Id. This is provided by statute:

Digitized by Google

Miltenberger v. *Hill*, 17 La. Ann. 52. Notes are often given the administrator for the purchase money, upon which he has his action at law: *Riddle* v. *Hill*, 51 Ala. 224; *Bland* v. *Bowie*, 53 Id. 152.

GUARDIAN'S SALE.—In Mississippi a statutory lien is given for the unpaid purchase money for land sold by guardian, and the guardian may file a bill to subject the land to the lien: *Ferguson* v. *Shepperd*, 58 Miss. 804. A recital in the record that the sale was for cash will not divest the lien, if this is not true, as far as the parties and their privies are concerned: Id.

PURCHASER'S DEFENSES TO PAYMENT OF BID.—A note treating of this subject will be appended to the case of *Wilson* v. *Campbell*, in volume 70 of this series.

SHIRLEY *v.* FEARNE.

[33 MISSISSIPPI, 653.]

FILING AMENDED ANSWER THAT MEETS OBJECTIONS SET OUT IN DEMURRER TO ORIGINAL ANSWER is an admission that the demurrer was well taken, and it is not error to proceed to trial upon issues of fact without a decision upon the demurrer.

PROOF OF EXECUTION OF DEED BY ONE OF TWO SUBSCRIBING WITNESSES is sufficient to admit it to registration, since one subscribing witness to the execution is sufficient.

EXECUTION OF DEED PURPORTING TO BE EXECUTED BY PARTNERSHIP, but acknowledged by one of the firm alone, is not proved unless a previous authorization or subsequent ratification by his copartners is shown.

PLAINTIFF IN TROVER CLAIMING TITLE UNDER DEED OF JOINT OWNERS must show its due execution by all the grantors; it is inadmissible to show a transfer of the interest of one owner, unless it is offered for this purpose alone.

TRUSTEE WHO SETS UP CLAIM FOR CESTUIS QUE TRUST, in proceeding to try right to personal property levied on, is presumed to have been properly appointed, in the absence of a showing to the contrary.

RECORD OF PROCEEDINGS TO TRY RIGHT TO PERSONAL PROPERTY LEVIED ON, in which the title is adjudged against the claimant, is conclusive against him in an action of trover by him for the property against the purchaser under the execution.

JUDGMENT AND DISTRINGAS AGAINST CLAIMANT IN PROCEEDING TO TRY TITLE TO PERSONAL PROPERTY LEVIED ON may be introduced by the purchaser under the *distringas* in an action brought by the claimant against him for the property, even though he acquired no title by his purchase, for it is competent for him to show that the plaintiff has no title, and is therefore not entitled to recover.

PAROL EVIDENCE IS ADMISSIBLE TO IDENTIFY PARTIES WITH PARTIES IN INTEREST IN FORMER SUIT, and thus conclude them by the judgment therein rendered.

RECORD CANNOT BE IMPEACHED BY PAROL EVIDENCE.

TROVER for a slave named Hannah, by James Shirley and Adeline Shirley, his wife, and their three minor children, Fred-

Digitized by Google

erick, Alice, and Robert D. Shirley, against Fearne, Fagan, and Magee. The defendants pleaded that the slave was taken from the plaintiffs by virtue of a judicial process issued from the United States circuit court. The plaintiffs demurred to this plea, on the ground that it did not show the kind of process, against whom it was issued, or any authority under the process to take the slave. Before the disposition of the demurrer, the defendants asked and obtained leave to file additional answers, in which they alleged that they took the slave under an execution on a judgment against James Shirley rendered in favor of Martin, Pleasants, & Co., in the United States circuit court, and also under an execution on a judgment in the same court in the case of the same plaintiffs against John G. Harris, a claimant of the slave. The cause was dismissed as to Magee and Fagan, and trial was had upon the above issue without any disposition of the demurrer. Judgment was for the defendant. The plaintiffs showed at the trial that Hannah was claimed by Mrs. Shirley as the property of herself and her children under a deed of trust, and that Fearne had purchased her at an execution sale. The plaintiffs then sought to introduce a deed of trust from Marsh and Leigh, Maddox, & Co., to two trustees in trust for Mrs. Shirley and the three children. The deed purported to convey slaves and other property lately purchased by the grantors under an execution against James Shirley. The deed had been recorded, and Marsh's signature, which was attested by two subscribing witnesses, was proved by one of them. James S. Ewing, who was proved to be a member of the firm of Leigh, Maddox, & Co., acknowledged the execution and delivery of the deed. Upon the defendant's objection, the court refused to allow the deed to be read in evidence, and the plaintiffs excepted, this constituting his first bill of exceptions. The second bill of exceptions is to the admission of a record of judgment and execution. This was the record of the case of Martin, Pleasants, & Co. against John G. Harris, trustee, etc., claimant, and contained a judgment in the United States circuit court in favor of Martin, Pleasants, & Co. against James Shirley. In this case an execution had issued on a judgment on a forfeited forthcoming bond, and had been levied on various personal property, including the slave Hannah. This slave was claimed by Harris as trustee for Mrs. Shirley and the three children. An issue was then made up to try whether the slave was subject to the execution, and this was the case of *Martin, Pleasants, & Co.* v. *Harris*. Judgment was rendered in favor of Martin, Pleasants,

Digitized by Google

& Co., and a *distringas* issued to the marshal to seize Hannah, and in default thereof to sell other property of Harris, etc. The marshal seized and sold Hannah, and the defendant Fearne was the purchaser. The plaintiffs also excepted to the admission of the testimony of William Yerger, who testified that he was counsel in the case of *Martin, Pleasants, & Co.* v. *Harris*, and that James Shirley, the husband of Mrs. Shirley, was present at the trial, was active in the defense, and stated at the time that he was representing the interest of his wife and children. The third bill of exceptions is to the exclusion of evidence offered by the plaintiffs, and states that after the reading of the above record the plaintiffs offered the deposition of W. H. Brown, clerk of the United States court, in which he stated that the final record in the case of *Martin, Pleasants, & Co.* v. *Shirley* was made out by a person who was not the sworn deputy of the late clerk; and that the minutes of the court were signed by the late clerk alone. The deposition was accompanied by a copy of the final record, showing a complete judgment, duly certified by the deponent as clerk and attested by the judge; and also by a transcript from the above-mentioned minutes, which shows a verdict, but no judgment. The deposition and the exhibits were excluded, and the plaintiffs excepted. A motion by the plaintiffs to exclude the *distringas* and the marshal's return was overruled, and the plaintiffs excepted.

David Mayes, for the plaintiffs in error.

W. C. and A. K. Smedes, for the defendant in error.

By Court, HANDY, J.: This case comes up upon several bills of exception taken to the rulings of the court below, upon questions of evidence raised on the trial.

Before we proceed to consider these questions, it is necessary to dispose of a preliminary ground of error insisted on in behalf of the appellants.

It is objected that the record does not show that the plaintiffs' demurrer to the original answer of the defendant was disposed of; and that it was error to proceed to the trial of the case, upon the issues of fact, without a decision upon the demurrer.

It appears by the record that the original answer was filed at October term, 1852, and at the same term that a demurrer thereto was filed. At the same term, which was continued until December, 1852, the defendant obtained leave to file additional answers within sixty days, and accordingly filed what is de-

Digitized by Google

scribed as an amended answer. That answer meets all the objections and deficiencies in the original answer, as set forth in the demurrer, and its contents and the circumstances of the case justify the presumption that the demurrer was admitted to be well taken, and that this amended answer was considered as filed to meet the objections therein stated. Under such circumstances, we do not think that it could be justly held that the demurrer was not disposed of.

We will proceed to consider the questions raised by the several bills of exception.

The first exception was taken to the exclusion of a deed of trust, purporting to be executed by Samuel B. Marsh and Leigh, Maddox, & Co. to Shattuck and Caruthers, as trustees; and this presents the question whether this deed was sufficiently acknowledged and proved by the grantors to admit it to registration.

The execution of the deed by Marsh appears to be attested by two subscribing witnesses, but the proof of the execution is made by the affidavit of only one of them. And that, it is insisted, is insufficient. But it is held, in the case of *Wilkins* v. *Wells*, 9 Smed. & M. 325, that one subscribing witness to the execution of a deed is sufficient; and if that be true, it is difficult to perceive how the proof of execution by one of the subscribing witnesses, where there are two, should not be sufficient; for the other may be regarded as supernumerary. This was, therefore, not sufficient to exclude the deed. The deed was signed, and purported to be executed by Leigh, Maddox, & Co. It was acknowledged by "James S. Ewing, one of the firm of Leigh, Maddox, & Co., as his act and deed, and the act and deed of said firm;" and the objection against it is, that it was not shown to have been either executed or acknowledged by the members of the firm. In answer to this, it is said that the execution by one partner would bind the firm if he had authority to make the deed at the time, or if it was subsequently ratified by his copartners. But no authority or subsequent adoption was shown in this case, and it cannot be presumed to exist. If there was proof of any such state of facts, it should have been adduced when the deed was offered, and in the absence of such proof, or at least of any notice that it would be adduced, the deed was inadmissible.

But it is said that the deed was sufficiently executed by Marsh, one of the grantors, and that it should therefore have been admitted in evidence as his deed. This is true, if the deed had been offered as evidence of the conveyance of the interest of

Digitized by Google

Marsh only. But such was not the object of the evidence. The property mentioned in the deed is shown thereby to have been the joint property of Marsh and Leigh, Maddox, & Co.; and the deed could have been introduced for no other purpose, so far as the record shows, than to show a conveyance of the title to trustees for the benefit of Mrs. Shirley and her children; and if the deed was ineffectual as to one of the grantors, it could not operate as a conveyance of the title purporting to be conveyed.

The second exception was taken to the admission of a transcript of the record of the proceedings and judgment of the circuit court of the United States in this state, on a trial of the right of property in the slave in controversy in this case, in which Martin, Pleasants, & Co. were plaintiffs, and John G. Harris, trustee for Mrs. Shirley and her children, was claimant, in which it was decided that the slave was the property of James Shirley, and liable to the execution of Martin, Pleasants, & Co., against him, which was levied on the slave, and which gave rise to that suit. This transcript also contained the execution issued on the judgment rendered on that trial, and under which the defendant here purchased the slave.

This record was offered to show that in the same suit under which the defendant in this action derived his title, the title to the slave had been adjudged against these plaintiffs.

It is now insisted that it was improperly admitted, for several reasons: 1. It is said that the appointment of the trustee who set up the claim was void for want of proper parties, and therefore that the judgment thereon was no evidence against the plaintiffs. But this record shows nothing with respect to the manner in which the trustee was appointed; and the presumption is that he was properly clothed with the powers of a trustee. 2. It is said the defendant here was not a party to that suit. But he claims title in virtue of it, and it is surely not necessary that a person who claims title to property under a judgment or execution against certain defendants should have been a party to the suit in order to enable him to show, in an action for the same property between those defendants and himself, the judgment or execution under which he claims, and by which their title had been adjudicated. The judgment is conclusive of the title of the parties against whom it is rendered, whenever the title has been the subject-matter of the suit, and has been adjudicated. 3. It is said that the defendant acquired no title under the *distringas* by virtue of which the slave was sold. If that be true, it is not a sufficient objection to the admission of

Digitized by Google

the record of the judgment and *distringas*, which appear in the transcript offered in evidence; for though the defendant may not have acquired any title by his purchase under that writ, yet it was competent for him to show by the judgment that the title to the slave had been adjudged against the plaintiffs. And if the sale was illegal, it was competent to show by the *distringas* that the legal title was still in the marshal, and thereby show that the plaintiffs were not entitled to recover. This objection, therefore, if it have any force, goes rather to the legal effect of this evidence than to its admissibility. And we think that it was properly admitted.

An exception was also taken to the admission of the testimony of the witness Judge Yerger. The purport of this testimony was that the present plaintiffs were represented in the trial of the right of property above mentioned by James Shirley, who then stated that he was representing the interests of his wife and children. This was competent for the purpose of showing that the parties in interest in that suit were the same as the plaintiffs in this; and that their title to the property is concluded by that judgment, and cannot again be litigated by them against one claiming title under that judgment.

The last exception taken was to the exclusion of the deposition of William H. Brown, clerk of the United States court, which was offered to prove that there was no proper record of the original judgment, upon which the execution was issued, which gave rise to the trial of the right of property above mentioned. The deposition was offered to invalidate the transcript of the record of that judgment, duly made and certified, which had been offered in evidence. The question here raised has already been decided by this court, upon very full argument and much consideration, in *Mandeville* v. *Stockett*, 28 Miss. 398; and we are entirely satisfied with the correctness of that decision.

Let the judgment be affirmed.

FILING AMENDED ANSWER AS ADMISSION THAT DEMURRER WAS WELL TAKEN.—In *Tittle* v. *Bonner*, 53 Miss. 583, it is said, citing the principal case: "The plaintiff demurred to this special plea. The record does not show any formal disposition of the demurrer, but at the next term of the court a plea was filed by Howell, apparently as a substitute to the plea demurred to. The record does not show any leave of court to file this plea at the second term, but it was treated as properly filed, and must be regarded as amounting to a confession of the demurrer to the first special plea." A party going to trial upon other issues, without invoking the action of the court upon demurrers to other defenses, is held to have waived such defenses, and the failure of the

Digitized by Google

court to decide upon the demurrers furnishes no ground for reversal: *Pritchett* v. *State*, 62 Am. Dec. 468, note 471.

PARTNERSHIP REALTY CANNOT BE ALIENATED BY ONE PARTNER unless to *bona fide* purchaser without notice: *Dyer* v. *Clark*, 39 Am. Dec. 697; *Buchan* v. *Sumner*, 47 Id. 305.

JUDGMENT IS CONCLUSIVE UPON PARTIES AND PRIVIES WHEN COURT HAS JURISDICTION OF PERSON AND SUBJECT-MATTER: *Horton* v. *Critchfield*, 65 Am. Dec. 701, and note citing prior cases 704; *Hollister* v. *Abbott*, 64 Id. 342, note 346; *Shotwell* v. *Lawson*, Id. 145.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW WHO WERE REAL PARTIES IN INTEREST and therefore bound by the judgment: *Tarleton* v. *Johnson*, 60 Am. Dec. 515, note 520.

RECORD CANNOT BE IMPEACHED BY EVIDENCE ALIUNDE: *Galloway* v. *McKeethen*, 42 Am. Dec. 153; *Jones* v. *Judkins*, 34 Id. 392; *Spaulding* v. *Chamberlain*, 36 Id. 358; unless tainted with fraud: *Lowry* v. *McMillan*, 49 Id. 501. The principal case was cited to the point that a record of court imports absolute verity and cannot be impeached by the parol evidence of the clerk: *Murrah* v. *State*, 51 Miss. 656.

THE PRINCIPAL CASE was previously before this court, and is reported in 31 Miss. 301.

HUNT v. CRANE.

[33 MISSISSIPPI, 669.]

DECLARATION BY EMPLOYEE FOR BREACH OF CONTRACT IS SUFFICIENT AFTER VERDICT, though it fail to allege that the plaintiff offered to perform his part of the agreement, if it allege that he was willing to do so, but after he had undertaken the work he was told by the defendant that if he continued in his service it must be at greatly reduced wages.

INSTRUCTION IS PROPERLY REFUSED, THOUGH CORRECT AS ABSTRACT PROPOSITION, if it does not fully state the rule with reference to the facts of the case, and the jury have already been fully instructed.

EMPLOYEE WHO OBTAINS EMPLOYMENT AFTER DISCHARGE IS PRESUMED TO GET BEST WAGES HE CAN, and the burden of proving the contrary is on the defendant, in an action by the employee for damages caused by a refusal to allow him to complete his contract.

EMPLOYER REFUSING TO ALLOW EMPLOYEE TO PERFORM CONTRACT AT AGREED RATE is liable to employee for such damages as he may sustain after due diligence to obtain other and the best wages he can in some proper business, and the burden of proving due diligence is upon the employee.

OBJECTION THAT NOTICE OF TAKING DEPOSITION DE BENE ESSE was given to the attorney for the party instead of to the party, as required by statute, is waived by the appearance of the attorney at the taking of the deposition and his acknowledgment of notice.

TWO HOURS' NOTICE OF TAKING DEPOSITION DE BENE ESSE IS NOT REASONABLE NOTICE when served upon the attorney, and when it does not appear that he could have notified his clients within the time.

Digitized by Google

NOTICE OF TAKING DEPOSITION, TO BE REASONABLE WHEN SERVED ON ATTORNEY, must be such as in all probability to allow him time to communicate with his client.

ACTION for damages for breach of labor contract. The opinion states the facts.

D. Mayes, for the plaintiffs in error.

Davis and Hill, for the defendant in error.

By Court, HANDY, J. This action was brought by the defendant in error to recover for the breach of a contract for work and labor, made by him with the plaintiffs in error for a specified term, the performance of which he entered upon but was prevented, by the conduct of the plaintiffs in error, from completing. The declaration alleges that after he had undertaken the work, and was willing to complete his term according to the contract, he was told by the plaintiffs in error that if he continued in their service it must be at wages greatly below the price stipulated in their contract; and in consequence of that refusal by them to comply with the terms of the contract, he was thrown out of employment, and after losing considerable time in ineffectually seeking other employment, he was then employed by another person at greatly reduced wages. A verdict and judgment were rendered for the plaintiff below.

The first ground of error, taken in behalf of the plaintiffs, is that the declaration is not sufficient to support the verdict. The objection is, that the declaration merely alleges that the defendant in error was "willing to work in accordance with his agreement," etc., and does not allege that he offered to do so. But it is averred that in consequence of the refusal of the plaintiffs in error to comply with the agreement, he was thrown out of employment. This refusal consisted in the notice given to him that if he remained longer in their service it must be at greatly reduced wages; and it cannot be understood otherwise than as a notice that his engagement at the price agreed upon was discontinued, and that he was thrown out of employment. This is sufficient, especially after verdict.

Again: it is objected that the court erred in refusing the instruction asked in behalf of the plaintiffs in error, "that the jury could only find for the plaintiff such damages as he actually sustained."

As an abstract proposition, this instruction was unobjectionable. But it did not fully state the rule by which the jury were

Digitized by Google

to be governed in assessing damages, with reference to the facts of the case before them. This was already stated to them, in a clear and practical manner, by the instruction granted at the instance of the plaintiff, that the measure of damages was the injury that the plaintiff had sustained, and that in estimating the damages, they should find the sum stated in the contract, less the value of the plaintiff's services during the residue of the year, as proved, provided those wages were all or the best he could obtain. The rule here declared was plain and explicit, and readily enabled the jury to ascertain the amount of injury sustained; whereas that asked by the plaintiffs in error was uncertain, and susceptible of misapplication. It was unnecessary, and was therefore properly refused.

Another objection is taken to the instruction that the burden of proof was on the defendants to show that the plaintiff could have obtained higher wages than he did obtain, and that it was sufficient for the plaintiff to show, or that it appeared in evidence, that he went to work after his discharge. We think that this rule was properly stated, under the circumstances of this case.

The principle applicable to such cases is, that the employer is liable to the employee for such damages as the latter may sustain, after due diligence to obtain other and the best wages he can in some proper business. Where he fails to obtain employment, it is necessary that he should show that he was unable to do so after due diligence, in order to be entitled to recover for the time he was out of employment. This was the case in *Prichard* v. *Martin*, 27 Miss. 306. But where he obtains employment, the presumption is that he gets the best wages he can; because the strong inducement of self-interest would impel him to do so, and the idea is most unreasonable that he did not act accordingly. Hence that presumption must prevail, unless it be shown by the adverse party, or otherwise appears, that he accepted less wages than he could have obtained.

The last objection is founded upon the admission of a deposition *de bene esse*, taken in behalf of the defendant in error. That deposition was objected to on sundry grounds, the first of which is that the notice of taking it was given to the attorney of record of the defendants, the statute requiring that it should be given to the party to the suit. This objection would probably be sufficient but for the fact that the attorney was present at the taking of the deposition, and that he acknowledged notice of it. That would be equivalent to a waiver of notice upon the

Digitized by Google

client, which the attorney was competent to do under his general authority as attorney.

2. But although the notice be considered as given to a proper party, and so far sufficient, yet it is objected that it was not "reasonable" as to time, according to the statute. It appears that it was given to the attorney a few minutes after one o'clock, and the deposition was taken at three o'clock on the same day. It appears that Clifton, one of the parties, was dead at the time, and that his administrator was not then appointed; and it cannot be supposed that the other defendant was in Canton, where the deposition was taken, at the time; for if he had been, it is to be presumed that the notice would have been given to him, and not to his attorney, in conformity to the statute. Conceding, then, that the attorney was competent to receive notice, it must be "reasonable," and such as in all probability to allow him time to communicate with his client; and though the attorney might waive the point of reasonableness, as well as the service upon his client, yet it would appear that this was not intended in this case; for in making his written acknowledgment of the notice, he specifies the exact time when he received it, thereby showing that he did not intend to waive the point of reasonableness.

It does not appear that notice might have been given by the attorney to either of the clients within the time specified; and under all the circumstances, we think that the notice was not reasonable, and that it was not sufficient to render the deposition valid. And the deposition should have been rejected.

For this error the judgment must be reversed, and the case remanded for a new trial.

INSTRUCTION MAY BE REFUSED WHEN ALREADY GIVEN IN SUBSTANCE, *Raver* v. *Webster*, 66 Am. Dec. 96, note 106; *Holbrook* v. *Utica etc. R. R. Co.*, 64 Id. 502; and irrelevant instructions need not be given: *Conger* v. *Dean*, 66 Id. 93, note 96; *Treat* v. *Lord*, Id. 298, note 305; *McIntyre* v. *Kline*, 64 Id. 163. Instructions upon hypothetical points of law, however correct, need not be given: *New Brunswick etc. Co.* v. *Tiers*, Id. 394, note 411.

REMEDY AND RECOVERY OF EMPLOYEE WRONGFULLY DISCHARGED BEFORE EXPIRATION OF CONTRACT OF SERVICE.—This subject is discussed in the note to *Decamp* v. *Hewitt*, 43 Am. Dec. 205–214; see also *Costigan* v. *Mohawk etc. R. R. Co.*, Id. 758; *Eldridge* v. *Rowe*, 48 Id. 41; *Miller* v. *Goddard*, 56 Id. 638; *Ryan* v. *Dayton*, 65 Id. 560, note 564.

APPEARANCE AS WAIVER OF IRREGULARITIES IN JUDICIAL PROCEEDINGS See *Beall* v. *Blake*, 58 Am. Dec. 513, and note 516.

Digitized by Google

EMANUEL *v.* WHITE.

[34 MISSISSIPPI, 56.]

PROMISSORY NOTES ARE GOVERNED BY RULES OF COMMERCIAL LAW PREVAILING WHERE THEY ARE PAYABLE.

HOLDER OF NEGOTIABLE PAPER IS PRESUMED TO BE BONA FIDE HOLDER until something is shown in disparagement of his title.

BURDEN OF PROVING HIMSELF BONA FIDE HOLDER IS NOT CAST UPON HOLDER of negotiable instrument by fact that the maker has paid the amount thereof to the original payee.

PAYMENT OF ANTECEDENT DEBT, AND RELEASE OF PARTIES COLLATERALLY LIABLE, is sufficient consideration to make a transfer of a note *bona fide*.

BILL in equity. The opinion states the case.

G. S. and W. S. Yerger, for the appellants.

George L. Potter, for the appellee.

By Court, HANDY, J. The facts of this case appear to be that in the year 1839 the appellants executed three promissory notes to Chappell & Co. of the city of Baltimore, payable in three, four, and five months respectively. Nearly twelve months after the maturity of these notes the appellants settled and arranged them with Chappell & Co., who delivered up the note first due, and agreed to deliver up the two others upon the appellants executing to them a deed for certain lands agreed to be received in part payment. At the time this settlement was made the appellants had no notice that the two other notes had been transferred to the appellee. The bill alleges that the appellee claims to be the holder of these notes by indorsement from the payees, and in consequence of the payment to the payees prays that they may be decreed to be delivered up by the appellee and canceled.

The answer states that the appellee took the notes by indorsement of the payees before their maturity, in payment and discharge of a debt he held against them, and long before the arrangement in regard to them, made between the appellants and Chappell & Co., and insists upon his right to recover upon the notes as a *bona fide* holder. The notes are exhibited with the answer, and are made payable at New Orleans, in the state of Louisiana.

The decree being in favor of the defendant, the complainants bring the case up by appeal.

1. It is contended that it is incumbent on the appellee to prove that he took the notes before maturity, and for a valuable consideration, inasmuch as the makers paid them to the payees to whom they were payable by their terms.

Digitized by Google

This position is wholly untenable with reference to the facts here presented. The notes, being payable in Louisiana, are, of course, governed by the rules of the commercial law which prevail in that state. By these rules the holder of negotiable paper is presumed to be a *bona fide* holder for valuable consideration until something be shown in disparagement of his title; and he is not bound to show that he has given value for the paper, or that he took it before maturity, until the adverse party has shown the want, or failure, or illegality of the consideration, or that it was lost or stolen from the rightful holder, or that the holder came to the possession of it fraudulently. Possession of the paper duly indorsed *prima facie* implies title, which casts the burden on the other party to show that he is not entitled to recover upon it: Story on Prom. Notes, sec. 196.

Here no circumstance whatever is shown to cast suspicion on the appellee's title, except the fact that the makers thought fit to pay the notes to the payees without requiring them to be delivered up, and that a long time after their maturity, and after they had become in presumption of law the property of the appellee. It would be plainly absurd to suppose that the mere payment, under such circumstances, could at all effect the right of the real holder, or impose anything upon him to be shown to substantiate his title. Such an act, instead of being the foundation of any right against the holder, goes only to show gross negligence.

2. It is said that the appellee is not a *bona fide* holder, because he took the notes for an antecedent debt. But it appears that the debt was discharged and extinguished, and that collateral parties who were bound for it were released. This has been held by this court to be a sufficient consideration, in conformity with the rule, which is very generally admitted now to be the correct rule in cases where the precedent debt has been released: *Love* v. *Taylor*, 26 Miss. 567.

Let the decree be affirmed.

HOLDER OF NEGOTIABLE INSTRUMENT IS PRESUMED TO BE BONA FIDE HOLDER: *Clapp* v. *County of Cedar*, 68 Am. Dec. 678, and note citing prior cases; *Kunkel* v. *Spooner*, 66 Id. 332.

LAW OF WHAT STATE GOVERNS LIABILITY ON PROMISSORY NOTE: *Emerson* v. *Patridge*, 62 Am. Dec. 617, note 621; *Peck* v. *Hibbard*, Id. 605; *Young* v. *Harris*, 61 Id. 170. The principal case is cited to the point that if a bill is drawn upon a party in another state or foreign country, or the note is made payable there, neither is, as a general rule, affected by the peculiar laws, statutory or otherwise, of the state wherein the bill is drawn or the note is made, but is governed by the law of the place where performance is to be made: *Harrison* v. *Pike*, 48 Miss. 56; *Coffman* v. *Bank of Kentucky*, 41 Id. 214.

Digitized by Google

HOLDER OF NOTE TAKEN IN PAYMENT OF ANTECEDENT DEBT, whether *bona fide:* See *Schaub* v. *Clark*, 47 Am. Dec. 554, and note 557, citing prior cases. The principal case is cited to the point that to constitute one a *bona fide* purchaser for a valuable consideration without notice, he must have advanced some new consideration, either in money or property, have relinquished a pre-existing security for his debt, or have done some act on the faith of the purchase itself which cannot be retracted: *McLeod* v. *First National Bank*, 42 Miss. 112; *Hinds* v. *Pugh*, 48 Id. 275. The transfer of a note or bill of exchange in satisfaction of debt is consequently a negotiation for value, because the creditor gives up his original demand, and would be without remedy if he could not enforce the obligation which has been given in exchange: *Hinds* v. *Pugh*, Id. 278.

WHERE SUFFICIENT APPEARS UPON FACE OF NEGOTIABLE INSTRUMENT to put the indorsee upon inquiry, he cannot be considered as a purchaser without notice: *Isom* v. *First National Bank*, 52 Miss. 920, citing the principal case.

JORDAN v. THOMAS.

[34 MISSISSIPPI, 72.]

DEFENDANT IN DETINUE AGAINST WHOM JUDGMENT HAS BEEN RENDERED has no right to pay the value assessed and retain the property, and he has no pretext for invoking the aid of equity to this end.

DEFENSE THAT MUST HAVE BEEN KNOWN IN TIME TO BE PRESENTED AT LAW is not ground for relief in equity against the judgment.

EQUITY WILL NOT ENJOIN EXECUTION OF JUDGMENT IN DETINUE in favor of trustee for a chattel purchased from the husband and wife, which by the terms of the trust is to remain under the trustee's control for the benefit of the wife; nor will it subrogate the purchaser to the usufructuary interest of the wife in the judgment.

BILL in equity. The complainants had purchased slaves from Newsom and his wife in the manner prescribed for the transfer of a wife's separate property. Subsequently W. R. Thomas recovered a judgment in detinue against the complainants for the slaves. The legal title to the slaves was in Thomas, under a testamentary trust in favor of Mrs. Newsom, which prescribed that her share in the estate should "be left in the hands of her brother, William R. Thomas, to be appropriated to the use of her and the heirs of her body. If she should die, and all the heirs of her natural body before they arrive at the age of twenty-one years, then her part to return to my other children." Thomas had given the possession of the slaves to Mrs. Newsom, who with her husband had been in possession for several years before the sale. On the ground that the complainants, by their purchase from Mrs. Newsom and her husband, acquired her rights in the property, they pray an injunction against the judg-

Digitized by Google

ment at law, and that they be subrogated to the rights of Mrs. Newsom in the property, and also that they be permitted to pay the value of the negroes as assessed by the jury, instead of being obliged to surrender them. Newsom and wife were made defendants with Thomas. The demurrer of Thomas to the bill was sustained, and the complainants appealed.

J. A. P. Campbell, for the appellants.

H. A. H. Lawson, for the appellee.

By Court, FISHER, J. This was a bill filed by the appellants in the chancery court of Leake county, to enjoin a judgment recovered in an action of detinue, commenced and prosecuted in the circuit court of said county. The bill alleges that an execution has been issued on said judgment, and placed in the hands of the sheriff of said county; that unless restrained, he will seize, in virtue of said execution, the slaves recovered in said action, and deliver them to the plaintiff; that the complainants are advised that they have the right to retain said slaves on paying their value as assessed by the jury, which they aver they are ready and willing to do. The mere statement of the facts would appear to be sufficient to suggest the rule which must govern this branch of the case. The very object in resorting to the action of detinue was to recover the specific property, if to be had; and the judgment conforming to the action, a court of equity, if it were to lend its aid at all in such a case, would do so for the purpose of enforcing, instead of defeating, the judgment. There is, therefore, not even a pretext for invoking the aid of a court of equity, so far as this point is concerned.

It is next alleged that the judgment was obtained by fraud. The facts relating to this branch of the case are as follows: Newsom and wife sold the slaves in controversy to the complainants, and about ten days thereafter the action of detinue was commenced in the name of Thomas, who held the legal title to the slaves in trust for Mrs. Newsom. It is averred that as Thomas was then in the state of Georgia, from the short time which elapsed between the sale and the commencement of the suit, it was commenced without his consent. Other facts are also averred in this connection, but if true, the complainants must have known them in time to have availed themselves of them at law, if, indeed, such facts amounted to a defense.

Under the terms and nature of the trust, the slaves were to remain under the control of Thomas for the benefit of Mrs.

Digitized by Google

Newsom, and under this view, the rights of the parties were settled at law.

Decree of the chancellor, sustaining the defendants' demurrer to the bill, is affirmed.

FAILURE TO MAKE DEFENSE AT LAW THROUGH MISTAKE AS TO HIS RIGHTS does not entitle party to relief in equity: *Dickerson* v. *Ripley County*, 63 Am. Dec. 373, and cases cited in the note 380; *Simpson* v. *Watts*, 62 Id. 392.

TENDER OF ALTERNATE VALUE OF PROPERTY WILL NOT DISCHARGE JUDGMENT IN DETINUE unless the plaintiff elects to take it, or the court is satisfied that without the defendant's fault it is beyond his power to restore the specific property: *Keith* v. *Johnson*, 25 Am. Dec. 167.

BROWN v. BEATTY.

[34 MISSISSIPPI, 227.]

RIGHT OF EMINENT DOMAIN IS INHERENT AND ESSENTIAL ELEMENT OF SOVEREIGNTY. It results from the social compact, and would exist without any provision of the organic law.

RIGHT OF EMINENT DOMAIN IS RECOGNIZED IN BILL OF RIGHTS IN MISSISSIPPI, and the only restrictions placed upon its exercise are that private property shall not be taken for public use without the consent of the legislature, or without just compensation being first made therefor.

LEGISLATURE MAY EXERCISE RIGHT OF EMINENT DOMAIN IN BEHALF OF INCORPORATED RAILROAD COMPANY, or any other incorporated company, by means of which it is proposed to construct any work of internal improvement useful and beneficial to the public.

OWNER IS ENTITLED TO CASH VALUE OF LAND APPROPRIATED FOR RAILROAD, and to indemnity for damage to his adjacent land, consequent upon the location of the road, and he cannot be compelled to receive as compensation, in whole or in part, the enhancement in the value of his remaining property.

STATUTE AUTHORIZING JURY, IN ASSESSING DAMAGES ACCRUING FROM APPROPRIATION OF LAND for a railroad, to estimate, as an offset to the claim of compensation, the benefit to the owner resulting from the location of the road, is unconstitutional.

UNCONSTITUTIONAL PROVISION OF STATUTE DOES NOT INVALIDATE OTHER PROVISIONS THEREOF which are distinct and independent of it.

NO REMEDY EXISTS AT COMMON LAW WHERE STATUTE PROVIDES MODE for assessment and payment of damages resulting to individuals from the construction of works of internal improvement authorised by the legislature.

TRESPASS CANNOT BE MAINTAINED FOR ACT DONE UNDER AUTHORITY OF CONSTITUTIONAL STATUTE.

AUTHORITY CONFERRED UPON MAGISTRATE TO SUMMON JURY TO ASSESS DAMAGES caused by location of railroad is not repugnant to the constitution of Mississippi

Digitized by Google

TRESPASS, which was justified by the defendant on the ground that he was the agent and contractor of the Mississippi Central Railroad Company, and he introduced in evidence the proceedings and inquest of a jury summoned under the provisions of the charter of that company, in which the value of the plaintiff's land used in the construction of the road was assessed at three hundred and twenty-five dollars; and showed that before his entry upon the plaintiff's premises the company tendered this amount to the plaintiff. Judgment for the plaintiff, and writ of error sued out by the defendant.

H. W. Walter, W. Brooke, and F. M. Aldridge, for the plaintiff in error.

C. G. Armistead and E. L. Acee, for the defendant in error.

By Court, SMITH, C. J. This suit was brought in the circuit court of Yallabusha to recover damages for injuries done to the lands of the plaintiff. The acts of trespass complained of were alleged to have been committed by the defendant, pretending to act as the agent and contractor of the Mississippi Central Railroad Company. A verdict and judgment were rendered for the plaintiff. A motion was made for a new trial, which was overruled; whereupon the defendant excepted, and sued out this writ of error.

Several points are made upon the pleadings. But as the defense relied on was available under the answer denying generally the allegations of the complaint, and as all the evidence is contained in the bill of exceptions, we will consider the questions arising upon the merits of the controversy in connection with the judgment upon the motion for a new trial.

It is conceded that if the defense set up was invalid, the verdict was warranted by the evidence. It is therefore unnecessary, at least for the present, to notice more particularly the testimony adduced by the plaintiff.

The defense rests, first, upon the validity of certain provisions in the charter of the Mississippi Central Railroad Company, and generally upon the question whether the remedy therein provided for a party aggrieved by the assessment of damages by the jury of inquest is not exclusive of the remedy existing at common law for injuries done to property condemned for the uses of the company.

Without specially examining the evidence offered in behalf of the defendant, it is sufficient to state, generally, that if the provisions of the charter, above adverted to, should be upheld, and

Digitized by Google

the remedy provided in the act of incorporation is the only one to which the plaintiff was entitled to resort, the verdict ought to be set aside and a new trial granted.

The cause appears to have been submitted to the jury without instructions. We are hence at a loss to understand the precise grounds upon which the court proceeded in overruling the motion for a new trial. We may suppose that the court acted upon the reasons assigned by counsel in this court in defense of the judgment; or that the more comprehensive ground was assumed, that it is incompetent for the legislature by law to provide for the appropriation of the private property of the citizen to incorporated companies, created for the purpose of constructing railroads or other works of internal improvement.

In reference to this latter ground, very little, at this day, is required to be said.

The right of eminent domain is an inherent and essential element of sovereignty. It results from the social compact; and hence would exist without any express provision of the organic law upon the subject. In this commonwealth its existence is recognized in the bill of rights. And the only restrictions placed upon its exercise are that private property shall not be taken or applied to public use without the consent of the legislature, nor without just compensation being first made therefor: Bill of Rights, sec. 13.

No question can be made in regard to the existence of the right. In the case before us, and in all similar cases, the sole inquiry is, whether the condemnation and appropriation of the land for the purposes and in the mode prescribed in the charter is the taking and application of private property to public use according to the true construction of the bill of rights.

If the construction of the Mississippi Central Railroad were a mere private enterprise, in which the people of the state have manifestly no interest, the provisions of the charter under which the plaintiff's lands were taken are clearly unconstitutional. It would not, in that view, be an act of legislation done in the exercise of the right of eminent domain. It would, in effect, be a judicial sentence, by which the property of one citizen would be taken from him and vested in others, and therefore void.

It is the object and primary duty of every commonwealth to promote the welfare and to secure the happiness of its members. And it is undoubtedly the right, as well as the duty, of the legislature to advance these objects by a wise and judicious exercise of its delegated authority. To facilitate and cheapen the trans-

Digitized by Google

portation of the products of labor, and to increase the intercourse amongst the citizens, are amongst the means obviously best calculated to promote these objects. Railroads and similar works of internal improvement are the appliances best adapted to these purposes. Consequently, when the legislature deems such works expedient, the duty and right devolves upon it to make them, or to cause them to be made at the public expense. But even where such enterprises are engaged in by individuals under charters of incorporation, they are not the less undertakings in which the public have an interest. They are public works, intended to promote the interests of the community. The individual corporators, in the anticipated pecuniary benefit which may result to them, have an object and an interest distinct from that of the public. In that respect the enterprise is individual, and the corporation private. But the object and purpose of the incorporation are the public advantage. This gives to the work its public character. A corporation created by the legislature with a view to the construction of a work of public utility is the agency or means by which its intentions are designed to be carried into effect. When, therefore, the object justifies it, that is, when, by means of an incorporated company, it is proposed to construct any work of internal improvement, useful and beneficial to the public, and it is necessary to the completion of the work, all the authorities hold (and there seems upon principle no reason to doubt) that in the exercise of the right of eminent domain the legislature may, by law, provide for taking and applying private property to that purpose, a just and full compensation being first made to the owner therefor. Indeed, this precise question, although never before directly and expressly decided in this court, was scarcely to be considered an open one.

The eighth section of the charter of the Mississippi Central Railroad Company, upon which the plaintiff in error based his defense, provides that when said company cannot agree upon the price with the owner of land over which said road shall pass, either party may apply to a magistrate for a warrant directed to and requiring the sheriff to summon twelve disinterested freeholders of his county, "who shall act as a jury of inquest of damages, having an oath or affirmation administered first to each by said sheriff or justice of the peace, justly and impartially to value the damage which the owner or owners will sustain by the use and occupation of the land, etc., required by said company; and the jury, in estimating the damages, if for the ground occupied by said road, shall take into the estimate

Digitized by Google

the benefit resulting to such owner or owners by reason of said road passing through or upon said land, towards the extinguishment of such claim for damages," etc.

It is said by counsel for the defendant in error that the whole proceeding in regard to the assessment of the damages was illegal and void: 1. Because the authority conferred upon the magistrate to summon the jury was void, being repugnant to the constitution; 2. Because full and exclusive jurisdiction over the subject of roads is vested, by the constitution, in the board of county police; and 3. Because the mode prescribed for making the assessment of the damage to the land violates the constitution of this state.

The first and second objections do not appear to be pressed with confidence by counsel; and as, in our opinion, they are clearly untenable, we will pass to the consideration of the third.

The party, at the time the assessment was made, was entitled to "just compensation" for the injury sustained in consequence of the appropriation of his property to the uses of the road. No diversity can exist as to the true construction of the language of the bill of rights. He was entitled to the cash value of the land when the assessment was made, and also to be indemnified for the damage to his adjacent land consequent upon the location of the road. He was entitled to be paid in money. It was as clearly incompetent for the legislature to prescribe in what he should be paid as to prescribe how much or how little he should receive. Manifestly, a party whose property has been taken and appropriated to public use in the construction of a railroad cannot be compelled to receive as compensation the estimated enhancement in the value of his remaining property. The cash value and the actual damage are the true standard by which to determine the compensation to which, in such cases, the party is entitled. We think, therefore, that the provision in the eighth section, by which the jury are directed, in assessing the damages when land is the subject, to take into the estimate, as an offset to the claim of compensation, "the benefit" to the owner resulting from the location of the road upon his land, is invalid.

But because this provision is repugnant to the bill of rights, and therefore void, it does not follow that the other provisions, which are distinct and independent of this, are also invalid. The reverse, according to the settled rule of construction, is the case. The authority given, and the duty imposed upon the jury, "justly and impartially to value the damages," is in no wise

Digitized by Google

dependent upon the provision by which the jury are directed to take into the estimate of the damages the consequential benefit to the owner of the land. It was, hence, a valid legislative enactment. And as the jury proceeded under legal authority, their verdict, whether erroneous or not, was clearly not void. It was sufficient, under the provisions of the charter, upon tender of the damages by the company to vest the title to the land in them, unless set aside in the mode prescribed in the act of incorporation.

The jury were not bound to observe the unconstitutional provision. But if, in point of fact, they did take into the estimate the consequential benefit to the owner of the land, the verdict was erroneous and unjust. And a remedy, if the party felt himself aggrieved, was provided in the act of incorporation. This brings up the question whether the remedy therein prescribed is a bar to the present action.

The eighth section of the charter provides that either party, the company, or the person whose lands have been condemned, may, within ten days, appeal from the decision of the jury to the circuit court of the county in which the land is situated; and that said court shall proceed in such cases as in cases of appeal from the boards of police in relation to public roads.

In some of the adjudged cases it has been held that the remedy provided by statute for the assessment of damages is merely cumulative, and not exclusive. And hence that the owner may maintain an action at common law for the injury sustained: *Crittenden* v. *Wilson*, 5 Cow. 165 [15 Am. Dec. 462]; *Carr* v. *Georgia R. R. Co.*, 1 Ga. 524.

These decisions seem to be based upon the principle that if a statute gives a remedy in the affirmative for a matter which was actionable at the common law, the injured party may sue at common law as well as upon the statute.

But in the class of cases analogous to the one before us, the question is not whether an action might, at common law, be maintained against a party for unlawful acts, done to the injury of others, but whether an action is maintainable for acts committed under the authority and sanction of the law, but which have proved injurious to others.

The acts complained of in this case, if done without authority of law, would be wholly unjustifiable. But having been performed in the execution of a power conferred by the legislature, and of consequence under the sanction of the law, their legal character was changed. It would be absurd to say that they

Digitized by Google

were tortious and illegal. If the defendant had a right to construct the road-bed upon the land of the plaintiff, what wrong was committed? The very nature of the action of trespasses presupposes the unlawful character of the acts complained of. Upon principle, therefore, it is clear that this action was not maintainable. The case comes completely within the rule that "if an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner:" Dwarris on Stats. 641. According to which it is held, in the great majority of cases, that when the legislature has authorized the erection of works of internal improvement, deemed convenient and useful to the public, and a mode is provided by statute for the assessment and payment of damages resulting to individuals from the construction of such works, parties injured are confined to the remedy prescribed, which is substituted for the remedy which would otherwise exist at common law: *London & N. R. R. Co.* v. *Bradley*, 5 Eng. L. & Eq. 104; *Knorr* v. *Germantown etc. R. R. Co.*, 5 Whart. 256; *Aldrich* v. *Cheshire R. R. Co.*, 1 Am. R'y Cas. 206; S. C., 21 N. H. 359 [53 Am. Dec. 212]; *Stowell* v. *Flagg*, 11 Mass. 364; *Stevens* v. *Proprietors etc.*, 12 Id. 466; *Mason* v. *Kenebec & P. R. R. Co.*, 31 Me. 215; *Calking* v. *Baldwin*, 4 Wend. 667 [21 Am. Dec. 168].

In this case the legislature has gone further. It has prescribed the mode of assessment and payment, given to the aggrieved party the right of appeal, and declared that the "inquest of the jury, after payment or tender of the valuation, shall be admitted to record in the office of the clerk of probates of the proper county, and be a bar to all actions for taking and using such property:" Charter, sec. 8. We are therefore, after a careful examination of the whole subject, clearly of opinion that this action was not maintainable for any injury alleged to be done to the land within the limits of the roadway.

There was, however, evidence before the jury that acts of trespass were committed upon the land of the plaintiff adjoining the roadway. And of consequence this action was maintainable to recover damages for the injuries thereby occasioned. But as it is evident from the record that the jury estimated the damages mainly with reference to the injury occasioned by the location of the road upon the plaintiff's lands, and the work done upon the roadway, such as making excavations, embankments, etc., necessary in the construction of the bed of the road, and

Digitized by Google

that the injuries done to the adjoining land formed a very inconsiderable item in their estimate of the whole injury sustained, it would be extremely unjust and improper to allow the verdict to stand.

Judgment reversed, and cause remanded for a new trial.

HANDY, J., delivered a dissenting opinion.

PROPERTY CANNOT BE TAKEN IN EXERCISE OF RIGHT OF EMINENT DOMAIN without making compensation to owner: *Henderson etc. R. R. Co.* v. *Dickerson*, 66 Am. Dec. 148, and cases cited in the note 153; *Bird* v. *Wilmington R. R. Co.*, 64 Id. 739.

MODE OF ASCERTAINING COMPENSATION TO BE MADE TO OWNER whose land is taken for public use: *Henderson etc. R. R. Co.* v. *Dickerson*, 66 Am. Dec. 148, and cases cited in the note 153. Offsetting resulting benefits: Id. The principal case is cited to the point that the owner is entitled, not only to the cash value of his land, but to indemnity for the damage done to his adjacent land consequent upon the location of the road, and that, too, in cash, and not in railroad or other advantages: *Isom* v. *Mississippi Central R. R. Co.*, 36 Miss. 313; *Penrice* v. *Wallis*, 37 Id. 183; *New Orleans etc. R. R. Co.* v. *Moye*, 39 Id. 385; S. C., 52 Id. 61. The compensation cannot be estimated in benefits thereafter to accrue from an improvement thereafter also to be made; but the compensation must precede, not follow, the taking, and hence cannot be affected by anything that is to be done afterwards: *Macon* v. *Patty*, 57 Id. 397, citing the principal case.

EMINENT DOMAIN IS PORTION OF STATE'S INHERENT SOVEREIGNTY: *Moale* v. *Mayor etc. of Baltimore*, 61 Am. Dec. 276, note 282. The principal case is cited upon the power of the sovereign authority over private property in *New Orleans etc. R. R. Co.* v. *Frederic*, 46 Miss. 10.

PRIVATE PROPERTY MAY BE TAKEN FOR USE OF RAILROADS AND OTHER PUBLIC USES: *Enfield T. B. Co.* v. *Hartford R. R. Co.*, 42 Am. Dec. 716, note 728; *Whiteman* v. *Wilmington etc. R. R. Co.*, 33 Id. 411; *Lexington etc. R. R. Co.* v. *Applegate*, Id. 497; *Bloodgood* v. *Mohawk & Hudson R. R. Co.*, 31 Id. 313, and note 372 et seq.

WHERE STATUTE PROVIDES MODE FOR ASSESSMENT AND PAYMENT OF DAMAGES accruing in the exercise of the right of eminent domain, no action lies at law: See *Hickox* v. *Cleveland*, 32 Am. Dec. 730; *Aldrich* v. *Cheshire R. R. Co.*, 53 Id. 212.

PART OF STATUTE MAY BE DECLARED VOID AND RESIDUE VALID: *Santo* v. *State*, 63 Am. Dec. 487, and note 519. The principal case is cited upon the constitutionality of legislative acts: *Lawson* v. *Jeffries*, 47 Miss. 707.

THE PRINCIPAL CASE IS CITED to the point that a justice of the peace in Mississippi may, under legislative authority, take jurisdiction of a case of a contested election, and in so doing he is not exercising the jurisdiction given him by the constitution over pecuniary demands not exceeding a prescribed sum, but his attitude is more analogous to the case where he holds an inquisition of damages caused by the exercise of the right of eminent domain, as in the principal case: *Sublett* v. *Bedwell*, 47 Miss. 270.

Digitized by Google

HARPER v. BIBB.

[34 MISSISSIPPI, 472.]

PURCHASER OF LEGAL TITLE IS NOT BOUND TO TAKE NOTICE OF LIEN upon land recorded against former owner of the equitable title through whom the purchaser does not deraign title, and whose name does not appear in connection with it.

BONA FIDE PURCHASER FROM GRANTEE IN STATE PATENT IS NOT BOUND TO TAKE NOTICE of a judgment lien on the land recorded against one who formerly held a certificate for the patent, and who, after the lien attached, conveyed to the purchaser's grantor, who obtained the state patent direct to himself.

EQUITY WILL NOT RELIEVE AGAINST BONA FIDE PURCHASER OF LEGAL TITLE for valuable consideration without notice.

BILL in equity by W. C. Harper against Bibb & Hopkins. The bill was dismissed, and the complainant appealed. The opinion states the facts.

George L. Potter, for the appellant.

Yerger, Rucks, and F. Anderson, for the appellees.

By Court, FISHER, J. The object of this bill is to compel the defendants, who hold the legal title to certain lots in the city of Jackson, to convey the same to the complainant, and to compel the defendants to account for the rents and profits during the time they have been in possession.

The complainant purchased the lots at a sale made by the sheriff of Hinds county, in May, 1844, under an execution issued upon a forthcoming bond, in which C. C. Mayson was principal, and John Shields and others were securities, and forfeited on the sixteenth day of October, 1837. The lots appear to have been sold as the property of Shields. It further appears that Shields purchased the lots from the state in June, 1834, and received a certificate or obligation, binding the state to execute to him a patent, on payment of the purchase money, which appears to have been fully paid on the sixteenth day of April, 1838, at which time it is insisted the judgment under which the complainant claims operated as a lien upon the lots; and that any sale made thereafter by Shields was made subject to such lien.

The defendants, Bibb & Hopkins, claim under John Martin, who purchased the lots at a marshal's sale made in 1839, under an execution against one John Morris, who purchased the lots in June, 1838, from Shields, and received, in December of that year, a patent for the lots from the state. The facts in the

Digitized by Google

clearest manner show that Bibb & Hopkins are purchasers for a valuable consideration, without notice of any equity of the complainant, or of the judgment creditor under whose execution the sale was made. It is, however, said that, the judgment being a matter of record, the defendants were bound to take notice of the lien.

This position, admitting the existence of the lien, might be correct if the defendants derived their title from or through Shields, the judgment debtor; but his name not appearing in connection with the title, they could not be required, by any rule exacting diligence in such case, to inquire into his affairs.

The patent which issued by the state to Morris shows a purchase by him directly from the state, without in any manner referring to Shields; and while it might be true that the defendants would be bound by liens existing against persons from whom or through whom they had to trace their title, they could not, as innocent purchasers, be charged with a lien or latent equity existing against a person whose name was in no manner connected with the legal title which had vested in Morris under the patent issued by the state. It may be safely admitted that the lien of the judgment under which the complainant claims attached to the lots on the sixteenth of April, 1838; and yet not true that such lien existed, except to a limited extent, if at all, in 1842, when the defendants purchased from Martin; for a lien, like anything else, may be lost or destroyed. Shields, at the time the lien attached, had but an equitable title to the lots; and the same act which destroyed this equity by vesting the legal title in another, and enabling that other to deal with third parties on the faith of the legal title, might also destroy the liens against the equitable title. When the equity ceased, that which incumbered it, as a general rule, would cease with it; and the question must in such case be, whether the incumbrance attached to the legal estate; for after the patent was issued there was no longer an equitable title; or in other words, the state no longer occupied the attitude of a trustee, holding the legal title for Shields, or his assignee. This brings us to the question to be decided. The defendants, it is admitted, hold the legal title; and the rule is a familiar one, that a court of equity will not disturb a person holding such title, except for purpose of justice; and recognizing the force of this rule, it is only necessary to glance at the facts to determine what the decision must be. Morris, the party beneficially interested, stood by at the marshal's sale, and saw the lots purchased by Martin's agent, and a

Digitized by Google

large amount of the debt against him thus canceled. Nor does it appear that Morris, or his legal heirs, have ever since questioned the validity of this purchase. The defendants, Bibb & Hopkins, purchased from Martin at a time when the legal title was in Morris, if it had not passed to Martin, and paid a full price as the consideration of their purchase.

Morris, by holding the legal title, was enabled to deal with the property as his own; and when he did so deal with it, under the circumstances above named, the purchaser would be bound only by such equitable claims or rights of others as were brought to his notice.

Thus viewing the main point in the case, we have not deemed it necessary to notice other points argued by counsel.

Decree affirmed.

RECORD OF CONVEYANCE IS NOTICE ONLY TO SUBSEQUENT PURCHASERS UNDER SAME GRANTOR: *Roberts* v. *Bourne*, 39 Am. Dec. 614. The purchaser of the legal title is not bound to take notice of a registered lien or incumbrance of an estate created by any person other than those through whom he is compelled to deraign his title: *Baker* v. *Griffin*, 50 Miss. 163, citing the principal case. The principal case is also cited to the point that the registry of a deed or other paper authorized and required by law to be recorded is notice to all subsequent purchasers, and to all the world: *Learned* v. *Corley*, 43 Id. 707.

EQUITY WILL PROTECT BONA FIDE PURCHASER: *Howell* v. *Askmore*, 57 Am. Dec. 371; *Crump* v. *Black*, 51 Id. 422.

HERNDON *v.* HARRISSON.

[34 MISSISSIPPI, 486.]

MEASURE OF DAMAGES, IN ACTION BY VENDEE FOR BREACH OF CONTRACT TO CONVEY, is the amount of the purchase money and interest, where no special damage has resulted.

VENDEE SUING FOR DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND can recover nothing where the vendor, before suit, offered to return the notes given for the purchase price, and brings them into court and tenders them to the plaintiff.

ADMINISTRATOR OF DECEASED VENDOR IS PROPER PERSON FOR VENDEE TO TENDER PURCHASE MONEY TO and demand deed from, and not the heirs, *semble*.

ACTION for damages for the breach of the condition of a bond for the conveyance of land, instituted against the administrator of the deceased vendor. The case was submitted on an agreed state of facts. The court below gave judgment for the defend-

Digitized by Google

ant, and the plaintiff sued out this writ of error. The opinion states the facts.

John B. Sale, for the plaintiff in error.

Harrisson, Whitfield, and W. F. Dowd, for the defendant in error.

By Court, FISHER, J. The plaintiff below brought this action in the circuit court of Monroe county to recover damages occasioned by the breach of a bond executed by the intestate, binding himself to make to the plaintiff a deed, in fee-simple, to a certain tract of land, upon payment of the purchase money. The case was tried below upon an agreed state of facts; and according to our understanding, the only question was, What should be the measure of damages? The plaintiff, before he commenced his suit, tendered to the administrators of the vendor the full amount of the purchase money and all interest, and demanded a deed, which being refused, he surrendered the possession of the land, but to whom does not appear, and thereupon commenced this suit. The defendants brought into court the notes given for the purchase money, and tendered them to the plaintiff. It was admitted that the land, at the time of the tender of the purchase money, was worth about three hundred dollars more than the purchase money. The court, upon this state of case, rendered a judgment for the defendants, which means that the plaintiff should accept the notes by him executed in full discharge of the damages which he had sustained by reason of the failure to make title according to the condition of the bond. This was according to the settled rule, that the purchase money and interest shall be the measure of damages in such case, where no special circumstances exist making the application of a different rule necessary.

No special circumstances are shown to exist in this case, and consequently we perceive no necessity for departing from the general rule.

It further appeared that the defendants had at all times been ready and willing to deliver up the notes to the plaintiff; and while it does not positively appear that such an offer was made, yet such an inference may be indulged. Under this state of case, there was no necessity for this suit, and consequently we are compelled to hold that the court below committed no error.

We deem it unnecessary to decide the other points so elaborately argued by counsel. It would seem, upon principle, that the demand upon the administrators who held the notes for a

Digitized by Google

deed ought to be sufficient. The vendee ought only to be required to tender performance to the parties holding the notes, and who could demand performance of him. He might not know the heirs; and even if he did, they could not ordinarily receive the purchase money on executing the deed. But these questions are only noticed for the purpose of stating that we do not consider them necessary to a decision of the case. The agreed state of facts presupposes that a demand for a deed was properly made of the administrators; and, as remarked at the outset, the question was whether the purchase money and interest should be the measure of damages, and whether these damages should be liquidated by the plaintiff's receiving back his own notes for the purchase money. These questions having been decided for the defendants, the judgment must be affirmed.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND: See *Shaw* v. *Wilkins*, 49 Am. Dec. 692, and note 697. See also *Martin* v. *Atkinson*, 50 Id. 403; *Fernander* v. *Dunn*, 65 Id. 607, note 608.

ABBEY *v.* COMMERCIAL BANK OF NEW ORLEANS.

[34 MISSISSIPPI, 571.]

LIEN OF JUDGMENT OF FEDERAL COURT HELD WITHIN STATE is subject to the statute of limitations of that state.

CERTIFICATE OF DISCHARGE IN BANKRUPTCY CANNOT BE AVOIDED ON GROUND OF WILLFUL CONCEALMENT by bankrupt of his property, where he failed to insert in his schedule land that he had conveyed before the passage of the bankrupt act, as a voluntary gift, in fraud of his creditors; nor can the conveyance be considered as an arrangement made in contemplation of bankruptcy, since it was made before the passage of the act.

CONVEYANCE IN FRAUD OF CREDITORS LEAVES NO INTEREST IN GRANTOR AS AGAINST GRANTEES.

DECISION BY APPELLATE COURT UPON DEMURRER TO BILL IN EQUITY is not an adjudication upon the validity of a defense set up by plea which had not been decided by the lower court and was not considered in the appellate court.

BILL in equity. The opinion states the facts.

Marshall and Miller, *and R. B. Mayes*, for the appellants.

Gibb and Bowman, *and Fulton Anderson*, for the appellee.

By Court, HANDY, J. This bill was filed in the middle district chancery court by the appellees, judgment creditors of Richard Abbey, to subject to their debt certain property alleged to have been conveyed by Abbey in fraud of his creditors.

Digitized by Google

The material facts appearing by the pleadings are, that in May, 1839, the appellees recovered a judgment in the circuit court of the United States, held in this state, for a large sum of money, on which executions had been regularly issued until February, 1851, and returned *nulla bona;* that in June, 1837, Abbey and wife executed a mortgage to the Agricultural Bank, on a tract of land and a large number of slaves, to secure a large debt due the bank, upon which there was a consent decree of foreclosure rendered at December term, 1840, and under that decree that the Agricultural Bank, by agreement with Abbey, became the purchaser of the property, but that Abbey continued in possession after the sale, and with the crops paid nearly all the debt due the bank; and that this was done in pursuance of an agreement in writing, made between Abbey and the bank, that the bank should bid off the property at the sale under the decree, and upon payment of the debt due, that the bank should convey the property to Abbey's wife and daughter; that in July, 1842, the bank assigned her interest in the property and her debt then unpaid to Cochran & Henderson, who, in April, 1848, executed a deed reciting the agreement between Abbey and the bank, and the payment of the debt by means of the crops and a sale of part of the property, and conveying the property to the appellants, the wife and daughter of Abbey. This is charged to be a fraudulent arrangement for the purpose of giving Abbey an opportunity to pay the debt by means of the crops upon long time, to secrete and secure it against other creditors, and to have it conveyed to his wife and daughter after the payment of the debt to the bank; and that it was, in effect, a voluntary gift by an insolvent debtor to his wife and daughter.

The bill further states that in April, 1838, the same property was conveyed by Abbey and wife to one Miller, in trust, to secure certain debts, some of which constitute a large portion of the debt upon which the complainant's judgment was founded; that although this trust deed was entered satisfied, it was fraudulently procured by Abbey to be so entered, and was not in fact satisfied.

The answer admits the continued possession of Abbey after the sale under the mortgage decree, but states that it was as agent for the bank, and upon wages to be paid by the bank; admits in effect the agreement to convey to Abbey's wife and daughter, and states that the consideration for it was, as a compensation for his wife's dower in the property which she had conveyed by the

Digitized by Google

mortgage; denies all fraud in the transaction, and all collusion with the bank in procuring the decree to sell the property under the mortgage; denies that any of the debts secured in the trust deed to Miller constitute a part of the complainant's judgment, or that the entry of satisfaction of the deed was obtained by fraud; and pleads the certificate of discharge of Abbey as a bankrupt granted on the twentieth of February, 1843, in bar of the complainant's claim.

An amended bill states that Abbey did not surrender in his schedule as a bankrupt any interest in the property in controversy, and that he carefully concealed the arrangement made with the bank from his creditors, and charges that the pretense that Abbey remained in possession as agent and overseer is false, and that he never received any compensation on that account.

The answer to this denies that the discharge in bankruptcy was obtained by fraud or concealment, and states that he had no interest in the property when he made his application as a bankrupt, and therefore did not insert it in his schedule.

Upon the hearing a decree was made subjecting the property to the payment of the judgment, from which this appeal was taken.

The first and main question presented is, whether the discharge in bankruptcy is a bar to the judgment against Abbey, and to the bill filed in this case to enforce it.

Under the rules held by this court, the lien of the judgment had expired under the operation of the statute of limitations of 1844, and therefore there was no lien preserved under the provisions of the bankrupt act, and which could be enforced. The certificate, therefore, must operate as a bar to the judgment, and all proceedings to enforce it, unless it appears by the pleadings and proof that it was obtained by fraud, and in violation of the provisions of the bankrupt act.

The ground upon which the certificate is attempted to be impeached is, that Abbey committed a willful concealment of his property in failing to insert in his schedule of property and effects as a bankrupt his interest in the property purchased by the Agricultural Bank, which is alleged to be an equity of redemption.

The condition of the property appears to be this: Abbey had executed a mortgage to the bank, under which the property was about to be sold. It was agreed between him and the bank that the bank should purchase it, and give time for paying the debt due by means of the crops to be raised upon it, and by sale of

Digitized by Google

portions of the property; and after the payment of the debt, the bank was bound by a written agreement to convey it to Abbey's wife and daughter, which agreement was carried out by Henderson & Cochran, to whom the bank transferred the debt held by her and her title to the property. This is stating the transaction as strongly against the interest of the appellants as the record would justify.

The question for consideration upon this is, not whether it was an arrangement securing the property to Abbey's wife and child in fraud of his creditors, but whether after the purchase of the bank and the agreement made he retained such an interest in the property as he could use to his benefit and assert against the claim of his wife and daughter or the bank; such an interest as his assignee in bankruptcy could maintain against his wife and daughter. Conceding the arrangement to be fraudulent on his part, and such that his creditors might, before his discharge in bankruptcy, have set it aside as voluntary and fraudulent as to them, yet it was conclusive upon him with reference to the rights of his wife and daughter; and as the legal right passed to them, though by a fraudulent act on his part, and his right as against them was concluded thereby, he could not be said to have made a willful concealment of any interest of his in the property. The arrangement was made before the passage of the bankrupt act, and could not be said to have been made in contemplation of bankruptcy. Unless, therefore, there was an interest remaining in Abbey after the arrangement made with the bank, he had nothing which he could willfully conceal in fraud of the bankrupt act, because he had nothing which could pass to his assignee. Hence this case comes fully under the rule held by this court in *Porter* v. *Douglass*, 27 Miss. 379; and the transaction must be regarded, as it is charged to be in the complainant's bill, as a voluntary gift of the interest of an insolvent debtor to his wife and daughter, but which divested him of all right or interest in the property so that his failure to surrender it in his schedule in bankruptcy cannot be considered as a willful concealment of his property. And it follows that the certificate cannot be avoided on that ground, and that it is a bar to the judgment.

It is however insisted, on behalf of the appellee, that the effect of the decision of this case when it was heretofore here on appeal from the order of the court below overruling the demurrer to the bill, is an adjudication that the discharge in bankruptcy was not a bar to the bill. This is founded in a

Digitized by Google

misapprehension. When the case was formerly here, the only questions presented upon demurrer were those which appeared by the face of the bill. The defense of Abbey's discharge in bankruptcy was set up by plea, which, when the case was formerly here, had not been decided, and was therefore neither involved nor considered by us in the former decision. Nor could it then have been considered; for it involves the question of fact whether, under the circumstances of the discharge as shown by the evidence touching the point of fraudulent and willful concealment of his property by the bankrupt, there was in law such a willful concealment, in fraud of the bankrupt act, as will avoid the certificate. The former decision, therefore, does not extend to the question of the validity of the discharge in bankruptcy.

Another ground of relief set up in the bill is the trust deed to Miller, made by Abbey and wife in 1838, which, it is alleged, covers a large portion of the debt upon which the judgment here sought to be enforced is founded. This allegation of the bill is denied by the answer, and it does not satisfactorily appear to be sustained by proof. But it appears that this deed was entered satisfied of record, and the bill alleges that this was fraudulently done by the procurement of Abbey. This allegation is denied in the answer, and the record shows no evidence to sustain it. It is therefore clear that the decree cannot be sustained on this ground of relief.

Under these views of the case, the decree must be reversed and the bill dismissed; which is ordered accordingly

---

THE PRINCIPAL CASE was formerly before this court, and is reported in 31 Miss. 431–437.

JUDGMENT IS CONCLUSIVE ONLY AS TO WHAT WAS DIRECTLY IN ISSUE: *Lord* v. *Chadbourne*, 66 Am. Dec. 290, and note citing prior cases. Affirmance by appellate court of judgment on demurrer is conclusive upon the parties: *Hempstead* v. *Watkins*, 42 Id. 696.

FRAUDULENT CONVEYANCE IS BINDING UPON PARTIES THERETO: *Britt* v. *Aylett*, 52 Am. Dec. 284; *Lisloff* v. *Hart*, 57 Id. 203, and notes.

EFFECT OF PRIOR FRAUDULENT CONVEYANCE UPON DISCHARGE IN BANKRUPTCY: *Ashley's Adm'r* v. *Robinson*, 65 Am. Dec. 387, and cases cited in the note 394.

STATUTE OF LIMITATIONS AS AGAINST JUDGMENTS OF SISTER STATES: *Reid* v. *Boyd*, 65 Am. Dec. 61, note 63. It does not run against a judgment of the United States circuit court in Kentucky, since judgments are not within the statute of that state: *Dudley* v. *Lindsey*, 50 Id. 522.

Digitized by Google

FARR v. FARR.

[34 MISSISSIPPI, 597.]

ADULTERY AS GROUND OF DIVORCE MUST BE CHARGED as committed at a particular time and place.

RULE THAT CERTAINTY TO COMMON INTENT MUST EXIST IN PLEADINGS applies as well in equity as at law, the reason of the rule in both instances being to inform the adverse party with sufficient precision of the charge made against him, and to enable the court to pronounce the proper judgment.

NAME OF PERSON WITH WHOM ADULTERY, CHARGED AS GROUND OF DIVORCE, WAS COMMITTED need not be set forth in bill for divorce unless reasonable certainty cannot otherwise be attained.

BILL for divorce. The opinion states the facts.

F. Anderson, for the appellant.

Johnson and Shelton, for the appellee.

By Court, FISHER, J. This was a bill filed by the appellee on the chancery side of the circuit court of Hinds county, for a divorce from the bonds of matrimony on the ground of adultery, alleged to have been committed by her husband, the appellant. The first error assigned relates to the action of the court below in overruling the appellant's demurrer to the bill; and as this error, if it shall appear to have been well assigned, will be decisive of the case, it will be first considered. The bill appears to have been filed on the twenty-seventh day of August, 1855. The marriage is alleged to have been solemnized on the eleventh day of March, 1847. The bill then proceeds to charge that at various times and upon various occasions since the marriage the defendant has proved unfaithful to his marriage vow, in this: that he has been guilty of repeated acts of adultery with a servant-woman of the complainant, and with other females. It is objected that this allegation is too vague and uncertain to entitle the complainant to maintain her bill, inasmuch as it would be next to impossible for the defendant, by reasonable diligence, to prepare himself to meet such an allegation.

The rule appears now to be well settled in this class of cases that the charge must be made with reference to some particular time and place, that the defendant may be able not only to anticipate the proof which may be made against him, but that he may know to what particular time or place to direct his own proof. This allegation puts in issue the defendant's course of conduct during the whole time of the matrimonial connection, a period of

Digitized by Google

more than eight years, and it is not to be presumed that he could, by the use of reasonable diligence, prepare to meet proof that might be made against him by witnesses having this latitude. The rule that certainty to a common intent must exist in pleadings applies as well to pleadings in equity as at law, the reason in both instances being the same—to inform the adverse party with sufficient precision of the charge made against him, and to enable the court to pronounce the proper judgment if the truth of the pleading should be established. We are therefore of opinion that this bill is too vague and uncertain as to time and place and other circumstances to require an answer, and that the demurrer should have been sustained.

Again: it is said that the name of the person with whom the adultery is alleged to have been committed should have been set forth in the bill. Perhaps, in many cases, greater certainty would be promoted by observing this practice; but while the practice might in this instance have been followed and the name of the servant given, there are nevertheless good reasons why, in most cases, a different rule should prevail. Persons who are strangers to the controversy, and whose characters would suffer more or less, should not be implicated when they have no opportunity to be heard unless reasonable certainty in the pleading could not be otherwise attained. As a general rule, it will be sufficient to set forth the time, place, and particular circumstances of the defendant's guilt, without introducing private scandal, which might subject the party pleading to an action for damages in consequence of the injury thus done to the character of a third party. Reasonable certainty is all that is required, and the court will favor a rule which can attain this end, and at the same time preserve its records from unnecessary scandal.

We therefore think that this cause of demurrer is not well assigned. The court, however, having erred as to the first cause of demurrer, the decree must be reversed.

Decree reversed, demurrer sustained, and bill dismissed.

CHARGE OF ADULTERY WITH PERSONS UNKNOWN TO LIBELANT IS SUFFICIENT: *Adams* v. *Adams*, 51 Am. Dec. 219, note 221.

PROOF OF ADULTERY AT DIFFERENT PLACE FROM ONE ALLEGED IS INSUFFICIENT: *Adams* v. *Adams*, 51 Am. Dec. 219.

ADULTERY MUST BE CHARGED AS COMMITTED AT PARTICULAR TIME AND PLACE: *Christianberry* v. *Christianberry*, 25 Am. Dec. 96.

Digitized by Google

NIXON v. PORTER.

[34 MISSISSIPPI, 697.]

DEED SHOWN TO BE THIRTY YEARS OLD OR MORE MAY BE PROVED by proof of the signature of one of the subscribing witnesses, for it is presumed that the subscribing witnesses are either beyond the jurisdiction of the court, or dead, or if living, that their memories have failed them as to the particular transaction.

DEED IS SHOWN TO BE ANCIENT BY FACT THAT GRANTEE TOOK POSSESSION of land believed to be conveyed by the deed shortly after the date of the deed, and that the grantor twenty years afterwards acknowledged that he executed the deed upon the day of its date.

DEED IS NOT VOID FOR UNCERTAINTY because from lapse of time it may be impossible to identify the lands conveyed by it.

PLACE OF DEPARTURE OF BOUNDARIES IN DEED MAY BE PROVED by direct evidence or common reputation, but it must be ascertained with reasonable certainty.

THAT IS CERTAIN WHICH MAY BE RENDERED CERTAIN RESPECTING DESCRIPTIONS IN DEEDS.

DEED TO DEFENDANT IN EJECTMENT EXECUTED UNDER DECREE OF CHANCERY may be introduced by the plaintiff without the production of the record in chancery, for the purpose of showing that the defendant claims under the plaintiff's grantor; though when a party claims title in himself under such a deed, it is generally necessary to produce the authority under which it was executed.

VOLUME OF STATE PAPERS PUBLISHED UNDER AUTHORITY OF CONGRESS is public record, and not open to objection as being secondary evidence of facts therein stated.

HEARSAY EVIDENCE OR REPUTATION, TO PROVE BOUNDARIES, MUST BE AS CERTAIN as to the subject-matter as direct evidence would be.

ACTION by the heirs of John Porter against Rebecca Nixon and Samuel White, brought under the pleading act of 1850, to recover a tract of land. The plaintiffs offered in evidence a deed from Charles Nicaise to John Porter, dated September 23, 1816. The deed was acknowledged by the grantor March 26, 1838, before Brush, circuit clerk of the county, but to the certificate of acknowledgment Brush had not affixed his official seal. Upon the defendants' objection, the court refused to permit this deed to be read upon the acknowledgment, because of the omission of the seal. There were three subscribing witnesses to the deed, and the plaintiffs proved the death of one of them and the genuineness of his signature. Brush also testified to the acknowledgment by Nicaise. The defendants objected to this testimony, on the ground that the subscribing witnesses ought to be produced or proved to be dead. The objection was overruled, and the defendants excepted. The plaintiffs being about to read the

Digitized by Google

deed to the jury, the defendants objected: 1. That the boundaries in the deed did not correspond with those set out in the complaint; 2. That the deed was void for uncertainty in describing the land conveyed. The objections were overruled, and the defendants excepted. The plaintiffs then offered a deed to the defendant White, executed by Pray, administrator of Avery, deceased, pursuant to a decree in chancery, which is set out in the deed. The decree was made in a suit by White against Pray, and recites that White purchased certain lands from Avery, who sold them as tax collector, but died before making a deed therefor; that one of the tracts was sold as the property of John Porter, and directs Pray to execute a deed conveying the lands to White, and describes the lands. A certified copy of the decree in chancery was appended to the deed. The defendants objected: 1. Because the whole record in the chancery suit was not produced; 2. Because the deed did not purport to convey the same premises as those described in the deed from Nicaise to Porter. The objections were overruled, and the court admitted the deed to show that the defendants claimed title from the same source as the plaintiffs, to wit, from John Porter. The defendants excepted. The plaintiffs introduced a deed from the defendant White to the defendant Nixon. The plaintiffs then introduced testimony to prove the boundaries to the land. The defendants' objections, on the ground that it was hearsay, were overruled, and exceptions taken. The defendants sought to introduce an extract from 3 American State Papers, Public Lands, 3, to show that Charles Nicaise, the grantor of Porter, had not complete title to the lands in question, but only a small undivided interest. The court refused to admit this evidence, holding that the defendants were estopped by the plaintiffs' evidence from setting up an outstanding title. The defendants excepted. Verdict and judgment for the plaintiff. Defendants' motion for a new trial being overruled, they sued out this writ of error.

W. P. Harris, J. C. Monet, and Champlin and Adams, for the plaintiffs in error.

F. Anderson, and George S. and W. S. Yerger, for the defendants in error.

By Court, FISHER, J. This was an action brought by the plaintiffs below under the pleading act of 1850, in the circuit court of Hancock county, to recover a tract of land alleged to be in the possession of the defendants.

The plaintiffs claim as heirs at law of John Porter, deceased,

Digitized by Google

to whom the land in controversy was conveyed in 1816 by one Charles Nicaise; and the first error assigned relates to the admission of this deed as evidence. The circumstance of Porter's possession, in 1816 or 1818, of land believed to be the same land conveyed by the deed, coupled with the acknowledgment of Nicaise in 1838 that he had executed the deed at the time it bears date, was sufficient to characterize it as an ancient document of more than thirty years' standing, and therefore to dispense with the strict rules of proof in the case. The antiquity of the deed being established, the law presumes that the subscribing witnesses are either beyond the jurisdiction of the court, or dead, or if living, that their memories have failed them as to the particular transaction; and hence the deed may be established by other and inferior testimony. We therefore do not think that the court erred on this point.

Again: it is said that the deed is void for uncertainty as to the description of the land. That is certain which may be rendered certain. It was only necessary to ascertain the south-east corner of Rapp's land to fix the boundaries, by survey, of the whole tract. His corner was a fact (if true) which might be ascertained in the usual mode of ascertaining boundaries, either by direct proof or by common reputation. Of course, as the certainty in the description of the land depends upon ascertaining the place of departure, it must follow that if this cannot be done with reasonable certainty the land cannot now be ascertained, though it may have been capable of identity at the time the deed was executed. The deed is not void for uncertainty, though it may be impossible at this late date to identify the lands embraced in it.

It is next said that the court erred in admitting the deed from Pray to White for the purpose of showing that, as he claims under Porter, he admits his title. This deed was executed under a decree of the superior court of chancery, and it was objected that the record should have been produced before reading the deed. As a general rule, when a deed is executed in virtue of a decree, or other power, the authority should be produced; but this is not necessary in this case. The plaintiffs did not claim under the deed; but the object was to show that White claimed under it, and having thus admitted the title of the plaintiffs' ancestor, they were not bound to go beyond the deed of Nicaise for the purpose of proving title. The deed was therefore competent; but it may have been insufficient for the purpose for which it was introduced. It may or may not be true that White

Digitized by Google

claims under the deed, but this is a question of fact for the jury.

Again: it is said that the court erred in rejecting evidence offered by the defendants. The defendants offered the third volume of the American State Papers, entitled Public Lands, for the purpose of showing the extent of the interest of Charles Nicaise in the land in controversy, and the court rejected this evidence, on the ground that White was estopped by his deed from Pray. It is admitted in argument that this is an insufficient reason; that White was not estopped by the deed from Pray. But it is said that the evidence was on other grounds clearly incompetent, as it was, at most, of a secondary character. This point has been directly decided by the supreme court of the United States, holding the evidence competent; and we will, therefore, without attempting to add anything to what has been said by that court, follow the rule there laid down: *Watkins* v. *Holman*, 16 Pet. 55. The court below therefore erred in rejecting this evidence.

We may remark, upon the motion for a new trial, that, in our opinion, the evidence was insufficient to uphold the verdict. We are satisfied that boundary may be proved by reputation, or in other words, by hearsay evidence; but this evidence must be as certain as to the subject-matter as direct evidence would be if introduced. There is an utter want of certainty in the evidence to identify the land with the deed under which the plaintiffs claim. The heirship of the plaintiffs is sufficiently proved.

Judgment reversed, and new trial granted.

THE PRINCIPAL CASE was before this court again, and is reported in 38 Miss. 401.

EXECUTION OF ANCIENT DEED NEED NOT BE PROVED when in possession of party claiming under it, and when possession of the land has followed it: *Beverly* v. *Burke*, 54 Am. Dec. 351; *Settle* v. *Alison*, 52 Id. 393; *Crane* v. *Marshall*, 33 Id. 631, and note.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN UNCERTAIN DESCRIPTION IN DEED: *Camley* v. *Stanfield*, 60 Am. Dec. 219, and cases cited in the note 222; *Lick* v. *O'Donnell*, 58 Id. 383, note 384.

DEED BECOMES VOID FOR UNCERTAINTY WHEN DESCRIPTION IS SO INDEFINITE that lands conveyed cannot be identified: *Howard* v. *North*, 51 Am. Dec. 169; note to *Gant* v. *Hunsucker*, 55 Id. 414; otherwise not: *Clark* v. *Munyan*, 33 Id. 752; *Harmon* v. *James*, 45 Id. 296; *Lick* v. *O'Donnell*, 58 Id. 383; *Choteau* v. *Jones*, 50 Id. 460; *Camley* v. *Stanfield*, 60 Id. 219.

THAT IS CERTAIN WHICH MAY BE MADE CERTAIN respecting descriptions in deeds: See *Armstrong* v. *Mudd*, 50 Am. Dec. 545.

HEARSAY EVIDENCE IS ADMISSIBLE TO PROVE BOUNDARIES: *Riley* v. *Griffin*, 60 Am. Dec. 726; *Chapman* v. *Twitchell*, 58 Id. 773; *Martin* v. *Atkinson*, 50 Id. 463.

Digitized by Google

BULLITT v. TAYLOR.

[34 MISSISSIPPI, 708.]

VOLUNTARY SETTLEMENT OF ONE'S PROPERTY FOR BENEFIT OF HIS WIFE AND CHILDREN, made for the sole purpose of protecting his family against the accidents of trade by saving the property from the payment of debts afterwards to be contracted, will be upheld against his subsequent creditors, unless it shall appear that the property thus conveyed remained so situated as to mislead easily as to the true state of the title, and to induce credit upon the belief that the title remained unchanged.

DUE REGISTRATION OF VOLUNTARY CONVEYANCE IS NOTICE TO WORLD not to trust the donor longer upon the faith of the property conveyed; hence such a conveyance cannot be regarded as an act done in secret.

CREDITORS CANNOT ATTACK VOLUNTARY CONVEYANCE BY SOLVENT PARTNER on ground that it was made without the knowledge of his insolvent co-partner, since the latter himself could not complain.

POSSESSION OF PERSONAL PROPERTY BY ONE WHO HAS CONVEYED IT VOLUNTARILY IN TRUST FOR HIS WIFE AND CHILDREN, by a deed duly recorded, is not fraudulent as to creditors, but will be regarded as the possession of those beneficially interested.

CONVEYANCE FRAUDULENT AND VOID AS TO EXISTING CREDITORS IS NOT VOID AS TO SUBSEQUENT CREDITORS, where the statute provides that such conveyance shall be void "only" as to those who are thereby defrauded; it operates to transfer the title to the property subject to the incumbrance of the grantor's debts then existing.

DEED DULY ACKNOWLEDGED AND RECORDED DOES NOT TRANSFER TITLE UNTIL DELIVERY TO GRANTEE.

DUE ACKNOWLEDGMENT AND RECORDING OF DEED IS MERELY PRESUMPTIVE, NOT CONCLUSIVE, EVIDENCE OF DELIVERY.

VOLUNTARY CONVEYANCE DULY RECORDED IS VOID AS TO SUBSEQUENT CREDITORS when fraud has intervened, as where the deed was never delivered to the trustee named therein, or where the debtor, before the execution of his deed, made an arrangement with another to make him advancements, and to recommend him to others for credit, and upon the faith of such recommendations he was given credit, for the credit thus given relates back to the date of the agreement for recommendations, when the party recommending is presumed to have investigated the pecuniary condition of the debtor, and in subsequently recommending he was not bound to investigate anew. In using the agreement as a means of obtaining credit, the debtor, in substance, obtained credit directly upon the faith of the property conveyed.

VOLUNTARY CONVEYANCE OF PROPERTY UPON FAITH OF WHICH DEBTS WERE CONTRACTED, under circumstances clearly showing that the debtor was at the time the true owner, is fraudulent and void as to the creditors.

CREDITOR WHO HAS REDUCED DEBT TO JUDGMENT IN FEDERAL COURT HELD WITHIN STATE may maintain a bill in the state courts to annul the debtor's fraudulent conveyance of his property.

BILL in equity filed by Bullitt, Miller, & Co., Murry, Miller, & Co., and Robert Richards, against Taylor & Richardson, Sarah A.

Digitized by Google

Taylor, wife of defendant Taylor, and Reber, the trustee in the trust deed sought to be avoided. The opinion states the facts.

W. C. Harper, T. P. Ware, J. D. Freeman, and W. P. Harris, for the appellants.

F. Anderson and W. S. Yerger, for the appellees.

By Court, FISHER, J. This was a bill filed by the complainants, as judgment creditors of the late firm of Taylor & Richardson, in the chancery court of Rankin county, to have a deed executed by the defendant Taylor declared void on the ground of fraud, and to subject the property thereby attempted to be conveyed to the payment of said judgments.

The defendants below demurred to the bill, and the court sustained the demurrer, from which decree the complainants have prosecuted this appeal.

The main ground of demurrer is that it appears by the bill that the complainants did not become creditors of the firm of Taylor & Richardson until a year or more after the execution of the deed, and that although it may have been voluntary, still the complainants have no right to assail it. The law now appears to be well settled that a man may, for the sole purpose of protecting his family against the casualties and accidents of trade, settle his property for their benefit, and that such settlement will be upheld against his subsequent creditors, unless it shall appear that the property was so situated that the community could have been easily misled as to the title of the true owner. The deed being its own exponent in this case, the object of Taylor was manifestly to settle his property on his family; and if this was the whole case, we should feel no hesitation in holding that the court below committed no error in sustaining the demurrer to the bill. The very object of such settlement by a man engaged in commerce is to prefer his family to those who may thereafter become his creditors, and it may be safely admitted that the design was to protect the property conveyed against the debts thus to be contracted; for otherwise the conveyance would be simply an idle ceremony. The right to make the settlement carries with it the right to the beneficiaries to hold and enjoy the property against the claims of the donor, or against those who may assert a title through him. The conveyance, when executed according to the forms and ceremonies of the law, and made a matter of record, is notice to the world not to trust the donor longer upon the faith of the property conveyed; and while it may have the effect of impairing his credit, it can-

Digitized by Google

not be regarded as a fraud upon those who have ample opportunity to learn his true condition.

But as already remarked, we must go further and ascertain whether this is the case made by the bill. It is in the first place alleged that Richardson was, at the date of the copartnership, and at the date of the deed, insolvent; that Taylor was then known to be worth about the sum of ten thousand dollars, consisting of the property conveyed by the deed; that the firm had recently purchased a stock of goods and contracted debts to the amount of about thirteen thousand dollars, and that about nine thousand five hundred dollars of this sum remained unpaid at the time Taylor executed the deed. It however appears that the larger portion of the goods purchased were in the possession of the firm at this time.

The bill then proceeds to charge that the object of the deed was to defraud the creditors of said firm, and also to defraud those who might thereafter become creditors. In order that the true questions may be presented, we will, at the risk of being tedious, quote the allegations of the bill relating to this branch of the case. It alleges "that on the twelfth of February, 1852, the defendant Taylor secretly, and with the intent to defraud his then creditors, and also with the view and intent of contracting other debts with complainants, and others for large amounts, and to defraud them, and without the knowledge of the defendant Richardson, his partner in business, and without any consideration whatever, made a deed in trust and gift of all his then remaining property and slaves to the defendant Reber for the use and benefit of himself and wife, the defendant Sarah A. Taylor." A copy of the deed being made an exhibit to the bill, the title of the slaves appears to have been conveyed to Reber for the use of Taylor's wife and children, and he does not appear as a party interested therein. The bill then proceeds as follows: "That neither the deed nor slaves, or either of them, was ever delivered to the trustee Reber, but that the said Taylor remained in the quiet possession, use, and control of the same. That immediately after the said partnership was formed, and before the deed was made or recorded, so far as the complainants know or believe, and while complainants had been led by said Taylor and Richardson to believe that all the property of said Taylor was subject to the firm debts of Taylor & Richardson, they, the said Taylor & Richardson, made a commercial arrangement with Wright, Williams, & Co. of New Orleans, to assume and pay the existing liabilities, then recently contracted,

Digitized by Google

and to advance to them all amounts of money, or the greater part thereof, necessary to carry on the business, and to give them credit by mercantile recommendation and letters of credit to buy goods of complainants and elsewhere, and said Wright, Williams, & Co. were informed, and believed at the time of said arrangement, that said Taylor was the owner of said slaves in said deed mentioned, and was the sole responsible party." The bill then proceeds to state that Wright, Williams, & Co. paid off the debts existing against the firm at the date of the deed, that they from time to time advanced large sums of money to the firm, that the complainant's debts were in part contracted on the faith of letters given by Wright, Williams, & Co., and upon the faith of said slaves. It appears that the debts due to Wright, Williams, & Co. have been paid.

These several allegations will be noticed in the order in which they are made by the bill.

It is said that the deed was secretly executed. The bill alleges that it was duly acknowledged and recorded. That which is placed upon the public records of the country can never be regarded as an act done in secret. The bill therefore simply contradicts itself in this respect. Again, it is said that Richardson, the other partner, was kept in ignorance of the deed. He is alleged to have been at the time insolvent, and having no individual property liable to the copartnership debts, he could not complain that Taylor had placed himself in the same situation; and creditors could not complain of an injury to Richardson when he himself could not complain.

Next, it is said that Taylor remained in possession of the property. Supposing the beneficial interest to have passed to his wife and children, and that the deed was properly recorded, Taylor's possession in such case would be regarded as the possession of those having the right, and who, under the laws and customs of society, constituted his family.

It is again said that the object of the deed was to defraud the existing creditors of the firm, and that it is therefore void as to the subsequent creditors.

It must be admitted that when a deed is shown to be fraudulent as to existing creditors, very high authority can be produced to show that it is likewise void as to subsequent creditors. If, however, we keep in view the principle which lies at the foundation of the authorities holding this doctrine, it is believed that no difficulty will be experienced in arriving at a correct conclusion. It is a familiar rule of the common law that fraud

Digitized by Google

vitiates every transaction into which it enters, and courts, acting with reference to this rule, have frequently declared that conveyances intended in their inception to defraud creditors, and therefore void to all intents and purposes, should be treated as void not only as to existing creditors, but likewise as to subsequent creditors. The transaction being void, neither party, upon the establishment of the fraud, could enforce the contract, but each was left by the court where he had elected to place himself—beyond the protection of the law. In subjecting the property to the payment of the debts of subsequent creditors, the courts, following this rule, acted upon the principle that, as the conveyance was void, the title never in fact passed to the fraudulent vendee, and as the investigation of the fraud in such case also involved the question of ownership of the property, the court, on ascertaining the existence of the fraud, declared what was but a natural consequence of the rule, that the title was still in the fraudulent vendor, and that such title should be made subservient to the claims of creditors. But the true question here is, how far this rule has been modified by the statute on this subject. It declares that such conveyance shall "only" be void as against those who are delayed, hindered, or defrauded in the collection of their debts, etc.: Hutch. Code, 638. This statute has already been construed to apply only to existing creditors, but if it were now an open question, the language would seem to be too clear to admit of construction. The conveyance is void as to all who are at the time of its execution in a situation to be injured by it, but valid as to all others. It operates to transfer the title to the property, but transfers it with the incumbrance of the grantor's debts then existing.

It must result from the dominion which every man has over his property, that he may dispose of it in such manner as best accords with his own will and judgment, except in those cases where the law, from considerations of policy, has thought proper to impose limitations upon this right.

And the same may be said with respect to the right to acquire property. The right of disposition by the grantor and of acquisition by the grantee both existing without restriction at the same time, it is difficult to conceive upon what principle persons who were not in a situation to be injured by the transaction can complain of it. Of course, if fraud has intervened, this constitutes an exception to the rule, and this brings us to the material point in this case. It is said that one object of the conveyance was to defraud the complainants, and others who might become

Digitized by Google

the creditors of the firm after the execution of this deed. The facts from which such fraud may be fairly inferred are alleged, and their truth being admitted by the demurrer, the complainants, under this state of the case, are of course entitled to relief. It is expressly alleged that neither the property nor the deed was ever delivered to the trustee Reber. Whether viewed as a gift or as a bargain and sale, the title to the property still remained in the debtor, and it is therefore liable to the complainants' judgments. The act of making, acknowledging, and having the deed recorded would not be sufficient to transfer the title, for the reason that a contract can only be consummated by the act of two persons, or, in technical language, by the assent of two minds, one agreeing to part with and the other to accept the title. Until the deed was delivered, it was at most but a proposition to convey, which could have been withdrawn at any time before it was accepted by the other party. It is no answer to this position to say that when a deed has been properly acknowledged and recorded, a delivery will be presumed; for this presumption, like all presumptions which exist only for the sake of convenience, must yield to facts, when established. The bill alleges that the deed was not delivered, and this allegation being admitted, it is no longer a question as to what facts will be presumed, but what facts exist to overthrow the presumption. If the rule were once firmly established that the registry of a deed should be taken as conclusive evidence of a delivery, a man desiring to defraud his creditors would have nothing to do but to describe some fictitious person as a grantee for a valuable consideration, in a deed, acknowledge it, and have it made a matter of record; and this is really the proposition attempted to be established by this allegation of the bill.

Again: it is alleged that prior to the execution of the deed an arrangement was made with Wright, Williams, & Co. for them to make certain advances to the firm of Taylor & Richardson, and to recommend them to others for credit; and that upon the faith of the recommendations thus given by Wright, Williams, & Co. the complainants gave credit to said firm. Credit given under this state of case would relate back to the agreement with Wright, Williams, & Co., and the complainants' claims would therefore overreach the deed executed by Taylor. Wright, Williams, & Co., in giving credit, or in recommending the firm of Taylor & Richardson for credit, were governed by this agreement, and they, Wright, Williams, & Co., must be presumed to have investigated the condition of the firm, and of its individual

Digitized by Google

members, before entering into the agreement; and being then satisfied of their condition, they were not bound, while this arrangement regulated the conduct of all the parties, to make other investigations at the time each item of credit was given or recommended to the firm.

Taylor & Richardson, then, making known their intention or wish to contract debts in future, and actually making their arrangements to do so must be supposed to, have made known their ability to meet such obligations; and using their property as the means of obtaining the agreement from Wright, Williams, & Co., and using the agreement as the means of obtaining credit, it would, in substance, be the same as obtaining credit directly upon the faith of the property. Under this view of the case, it falls clearly within the operation of the rule which declares that if the debts were contracted upon the faith of the property, under circumstances clearly showing, as in this case, that the debtor was at the time the true owner, the conveyance will be regarded as fraudulent and void at the instance of creditors.

Another ground of demurrer which has been argued is, that the bill shows that the judgments sought to be enforced were recovered in the United States court at Jackson, and that, being foreign judgments, as is alleged, the bill cannot be maintained. While a judgment of the United States court may, in some respects, be regarded as a foreign judgment, it is not so in the full sense of the term. Such judgments may be enforced by execution against the property of the debtor, like state judgments, and indeed, they are in the main regulated by state laws. It is only necessary, to maintain the bill, to make the same allegations in regard to these judgments which would be made in regard to judgments of the state courts, that in consequence of the fraud the remedy had become ineffectual by execution at law. We therefore do not think this ground of demurrer can prevail.

Decree reversed, demurrer overruled, and cause remanded for answer in sixty days.

HANDY, J., dissented from some of the views expressed in the opinion of FISHER, J., but concurred as to the conclusion.

RECORDING DEED IS ONLY PRIMA FACIE EVIDENCE OF ITS DELIVERY: *Hoffman* v. *Mackall*, 64 Am. Dec. 637, and cases cited in note 647; *Wellborn* v. *Weaver*, 63 Id. 235, note 246. Inferences may be drawn from the date of the deed and acknowledgment as to the time of delivery. The acknowledgment and subsequent registration is presumptive, but not conclusive, evidence of delivery: *Claiborne* v. *Holmes*, 51 Miss. 153, citing the principal case.

Digitized by Google

DELIVERY OF DEED IS ESSENTIAL TO ITS VALIDITY: *Wellborn* v. *Weaver*, 63 Am. Dec. 235; *Wood* v. *Ingraham*, 51 Id. 671, and cases cited in the note 674.

BILL BY CREDITOR TO SET ASIDE FRAUDULENT CONVEYANCE, necessity of judgment and execution returned unsatisfied, to maintain: See *Heyneman* v. *Dannenberg*, 65 Am. Dec. 519, note 521.

SUBSEQUENT PURCHASER OR CREDITOR WITH NOTICE OF FRAUDULENT CONVEYANCE CANNOT AVOID IT: *Fowler* v. *Stoneum*, 62 Am. Dec. 490, note 506, citing other cases.

VOLUNTARY CONVEYANCES, WHEN FRAUDULENT AS TO SUBSEQUENT CREDITORS: *Bangor* v. *Warren*, 56 Am. Dec. 657, note 662; *Martin* v. *Oliver*, 49 Id. 717; *Elliott* v. *Horn*, 44 Id. 488; *Hester* v. *Wilkinson*, Id. 303; *Clark* v. *French*, 39 Id. 618; *Hutchison* v. *Kelly*, Id. 250; *Miller* v. *Miller*, Id. 597, note 599; note to *Greer* v. *Wright*, 52 Id. 119. The principal case is cited to the point that under the Mississippi statute of frauds a conveyance or contract fraudulent as to creditors is not void as to subsequent creditors, and cannot be attacked by them unless made with intent to defraud them: *Summers* v. *Roos*, 42 Miss. 788; *Hilliard* v. *Cagle*, 46 Id. 341.

VOLUNTARY CONVEYANCES FOR BENEFIT OF WIFE AND CHILDREN ARE GOOD AGAINST SUBSEQUENT CREDITORS: *Martin* v. *Oliver*, 49 Am. Dec. 717; *Hester* v. *Wilkinson*, 44 Id. 303.

RETENTION OF POSSESSION BY VENDOR OR DONOR OF PERSONAL PROPERTY after absolute sale or gift is *prima facie* evidence of fraud: *Fleming* v. *Townsend*, 50 Am. Dec. 318; *Shaddon* v. *Knott*, 53 Id. 63, and notes.

Digitized by Google

CASES

IN THE

SUPREME COURT

OF

MISSOURI

DUNNICA *v.* COY.

[24 MISSOURI, 167.]

TRUST RESULTS TO FRAUDULENT DEBTOR FOR CREDITORS ON PURCHASE OF LAND IN ANOTHER'S NAME by such debtor to defraud his creditors, and the debtor's interest is subject to sale on execution, and the execution purchaser may in equity compel the holder of the legal title to convey to him, to surrender possession, and to account for the rents and profits.

PURCHASER ON EXECUTION AGAINST FRAUDULENT DEBTOR MUST HAVE SHERIFF'S DEED to land purchased by such debtor in another's name to defraud his creditors before he can maintain a suit to compel the holder of the legal title to convey to him.

PETITION to compel a conveyance of certain land to the plaintiff, and a surrender of possession, and to recover for the use and occupation. The substance of the petition was that one John Coy, being indebted to the plaintiff, purchased the realty now in question of one Collins Coy, and paid therefor in personal property, and for the purpose of defrauding his creditors caused the title bond to be made to one Prewitt, in trust for John Coy's wife and her children, Prewitt having knowledge of the fraudulent design, and that the plaintiff, having obtained judgment against John Coy for his debt, had purchased the land on execution. There was no allegation that he had received the sheriff's deed. John Coy and wife, Collins Coy, and Prewitt were all defendants. Demurrer to the petition, and judgment for the defendants on the demurrer. The plaintiff brought error.

Shackelford, for the plaintiff in error.

Turner, for the defendant in error.

Digitized by Google

By Court, LEONARD, J. This judgment will be affirmed; but we proceed on grounds altogether different from those that have been suggested to us in the briefs. We decided at our last fall term at St. Louis, in the case of *Rankin* v. *Harper*, 23 Mo. 579, that where a father purchased land with his own money, in the name of a child, in order to defraud his creditors, there was a resulting trust to the father in favor of the creditors, which was subject to sale under our execution laws. In that case the land was sold and conveyed by sheriff's deed to the plaintiff, who filed his petition stating these facts, and upon a trial and verdict he obtained a judgment vesting the legal title in him and for the possession and damages. And at the same term, in the case of *Eddy* v. *Baldwin*, Id. 588, we applied the same doctrine to a case where the alleged fraudulent purchase of the land sold under execution was made by the husband in the name of a stranger as trustee, upon expressed trusts, in favor of the wife. According to these decisions, it would seem that if the facts be in the present case as stated in the petition, and the plaintiff had completed his purchase by taking the sheriff's deed for the land bought, he would have become the beneficial owner of the property, and might have filed his petition to have the alleged fraud tried and the trustee decreed to convey the legal title to him, and for the possession of the land, and an account of the rents that had accrued since the purchase. But the fatal defect in the petition is, it is not shown that the sheriff had executed a deed to the plaintiff, which of course was necessary to complete the purchase and transfer tc the purchaser the rights of the judgment debtor in the land. This may have been an accidental omission on the part of the pleader, or it may be that the deed has never been made; but however the truth may be, we must assume upon this demurrer that there was no conveyance, and therefore the plaintiff was not entitled to the relief he asked.

Although a judgment creditor may, before proceeding to a sale of land alleged to have been fraudulently conveyed, go into equity for the purpose of having the question of fraud there tried, and the land sold under a decree for that purpose, and the proceeds applied to the payment of his debt, yet this petition does not seem to have been framed with any view to that kind of relief, and we are not perhaps at liberty to treat it as such, after the party's averment of the execution sale, even if the allegations of the petition were otherwise sufficient to entitle the plaintiff to the other relief indicated.

The judgment upon the demurrer must therefore be affirmed.

Digitized by Google

and the party will then, of course, complete his purchase by taking a deed, and afterwards institute such fresh proceedings as he may deem appropriate to his case. The judgment is affirmed.

RESULTING TRUSTS GENERALLY, WHERE ONE FURNISHES PURCHASE MONEY and another takes the conveyance: See *Osborne* v. *Endicott*, 65 Am. Dec. 498; *Sullivan* v. *McLenans*, Id. 780; *Smith* v. *Strahan*, 67 Id. 622, and cases cited in the notes thereto.

EQUITABLE INTERESTS IN REALTY AND PERSONALTY, LIABILITY OF, TO EXECUTION: See *Rice* ads. *Burnett*, 42 Am. Dec. 336; *Cohen* v. *Carroll*, 45 Id. 267; *Harmon* v. *James*, Id. 296; *Pitts* v. *Bullard*, 46 Id. 405; *Wolfe* v. *Dowell*, 51 Id. 147; *Pratt* v. *Phillips*, 60 Id. 162, and notes thereto. To the point that a trust results to a fraudulent debtor for the benefit of his creditors in land purchased by him and caused to be conveyed to another, and that such trust may be sold on execution, the principal case is cited in *Rogers* v. *Carey*, 47 Mo. 237. In *McIlvaine* v. *Smith*, 42 Id. 45, 55, the principal case is referred to with others as warranting a distinction between a vested equitable estate in possession and a mere ground of equitable relief against a trustee, such as a simple right to maintain a suit in equity, as regards the liability of an interest of a *cestui que trust* to execution, and it is held that the latter class of equitable interests of a debtor cannot be so reached.

DUMEY v. SCHŒFFLER.

[24 MISSOURI, 170.]

CONDITION IN HUSBAND'S WILL RESTRAINING WIDOW'S MARRIAGE by providing that if she marry again a devise or bequest to her shall be void, and that the property shall go over, is valid in Missouri, without regard to the question whether the property is real or personal, or whether there are children of the marriage, or whether the wife is otherwise provided for in the event of marriage.

SUIT for partition. The plaintiff, John Dumey, claimed the property as tenant in common with his sister Sarah, one of the defendants, under the will of one Henneger. The will gave all the testator's property, real and personal, to his wife "during her life or widowhood," but provided that if she should marry again the whole estate should go to John and Sarah Dumey. The widow afterwards intermarried with Schœffler, defendant, and the plaintiff claimed that the devise over thereby took effect. Sarah Dumey admitted the claim, and joined in the prayer for a partition. The defendants, Schœffler and wife, claimed in their answer: 1. That there was due the wife upon the final settlement of her account as administratrix of her late husband a large balance which should be paid out of the realty in controversy, if it should be found to be the property of the plain-

Digitized by Google

tiff and his sister; and 2. That as the testator and his wife never had any issue, the condition in restraint of her marriage was void, and she had a life estate in the land, under the will. The latter claim in the answer was stricken out on motion, and this was assigned by the defendants as error after judgment against them.

Clark, for the plaintiffs in error.

Turner, for the defendant in error.

By Court, LEONARD, J. *Walsh* v. *Mathews*, 11 Mo. 134, determined here in 1847, is a direct authority in point, and must control our present judgment. That case is not shaken by the subsequent case of *Williams* v. *Cowden*, 13 Id. 211 [53 Am. Dec. 143], from which it is clearly distinguishable. The first is a condition annexed by a husband to restrain the marriage of his widow, and the second by a father in restraint of the marriage of his daughter. Both were annexed to testamentary dispositions of real property; and the first was allowed and the second declared to be unlawful as being against public policy; and although the point is settled by the previous judgment of this court, yet as the matter has been argued somewhat at large, we have re-examined the question, and are entirely satisfied with the first decision.

The doctrine that all restraints on marriage are against public policy came from the Roman law, and thence through the canon law was partially incorporated into the common and equity law of England; and by reference to Ayliffe's Pandect of the Roman civil law (a short extract from which is here inserted), it will be seen that the distinction between first and second marriages, recognized in the two cases to which we have referred, was made at an early day in both the civil and the canon law. "The ancient law rejected the condition [not to marry] almost without any distinction, as being contrary to the procreation of children, and the advantage of the state, for such was the judgment then that marriage ought not to suffer by any impediment. For though it be for the interest of the state that the testator's will should be observed in other respects, yet the wisdom of men has thought it more for the advantage of the commonwealth in this case that the same should be peopled by a lawful offspring." And Baldus well observes, "that the good of the public rather consists in marriages than in a state of continency, it being the interest of a state to have as many subjects as possible. And this is to be observed in all first marriages:

Digitized by Google

but in second marriages, the condition is to be fulfilled and performed; for widows are praiseworthy that content themselves with one husband, as being a pattern of chastity and modesty; because a second marriage, according to the canonists, is a kind of fornication which yet is permitted upon a good account even by the canon law, and therefore they style it an honest fornication. Wherefore, if a husband leaving a legacy to his wife adds this condition in, 'if she shall keep her widowhood,' or 'until she marries a second time,' such condition ought to be observed; for if she contracts a second marriage the legacy is forfeited. And it is the same thing even by the canon law, though the apostle says that after the husband's death the wife is free from the law of her husband." The same distinction is also mentioned in 2 Swinburne on Wills, 481, where it is said that "the prohibition of the first marriage is much more odious in law than the second," and it has also been made and acted upon both in American and English cases. In *Scott* v. *Tyler*, 2 Bro. C. C. 488, Lord Thurlow said: "A condition that a widow shall not marry is not unlawful." In *Grace* v. *Webb*, 15 Sim. 388, the vice-chancellor, in 1846, said: "A man may make a provision for his wife and declare that it shall cease on her second marriage, because it is considered that a husband has a sort of interest to preserve the viduity of his wife for the sake of his children." And in 1852, in *Lloyd* v. *Lloyd*, 10 Eng. L. & Eq. 143, the chancellor remarked that "the law recognized in the husband that species of interest in the widowhood of his wife as made it lawful for him to restrain a second marriage—that is to say, that the provision which he has made shall cease." In *Phillips* v. *Medbury*, 7 Conn. 568, there was a testamentary disposition of land by a husband to his surviving wife as long as she should remain his widow, and it was held that the rule in reference to conditions in restraint of marriage were not applicable to real estate or to a widow. The court declared it to be "very reasonable that a man, leaving a widow with seven children, should be permitted to encourage her by suitable provision in his will to remain single, and not subject his own offspring to the probable evils of a step-father to waste her substance, and thereby render her less able to support and educate them." A similar disposition of both real and personal estate was made by a husband for his widow in Pennsylvania, in *Commonwealth* v. *Stauffer*, 10 Pa. St. 350 [51 Am. Dec. 489], and the clause in restraint of her marrying again was held to be valid in reference to the land, which was the only property then

Digitized by Google

in contest; and Gibson, C. J., in delivering the opinion of the court, observed in his peculiar style that "it would be extremely difficult to say why a husband should not be at liberty to leave a homestead to his wife without being compelled to let her share it with a successor to his bed, to use it as a nest to hatch a brood of strangers to his blood."

Decisions to the same effect were made in Kentucky in *Vance* v. *Campbell's Heirs*, 1 Dana, 229, and in *Coppage* v. *Alexander's Heirs*, 2 B. Mon. 314 [38 Am. Dec. 153], and in Mississippi, in *Pringle* v. *Dunkley*, 14 Smed. & M. 16 [53 Am. Dec. 110]. It is true, it was decided otherwise in Massachusetts, in *Parsons* v. *Winslow*, 6 Mass. 178 [4 Am. Dec. 107], but the distinction between first and second marriages was not noticed in the case. And in *Marples* v. *Bainbridge*, 1 Mad. Ch. 590, which was a bequest of personal property by a husband to his wife, on a condition subsequent, to be void if she married again, it was holden by Vice-Chancellor Plumer that the condition was void, being in restraint of marriage, and that the wife was entitled notwithstanding her second marriage; but these are the only decisions to this effect that we are aware of. The weight of authority is decidedly in favor of the distinction between first and second marriages, and we think it is founded in much practical good sense. Our law having made provision for the support of the wife out of her husband's estate, which he is not allowed to control by his will, it seems but reasonable to allow him the privilege of disposing of the residue of his property as his judgment shall deem best for the interests of his family. The wife may reject the scheme he has provided for their support and government after his death, so far as her rights of property are concerned, if she prefer the dower allowed her by law. But after she has made her election to take under the will by omitting to renounce its provisions, she has no cause to complain that she is held to her own choice, and not allowed upon her subsequent marriage to enjoy absolutely the larger estate that was given to her by her husband conditionally, under the expectation that if she kept the condition and remained unmarried she would devote herself and what she possessed to the well-being of the family of which she was the surviving head. This distinction, too, has a place in the habits and sentiments of our people; such dispositions of property are of very frequent occurrence, and are approved by the common judgment of the community. Although in the case now before us there were no children, there were yet two young persons, to whom, as we may infer, the tes-

Digitized by Google

tator and his wife stood in the place of parents, and all the property real and personal was given to the wife during her life or widowhood, and she was directed to keep it together and to manage it as she pleased, supporting and educating these children, to whom it was to go upon her death or marriage. The widow having married again, the new husband and wife insist that the condition is void upon the ground of the public policy in reference to marriage, and that she is therefore entitled under the will to all that is there given to her, notwithstanding her refusal to comply with the condition.

We remark here that in determining upon the validity of any condition of marriage under the English law it is necessary to make several distinctions—as between real and personal property, between conditions precedent and subsequent, between a limitation and a condition, and between a condition followed by a limitation over to a third person, and one without such limitation over. And accordingly, if the disposition be of real property, and the restraint in the form of a limitation, and not of a condition, as during widowhood, it is valid, and the estates cease upon the marriage. And so, too, although as a general rule a condition annexed to a testamentary disposition of property, either real or personal, for life, to be void if the party marry, is void as a general restraint on marriage; yet if there be an immediate limitation over to a third person, it is valid as a conditional limitation, and upon the happening of the event the first estate ceases, and the limitation over takes effect: *Parsons* v. *Winslow*, 6 Mass. 181 [4 Am. Dec. 107]. And although the present judgment might be put upon some one of these grounds, we prefer placing it on the same ground that controlled the decision in *Walsh* v. *Mathews*, 11 Mo. 134, and, disregarding the distinctions to which we have referred, to declare, as was in effect declared in that case, that a testamentary disposition by a husband of either real or personal property to his wife, to be void upon her marrying again, is not against public policy, but a valid disposition under our laws. This, being the general rule, must apply to every such case, without reference to the question whether, in the particular case, there be children of the marriage or a provision in the will for the wife, in the event of her marrying again.

In reference to the claim set up by the plaintiffs for the money allowed the widow against the estate by the probate court, enough is not disclosed to enable us to say that she is entitled to it, even if it be admitted that such a demand could be brought

Digitized by Google

forward in this case as a ground of defense. Her rights in this particular will not be precluded by the present judgment, but she will be at liberty to institute such proceedings in reference to them as are appropriate to her case, unprejudiced by anything done here.

The result is, the judgment must be affirmed.

CONDITIONS IN RESTAINT OF MARRIAGE, VALIDITY OF: See *Coppage* v. *Alexander's Heirs*, 38 Am. Dec. 153, and the note thereto, fully discussing the subject; see also *Williams* v. *Cowden*, 53 Id. 143; *Pringle* v. *Dunkley*, Id. 110; *Commonwealth* v. *Stauffer*, 51 Id. 489.

CANEFOX v. CRENSHAW.

[24 MISSOURI, 199.]

OWNER OF CLOSE IS NOT BOUND TO FENCE AGAINST ANIMALS FERÆ NATURÆ, by the fence law of Missouri, but only against the domestic animals enumerated in the statute.

KILLING OF WILD AND VICIOUS BUFFALO BULL TRESPASSING within an inclosure, by the owner of such inclosure, when necessary to prevent the destruction of his property, is justifiable, though the close is not fenced as prescribed by statute.

ACTION for damages for killing the plaintiff's buffalo bull. The substance of the answer is stated in the opinion. The answer was stricken out on motion, and after judgment for the plaintiff this was assigned as error on appeal.

Otter and Hendricks, for the appellant.

F. P. Wright, for the respondent.

By Court, LEONARD, J. We must reverse this judgment. The answer alleges substantially that the buffalo bull was a wild, vicious, and mischievous animal; that he had broken into the defendant's field and was in the act of destroying the defendant's property of the value of one hundred dollars, when the defendant killed him, not wantonly, but from necessity, because he could not otherwise be restrained. Without undertaking to determine the precise conditions that will justify the killing of such an animal, we may safely assert that if the facts be as here stated, the killing here complained of was quite justifiable, not only in a legal, but in a moral point of view. In every system of jurisprudence there are cases in which the law allows a party to protect his own rights without appealing to the courts for that purpose, and by the common law one may

Digitized by Google

not only defend his property from impending wrongs, but may in some cases redress his own injuries. When we are forcibly attacked in our property, we may repel force by force, and the breach of the peace that happens is chargeable to our adversary; and when unlawfully deprived of it, we may retake it wherever we can find it, so that it be not done in a riotous manner or attended with a breach of the peace. We may ourselves abate a nuisance that is injurious to our rights, doing no unnecessary harm, and take and detain animals that are trespassing upon our land, not merely to prevent a continuance of the wrong, but to constrain their owners to make satisfaction for the damage already done: 3 Steph. Com. 361; *Earl of Lonsdale* v. *Nelson*, 2 Barn. & Cress. 311. And upon these established principles it is plain enough that if this animal was about to destroy the defendant's property the defendant had a right to kill him to prevent the impending injury, although it might have been otherwise if the property endangered had been of trivial value, so as to have rendered applicable the maxim, *De minimis lex non curat;* or if the defendant had at hand other means of preserving his own property from destruction besides the destruction of his neighbor's.

In coming to this conclusion, we of course assume that the bull was unlawfully in the defendant's field, as he undoubtedly was, unless it was the duty of the defendant to have fenced against him. But if such was the defendant's duty, and he neglected to protect himself by a lawful fence, and in consequence of this failure the animal strayed into his field and did the mischief complained of, the damage would be attributable to his own fault, and he of course would be without remedy, either judicial or extrajudicial. The defendant, however, was under no such obligation, either at common law or under the provisions of our statute concerning inclosures. In 3 Dane's Abr., c. 76, art. 9, sec. 19, it is said: "Anciently, every man was bound to keep even his cattle at his peril so that they injured not his neighbors. This principle extended to all the animals a man kept; to fence or build against them to restrain them was no part of the system; and this principle remains the same in most parts of Europe, and hence fences are not common. But several centuries ago the principle was done away in England and that of fences substituted, and thence it became a general principle there, as it has been here [in Massachusetts], for each occupant to fence his land in certain proportions, and to rely on fences for its protection. But the general principle was thus

Digitized by Google

altered only in regard to creatures properly restrainable by fences, as horses, cattle, sheep, etc., but not in regard to animals not restrained or kept within bounds by common fences. As to them the ancient principle is still in force, and their owner must keep them at his peril." Accordingly Hale, 1 Hale P. C. 430, remarks in reference to animals *feræ naturæ*, that "the owner must, at his peril, keep them up safe from doing hurt; for though he uses his diligence to keep them up, if they escape and do harm the owner is liable to answer in damages." But it is proper to observe here that the duty to fence against animals referred to in the above extract from Dane's Abridgment is not a duty imposed by the common law, but exists by prescription only, and is limited not merely to domestic animals, but to such domestic animals as are rightfully on the adjoining land: *Rust* v. *Low*, 6 Mass. 90; *Dovaston* v. *Payne*, 2 H. Black. 527; 6 Bac. Abr., tit. Trespass, 92, p. 594; *Holladay* v. *Marsh*, 3 Wend. 146 [20 Am. Dec. 678].

Several of the states have prescribed by statute what shall be deemed lawful fences, and provided the penalties to be inflicted on the owners of domestic animals that break through them and do damage; and in some of these states it has been holden that the effect of these provisions is to impose upon a party the duty of inclosing his field with a lawful fence, in order to entitle him to an action for any damage done there by domestic animals, although this has been determined otherwise in other states: *Studwell* v. *Ritch*, 14 Conn. 300; *Seeley* v. *Peters*, 10 Ill. 146; *Rust* v. *Low*, 6 Mass. 90; *Little* v. *Lathrop*, 5 Me. 358; *Chambers* v. *Mathews*, 18 N. J. L. 368. But if, in the construction of our statute of inclosures, we hold that a party must fence his field with a lawful fence before he can complain of damage done to him there by the animals of others, we must of course limit this immunity to the domestic animals enumerated in the statute against which he is bound to fence, and this will leave the owners of animals *feræ naturæ* under the same obligation to keep them at their peril from doing harm that the common law imposed upon them.

Under any view of the law, therefore, upon the facts stated in the answer, the plaintiff would have been liable for the damage about to be done to the defendant by this animal, and if the circumstances were such as we have enumerated, the defendant was at liberty to protect his own property by killing the animal that was about to destroy it; but under what precise conditions he could lawfully resort to such a measure cannot and

Digitized by Google

ought not to be determined until the facts of the case are more fully developed. It is sufficient for the reversal of the present judgment that if the facts substantially stated in the answer be made out in the proof, they are sufficient to justify the killing here complained of.

The judgment is reversed and the cause remanded.

DUTY OF LAND-OWNER TO FENCE AGAINST TRESPASSING ANIMALS: See the note to *Tonawanda R. R. Co.* v. *Munger*, 49 Am. Dec. 248, discussing this subject at length. See also *Vicksburg etc. R. R. Co.* v. *Patton*, 66 Id. 552, and cases collected in the note thereto.

LIABILITY FOR INJURY TO TRESPASSING ANIMALS.—This subject is sufficiently discussed in the note to *Tonawanda R. R. Co.* v. *Munger*, 49 Am. Dec. 258–272. See also *Snap* v. *People*, 68 Id. 582; *Myers* v. *Dodd*, Id. 624.

BAKER *v.* HALDEMAN.

[24 MISSOURI, 219.]

FATHER IS NOT LIABLE FOR ASSAULT BY INFANT CHILD, even, it seems, when he knows the child to be of a vicious disposition.

PARTY CANNOT COMPLAIN OF ERROR NOT PREJUDICIAL to him.

ACTION for an assault with a knife, committed upon the plaintiff by the defendant's minor son. The defendant had verdict and judgment thereon, and the plaintiff brought error, assigning as error certain instructions stated in the opinion.

Ewing, for the plaintiff in error.

By Court, LEONARD, J. It seems to have been assumed in the trial of this cause that a father was responsible for the injury caused by the willful wrong of his minor child; and the question discussed was whether this liability existed in all cases, or was confined to the case where the child was of a vicious disposition and the father was aware of it. The court decided, at the instance of the defendant, that he was liable only in the latter class of cases, and the jury accordingly found for the defendant.

An opinion, we believe, prevails to some extent in the community that a father must answer for all the civil injuries inflicted by his child, and we may suppose, therefore, that there is a foundation for this sentiment in the common sense of mankind. And accordingly it was the doctrine of the early Roman law that if a child or a slave committed an injury the person injured had a remedy for the wrong done him against the father or master,

Digitized by Google

but he had no action against the son or the slave; and the father or master might either pay the damages to the injured person, or surrender the offender to him: Smith's Dictionary of Greek and Roman Antiquities; Noxalis Actio, Just. Inst., by Saunders, lib. 4, tit. 8. And in the Institutes it is said to be with great reason that the master is permitted to deliver up the offending slave; for that it would be very unjust, when a slave does a wrongful act, to make the master liable to lose anything more than the slave itself; and that, although the ancients applied the same rule to children, yet the feeling of later times had rightly rejected such extreme rigor, and the surrender of children had passed wholly into disuse. The general principle of the Roman law, that every person is responsible, not only for injuries caused by his own act, but for all that are caused by the act of persons and things under his dominion, is expressly adopted in the civil code of France, art. 1384; but the responsibility of a father for the act of his minor child is not incurred there if the father can prove that he was not able to prevent the act which gives rise to the responsibility; and the same principles are adopted and acted upon in the state of Louisiana: *Cleaveland* v. *Mayo*, 19 La. 414; and *Guerrier* v. *Lambeth*, 9 Id. 341. Our unwritten law, however, imposes no such responsibility upon parent or master, although the statute law has made the master liable for certain specified offenses of his slave, not to exceed the slave's value, the limit prescribed in the ancient Roman law: *Ewing* v. *Thompson*, 13 Mo. 132. The present plaintiff, therefore, had no cause of action against the defendant, even upon his own statement of his case. In reference to the instructions, it is sufficient to say that there was no error in point of abstract law in refusing those asked by the plaintiff, and that although the one given at the instance of the defendant was erroneous, it was not to the plaintiff's prejudice, and of course is not a matter for him to complain of.

The judgment is affirmed.

PARENT'S LIABILITY FOR TORTS OF MINOR CHILDREN: See *Carmouche* v. *Bonis*, 54 Am. Dec. 558. In *Paul* v. *Hummell*, 43 Mo. 121, counsel sought to restrict the doctrine of the principal case to injuries committed by children not known to their parents to be vicious or dangerous, on the ground that that was the real point involved in the case, inasmuch as the instruction in the court below upon which the case went up was that the father's liability was confined to cases where the child was of a vicious disposition, and the father was aware of it. The court, however, held that there was no such distinction, and that the father would not be liable for a tort committed by his minor child if he did not sanction it, even though he knew the child to be dangerous.

Digitized by Google

STATE v. CHANDLER.

[24 Missouri, 371.]

MODE OF MAKING ASSAULT NEED NOT BE SET OUT IN INDICTMENT for an assault with a gun "loaded with powder and ball," with intent to kill.

INDICTMENT for an assault with intent to kill. The indictment was quashed on motion, and the circuit attorney brought this appeal. The facts appear in the opinion.

Ewing, attorney-general, for the state.

By Court, RYLAND, J. The defendant was indicted in the circuit court of Dunklin county at the September term, in the year eighteen hundred and fifty-five, for an assault with intent to kill one Samuel Moore. The defendant appeared to the indictment, and moved the court to quash it. The motion was sustained; the indictment quashed; the circuit attorney excepted, and brings the case here by appeal.

The indictment is as follows: "The grand jury of the state of Missouri, impaneled and sworn to inquire in and for the body of the county of Dunklin, upon their oath do present, that Lewis Chandler, late of the county of Dunklin, in the state of Missouri, on the first day of October, A. D. one thousand eight hundred and fifty-five, with force and arms, at the county of Dunklin, and state aforesaid, upon the body of one Samuel Moore, then and there being, feloniously, on purpose, and of his malice aforethought, with a deadly weapon, to wit, a gun, which he, the said Lewis Chandler, in both his hands then and there had and held, which gun was then and there loaded with gunpowder and a leaden ball, did then and there make an assault with the intent him, the said Samuel Moore, then and there to kill, against the peace and dignity of the state of Missouri." The reasons assigned in the motion to quash are, "because it is not alleged in what manner the assault was made, or the deadly weapon—the gun—was used, or attempted to be used; whether by beating or shooting, or, in fact, in any way or mode."

This indictment is almost a literal copy from a form in 3 Ch. Crim. L. 828. It is substantially good. The mode of making the assault would appear not to be necessary to be set forth. It is a matter of proof. In the opinion of this court, the particular manner in which the assault was made need not be pointed out in the indictment. Section 34 of article 2, of the act concerning crimes and punishments, R. C. 1845, p. 350, under which this indictment was found, declares that "every person

Digitized by Google

who shall on purpose, and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, etc., with intent to kill, etc., shall be punished," etc. The indictment, in substance, charges that Chandler, feloniously, on purpose, and of his malice aforethought, made an assault upon the body of one Samuel Moore with a deadly weapon, to wit, a gun held in both hands and loaded with powder and ball, with intent to kill him. This is sufficient.

The circuit court erred in quashing the indictment. Its judgment must be reversed and the cause remanded; the other judges concurring.

INDICTMENT FOR ASSAULT WITH INTENT TO KILL NEED NOT STATE MODE OF COMMITTING ASSAULT: *State* v. *Vaughn*, 26 Mo. 29, 30; *State* v. *Miller*, 25 Kan. 700, both following the principal case. In the latter of these cases the indictment was substantially the same as that in the principal case. In *State* v. *Vaughn*, *supra*, the indictment charged that the defendant "assaulted C. H. with a loaded pistol, and then and there with said pistol feloniously, etc., did shoot said C. H. with the intent to kill him." The court held that, even conceding that the averment of the shooting was insufficient, the indictment was good without that averment, under the doctrine of the principal case. In *People* v. *Aro*, 65 Am. Dec. 503, it was held that an indictment for murder not describing the offense but simply stating that on or about a certain day, etc., the defendant did "with a Colt's pistol and dirk-knife, willfully, feloniously, and with malice aforethought, kill, murder, and do to death" the deceased, was insufficient.

STATE v. BURGESS.

[24 MISSOURI, 361.]

STATUTE REQUIRING INDICTMENT TO BE INDORSED "TRUE BILL" IS DIRECTORY merely, and the omission of such indorsement cannot be made a ground of objection after trial and conviction, but the indictment may be quashed on that ground.

INDICTMENT. The opinion states the facts.

Ewing, *attorney-general*, for the state.

J. C. Griffin, for the respondent.

By Court, LEONARD, J. According to the English practice, indictments are drawn up and preferred to the grand jury by any private prosecutor, in the name of the king. The jury then hear the evidence, and if they think the accusation groundless, they indorse upon the bill "not a true bill;" but if they are satisfied of its truth, they indorse it "a true bill." It is then

Digitized by Google

delivered publicly in court by the grand jury, received by the court, and placed among its files; and the indictment is then said to be found, and the party stands accused: 4 Bla. Com. 306; 1 Ch. Crim. L. 324. The American practice is similar, except that here the grand jury generally hear the evidence first, and if they agree to find a bill, the indictment is then drawn up in form by the proper law officers of the government, and sent to them for their indorsement and delivery into court: *Webster's Case*, 5 Me. 432. In North Carolina, *State* v. *Cox*, 6 Ired. L. 446, and *State* v. *Calhoon*, 1 Dev. & B. L. 374, it has been expressly holden that the indorsement was no part of the indictment, but that it was the action of the grand jury in returning the bill into court, and the receiving of it there, that rendered it a legal accusation against the defendant; and the same opinion seems to prevail in South Carolina: *State* v. *Creighton*, 1 Nott & M. 257. And although in 1 Ch. Crim. L. 324, it is said that the indorsement "a true bill" becomes part of the indictment, and renders it a complete accusation, yet *Rex* v. *Ford*, Yelv. 99, which is referred to as authority, does not seem to warrant the assertion; indeed, the position is contradicted by the form of the record, which, when formally drawn up, omits all mention of the indorsement, and states in the caption merely that the grand jury present that the accused did, etc., reciting the allegations of the indictment; and this is the principle upon which the want of a proper indorsement is disallowed in arrest of judgment after a conviction: *Burgess* v. *Commonwealth*, 2 Va. Cas. 483; *Wau-kon-chaw-neek-kaw* v. *United States*, Morris, 332; and the cases from North and South Carolina above referred to. However, in *Webster's Case*, 5 Me. 432, where the words of the finding were indorsed, but the foreman's signature was admitted, and *State* v. *Squire*, 10 N. H. 558, where the signature only was omitted, the defect was allowed to prevail, after verdict, in arrest of judgment, on the ground, it would seem, that the matters omitted were an essential part of the indictment. Subsequently, however, in *State* v. *Freeman*, 13 Id. 488, the supreme court of New Hampshire held that the omission of the words "a true bill," if the foreman's signature was indorsed, was no cause for arresting the judgment, and expressly overruled *Webster's Case*, *supra*, and this decision was followed in Massachusetts, in *Commonwealth* v. *Smith*, 1 Lead. Crim. Cas. 204, note.

The practice that prevails in our state as to the indorsement upon an indictment when found by the grand jury was incor-

Digitized by Google

porated into our written law at the revision of 1835; and afterwards, in Merten's case, this court decided that this requirement was directory merely, and could not prevail after a trial and conviction, and to this decision we still adhere. The present question, however, is altogether a different one; the circuit court having, in the preliminary stage of the proceeding, quashed the indictment for want of the required proof of its authenticity, we are asked to reverse the order, and thus in effect, partially at least, repeal the statute by declaring that the circuit court cannot, if the omission escape them at the time the bill was presented, afterwards correct the omission by quashing the indictment before trial. We think otherwise; the proof of the authenticity of the indictment required by the statute is the most convenient and trustworthy that could be provided, and we see no reason why the courts should not make the provision effectual by exacting a compliance with it, when it has not been waived, if not, indeed, rendered quite unnecessary by the conviction of the party after a fair trial.

The judgment is affirmed.

INDICTMENT NOT INDORSED "TRUE BILL," with the name of the foreman of the grand jury signed to such indorsement, was held to be a nullity in *Nomaque* v. *People*, 12 Am. Dec. 157, contrary to the doctrine of the principal case. But in *State* v. *Murphy*, 47 Mo. 275, it was held that the want of such indorsement could be taken advantage of only by a motion to quash the indictment, as laid down in the principal case.

STATE v. McO'BLENIS.

[24 MISSOURI, 402.]

DEPOSITION OF WITNESS SINCE DECEASED, TAKEN ON PRELIMINARY EXAMINATION in a criminal case, in the presence of the accused, is competent evidence on the trial, and its admission is not in contravention of the constitutional provision that the accused shall have the right to be confronted with the witnesses against him.

INDICTMENT for murder. The defendant was convicted and appealed. The principal ground of the appeal was the admission, against the defendant's objection, of the deposition of one Nievergelder, taken on the preliminary examination of the accused, it having been first proved that Nievergelder had since died.

U. Wright, E. Bates, and Blennerhassett, for the appellant.

H. A. Clover, circuit attorney, for the state.

Digitized by Google

By Court, LEONARD, J. The main question that has been discussed before us in this case is the competency of Nievergelder's deposition, which was regularly taken before the committing magistrate upon the preliminary examination, in the presence of the accused, and read on the trial upon proof of the deponent's death. Before we dispose of it, however, we will remark that, on a careful examination of the record and consideration of other points presented, we have not found any ground for reversing the judgment, in the impaneling of the jury, in the admission or exclusion of evidence, in the instructions under which the cause was tried, or in the verdict, either as to form or substance; and dismissing with these remarks the minor points, we proceed at once to the question that was mainly relied upon in argument before us.

The proud answer of the Roman governor to the Jews, when they demanded of him the condemnation of Paul, was: "It is not the manner of the Romans to deliver any man to die before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." And De Lolme, a foreigner, born in Switzerland, and educated under the civil law, impressed by the strong contrast in this respect between the mode of administering criminal justice in England and throughout the continent of Europe, says: "When at length the jury is formed, and they have taken their oath, the indictment is opened, and the prosecutor produces the proofs of his accusation; but, unlike the rules of the civil law, the witnesses deliver their evidence in the presence of the prisoner:" 2 De Lolme, by Stephens, b. 1, c. 12, 13. And again: "It is an invariable rule that the trial be public; the prisoner neither makes his appearance nor pleads but in places where everybody may have free entrance; and the witnesses when they give their evidence, the judge when he delivers his opinion, the jury when they give their verdict, are all under the public eye." In a note we are informed of the secrecy with which the proceedings in the administration of criminal justice are carried on according to the rules of the civil law, which, in that respect, are adopted all over Europe. "As soon as the prisoner is committed, he is debarred of the sight of everybody till he has gone through his several examinations. One or two judges are appointed to examine him, with a clerk to take his answers in writing, and he stands alone before them in some private room in the prison. The witnesses are to be examined apart, and he is not admitted to see them till their evi-

Digitized by Google

dence is closed; they are then confronted together before all the judges, to the end that the witnesses may see if the prisoner is really the man they meant in delivering their respective evidences, and that the prisoner may object to such of them as he shall think proper. This done, the depositions of those witnesses who are adjudged upon the trial to be exceptionable are set aside. The depositions of the others are to be laid before the judges, as well as the answers of the prisoner, who has been previously called upon to confirm or deny them in their presence; and a copy of the whole is delivered to him that he may prepare for his justification. The judges are to decide both upon the matter of law and the matter of fact, as well as upon all incidents that may arise during the course of the trial, such as admitting witnesses to be heard in behalf of the prisoner," etc.

This contrast between the common-law and civil-law mode of administering criminal justice, which prevailed over the whole continent ever since the latter age of the Roman law, impressed itself strongly upon the mind of the intelligent foreigner, and is forcibly presented in his book; and these great principles of the common law to which he has referred—the accusation by a grand jury; the public trial by petit jury of the neighborhood, instead of by a permanent body of men; the production of the witnesses before the court, and their public examination there in the presence of the accused; the right of the accused to compel the attendance of his own witnesses to be heard in his own defense; and his exemption from torture, or being otherwise required to testify against himself—have been deemed of so much importance on this side of the Atlantic that they have been generally, in some shape or other, incorporated into most of the American constitutions, and in this way secured against legislative control. Our own bill of rights secures to the accused, among other things, the right "to be heard by himself and his counsel;" "to demand the nature and cause of accusation;" "to have compulsory process to compel the attendance of witnesses in his favor;" "to meet the witnesses against him face to face;" and "to a speedy trial by an impartial jury of the vicinage," and to an exemption from "being compelled to give evidence against himself;" and the admission upon the present trial of Nievergelder's deposition is supposed to have violated the clause which secures to the accused "in all criminal prosecutions the right to meet witnesses against him face to face." The great security of the accused, however, after all, is in the funda-

Digitized by Google

mental principle of the common law, that legal evidence consists in facts testified to by some person who has personal knowledge of them; thus excluding all suspicions, public rumors, second-hand statements, and generally all mere hearsay testimony, whether oral or written, from the consideration of the jury—the usual test of this hearsay evidence being that it does not derive its value solely from the credit to be given to the witness who is before them, but partly from the veracity of some other individual. This great principle, however, like all others, has its exceptions and limitations, which are as well settled as the rule itself, and among these exceptions, in its application to the administration of criminal justice, are dying declarations in reference to the same homicide, and the deposition of a witness regularly taken in a judicial proceeding against the accused in respect to the same transaction and in his presence, when the subsequent death of the witness has rendered his production in court impossible; and the question now to be passed upon comes to this: whether the provision in our constitution is to be construed so as to abolish both or either of these exceptions, so that hereafter this species of evidence, which has heretofore, it is believed, always been received both in England and all over the United States, must be excluded.

The constitution, it is to be observed, has not undertaken to define by any direct provision what constitutes competent evidence in criminal cases, except in the single case of treason, but requires it to come from witnesses standing in the presence of the accused, and it may be in the tribunal where his guilt or innocence is to be finally passed upon. If the clause be understood literally, it provides for the production of the witness, but does not prescribe what he may communicate as evidence. It compels his presence in court, but leaves the evidence he may give to be regulated by law. The dying statement of the slain, and the deposition of the deceased witness, are both mere hearsay in the legal sense of the term. The truth of the facts they relate do not depend upon the veracity of the witness who heard the oral statement in one case, or of the officer who heard the testimony of the deponent and wrote it down and read it over to him in the other, but mainly upon the credit due to statements made under such circumstances. Even in the civil-law mode of procedure the witnesses, it seems, are ultimately confronted with the accused, and therefore it may be said literally even there that they "meet the accused face to face." But all such constructions would be quite too narrow, and alto-

Digitized by Google

gether unworthy both of the instrument and of this tribunal. The people have incorporated into their frame of government a great living principle of the common law, under which they and their ancestors have lived, and it is the duty of the court so to construe it as to make it effectual to answer the great purpose they had in view. And this principle, we think, is no other than the principle of the common law in reference to criminal evidence; that it consists in facts within the personal knowledge of the witness, to be testified to in open court in the presence of the accused. This principle, however, was nowhere written down on parchment. It is not to be found in Magna Charta or in the English bill of rights, but it existed in the living memory of men, and was always a part of the common law, although in bad times it was trodden under foot by bad men in high places. It is not, however, a stiff, unbending rule, extending to every case without exception, falling within its letter, but is limited and controlled by subordinate rules, which render it safe and useful in the administration of public justice, and are as well established as the great principle itself, which, with all its exceptions and limitations, was taken from the existing law of the land and incorporated into the constitution. The purpose of the people was not, we think, to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land from future change by elevating them into constitutional law. It may as well be the boast of an Englishman living under the common law as of a citizen of this state living under our constitution, that in a criminal prosecution he has a right to meet the witnesses against him face to face; and yet it was never supposed in England, at any time, that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness, under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the general rule.

It is said by Lord Aukland in reference to the conduct of the British courts in the sixteenth and part of the seventeenth centuries: "Depositions of witnesses forthcoming, if called, but not permitted to be confronted with the prisoner, written examinations of accomplices living and amenable, confessions of convicts lately hanged for the same offense, hearsay of these convicts repeated at second hand from others, all formed so many classes of competent evidence, and were received as such in the most solemn trials by learned judges:" Principles of

Digitized by Google

Penal Law, 2d ed., 197. But no complaint of the character of the one now made was ever heard. This was not an evil to be provided for by any law, much less by a constitutional provision; these exceptions to the general rule were never considered violations of the rule itself; they grew out of the necessity of the case, and are founded in practical wisdom. The facts thus communicated go to the jury, not as entitled to the full faith of the facts sworn to by a witness from his own personal knowledge, but yet as competent to be considered by the jury in forming their verdict. But whether these exceptions be wise or unwise is not submitted to our judgment. They were well established at the time, and, we think, went into the constitution as part of the great principle of criminal evidence adopted by the clause now under consideration.

We refer, in conclusion, in confirmation of our views upon the subject, to the decisions of the other states; but as they are cited in the briefs, we shall do so in a general manner, without calling attention to the particular cases. The privilege now under consideration exists in every state where the common law prevails, either as part of that law, or by a constitutional provision similar to our own, and yet evidence of this character, it appears, has never been excluded but in a single case, decided in early times in Tennessee, and which has since been expressly overruled. In some of the states it has been expressly recognized as competent by direct decisions to that effect, and in all of them the uniform current of judicial *dicta*, whenever the question has been a subject of discussion, is in favor of its competency. We are constrained, therefore, both on the score of reason and authority, to pronounce in favor of the legality of the evidence. The judgment must therefore be affirmed.

SCOTT, J., concurred.

RYLAND, J., delivered a dissenting opinion.

FORMER TESTIMONY OF DECEASED OR ABSENT WITNESS, admissibility of, on subsequent trial of criminal or civil case: See the note to *Bergin* v. *People*, 65 Am. Dec. 676, discussing this subject; see also *Emery* v. *Fowler*, 63 Id. 627, and cases collected in the note thereto. The doctrine of the principal case, that the deposition of a deceased witness in a criminal case, taken on a preliminary examination of the accused, is competent evidence on the trial, upon proving the death of the witness, notwithstanding the constitutional provision requiring that the accused shall be confronted with the witnesses against him, is approved and followed in *State* v. *Harman*, 27 Mo. 120; and *State* v. *Carlisle*, 57 Id. 105. And on similar grounds it is held in *State* v. *Able*, 65 Id. 370, that oral proof of testimony given on a former trial of a criminal case by a witness shown to have since died is also competent upon

Digitized by Google

a subsequent trial. But in *State* v. *Houser*, 26 Id. 432, while the principal case was approved, it was held not to authorize the admission of a deposition taken on a preliminary examination as evidence upon a subsequent trial merely upon proof that the witness had since gone beyond the jurisdiction of the court, it not appearing that the accused had anything to do with procuring his non-attendance.

PETERSON v. LAIK.

[24 MISSOURI, 541.]

DEFENDANT IN EJECTMENT DENYING CO-TENANCY WITH PLAINTIFF as alleged in the complaint cannot claim the benefit of a co-tenancy, so as to require more stringent proof of ouster than in a case between strangers.

LAW OF OUSTER BETWEEN CO-TENANTS IN EJECTMENT, WHERE DEFENDANT DENIES the plaintiff's title, is the same as if no co-tenancy existed.

ACQUIESCENCE OF INFANT AFTER FULL AGE WILL NOT PRECLUDE DISAFFIRMANCE OF DEED made by him during infancy, unless such acquiescence continues for the period necessary to confer title under the statute of limitations.

INFANT'S DEED IS DISAFFIRMED BY SUBSEQUENT CONVEYANCE of the same land by the infant after attaining his majority.

WHETHER DEED AFTER MAJORITY CONSTITUTES DISAFFIRMANCE of a prior deed executed by the grantor while an infant is a question of law for the court.

EJECTMENT for certain realty claimed by defendant under conveyances from Pierre and Charles Tourville, to whom the same had been conveyed by certain infants. The plaintiffs claimed under subsequent conveyances from the infants, executed after such infants had attained their majority. The conveyances to the plaintiffs made no mention of the prior conveyances during the infancy of the grantors. The plaintiffs asked an instruction to the effect that an infant's deed may be avoided by a subsequent conveyance of the same land by the infant after arriving at age, which instruction the court refused, and instructed the jury in substance: 1. That the deeds of the infants in this case were voidable, and could be disaffirmed by subsequent conveyances made after attaining their majority, if such subsequent conveyances were intended to have that effect, and that the question whether or not they were so intended was for the jury; 2. That if the plaintiffs claimed only an undivided share in the land, and were tenants in common with the defendant, the latter was entitled to a verdict, unless the jury were satisfied that he had actually ejected the plaintiffs from possession or hindered their taking possession. Verdict and judgment for the defendant, and the plaintiffs appealed, assigning as error the refusal

Digitized by Google

of the instruction prayed by the plaintiffs, and the giving of the instructions above recited.

Morehead, for the appellants.

Kribben, for the respondent.

By Court, SCOTT, J. Under the circumstances of the case, the instruction given by the court as a substitute for that offered by the plaintiff was erroneous. As the defendant in her answer under oath denies the right of the plaintiffs to the premises, they, for the purposes of the suit, could not be regarded as co-tenants. The instruction gave the defendant all the benefit of an actual co-tenancy in making her defense, while at the same time she holds the plaintiffs at arms-length, and denies that they have any title. The law of ouster in an action of ejectment between co-tenants, wherein the one denies that the other ever had any title to the disputed premises, must be the same as in an action between those who are connected by no such relation. If the defendant wanted the benefit of the facts assumed in the instruction, why, in her answer, did she not disclaim to hold adversely to the plaintiffs? She would in one breath deny that the plaintiffs were her co-tenants, and in the other claim the benefit of the relation. Where one co-tenant seeks to bar another on the ground of adverse possession, the law requires proof of unequivocal acts showing an actual ouster. So where the title of the plaintiff as a co-tenant is not disputed by the defendant, and the case turns on the fact whether there has been a disseisin of one co-tenant by another, the plaintiff must show an actual ouster, or that some act was done by the defendant amounting to a total denial of the right of the plaintiff as a co-tenant. But in an action wherein the co-tenancy is denied ever to have existed, there is no reason why stronger evidence of an ouster should be required of one claiming as co-tenant than any other party. In such case the eleventh section of the act concerning ejectment has no application. By filing such an answer as was put in in this case, an act was done which showed that the defendant made a total denial of the right of the plaintiffs as co-tenants.

There was error in submitting to the jury the construction of the deeds read in evidence. Whether the deeds amounted to a disaffirmance of the act done by those who executed them while they were infants was a question of law for the determination of the court. That a deed executed by one who has attained his majority, conveying lands which he had alienated during his

Digitized by Google

infancy, is a disaffirmance of a deed of alienation made during his infancy, is the well-settled doctrine of this court. The acquiescence of the infant, after his reaching his full age, for a period short of that which would secure a title by the statutes of limitations, does not destroy or take away the right which the law, for wise purposes, has conferred on infants of disaffirming their deeds. Whether the infant may not, after attaining full age, within a shorter time, by his declarations, acts, or conduct, restrain himself from a disaffirmance of his acts done, during infancy, is a question not presented by anything contained in this record. In the case before us, we are of the opinion that the deeds, executed by the infants after they attained their majority, and relied on by the plaintiffs, amounted to a disaffirmance of the deeds made for the same land during their infancy: *Youse* v. *Norcoms*, 12 Mo. 549 [51 Am. Dec. 175]; *Norcum* v. *Gaty*, 19 Id. 65; *Tucker* v. *Moreland*, 10 Pet. 72; *Jackson* v. *Carpenter*, 11 Johns. 539; *Jackson* v. *Burchin*, 14 Id. 124.

Judge Ryland concurring, the judgment is reversed and the cause remanded.

LEONARD, J., absent.

OUSTER OF TENANT IN COMMON BY CO-TENANT, WHAT CONSTITUTES: See *Colburn* v. *Mason*, 43 Am. Dec. 292; *Harmon* v. *James*, 45 Id. 296; *Meredith* v. *Andres*, Id. 504; *Jones* v. *Weathersbee*, 51 Id. 653; *McMahan* v. *McMahan*, 53 Id. 481; *Marcy* v. *Stone*, 54 Id. 736; *Young* v. *Adams*, 58 Id. 654, and notes thereto.

DISAFFIRMANCE OF INFANT'S DEED BY SUBSEQUENT CONVEYANCE AFTER AGE: See *Bool* v. *Mix*, 31 Am. Dec. 285; *Cresinger* v. *Welch*, 45 Id. 565; *Youse* v. *Norcoms*, 51 Id. 175, and notes thereto. See also *Slaughter* v. *Cunningham*, 60 Id. 463.

AFFIRMANCE OF INFANT'S DEED BY ACQUIESCENCE AFTER AGE.—In *Cresinger* v. *Welch*, 45 Am. Dec. 565, it is held, in accordance with the doctrine of the principal case, that mere lapse of time for a shorter period than required for a title under the statute of limitations will not prevent the disaffirmance after age of a deed made during infancy, but that a shorter period, taken in connection with other circumstances, may amount to the confirmation of the deed. The principal case is commented on and approved as an authority to the same effect in *Huth* v. *Railway etc. Co.*, 56 Mo. 208, 210.

Digitized by Google

REY v. TONEY.

[24 MISSOURI, 600.]

AGISTER OF ANIMALS IS NOT INSURER OF THEIR SAFETY, and is liable for their loss only on proof of negligence or want of ordinary care on his part.

ACTION for damages for the loss of a horse belonging to the plaintiff, and bailed to the defendant for pasturage. The opinion states the facts.

J. B. Goff, for the appellant.

L. M. Shreve, for the respondent.

By Court, RYLAND, J. The finding of the facts by the court in this case will not warrant the judgment rendered thereon. The following is the finding: "The court finds from the evidence that in the spring of the year 1855 the defendant was an agister of cattle near the city of St. Louis; that the plaintiff, by his agent, delivered the horse mentioned and described in his petition to the defendant, to be by the defendant pastured and cared for, at the rate of two dollars per month during the time the defendant should pasture said horse; that the plaintiff paid to the defendant two dollars at the time he delivered the horse to the defendant in advance for the first month; that some three or four weeks afterwards the plaintiff, by his same agent, demanded the horse from the defendant at the place where the horse was left, but did not receive him; that prior to the demand the horse had either been taken away by some one, or had broken out of defendant's inclosure and strayed away; that the said horse was the property of the plaintiff, Christopher Rey, and at the time he was delivered to the defendant was of the value of one hundred and fifty dollars. The court does not find that said horse was delivered to the defendant with the express understanding, and received by the defendant with the condition, that defendant was not to be in any wise responsible for the safekeeping of said horse; nor that said defendant, under a contract, suffered him to feed upon the grass growing upon his land without any stipulation for care or attention on the part of defendant; nor that said horse escaped or was removed from defendant's premises without the knowledge or consent of defendant. Upon the facts as found, the court declares the law to be that the plaintiff is entitled to recover, and that the measure of damages is the value of the said horse at the time he was delivered to the de-

Digitized by Google

fendant, with interest from the time of the demand made for the same."

Now, an agister of cattle is not an insurer of the safe-keeping, and is answerable only in case of negligence. In the case of *Broadwater* v. *Blot*, Holt, 548, the defendant was a farmer, and had received the plaintiff's horse to agist at a stated price. The horse had strayed out of the defendant's field and was lost. Chief Justice Gibbs said: "All the defendant is obliged to observe is reasonable care. He does not insure, and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved by occasion of which the horse was lost, or gross general negligence to which the loss may be ascribed in ignorance of the special circumstance which occasioned it. If there was a want of due care and diligence generally, the defendant will be liable. The question is, Were the defendant's fences in an improper state at the time the horse was taken in to agist? Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff who intrusted the horse to him had a right to expect? I shall leave it to the jury." The finding is entirely silent as to the care or negligence of the defendant. There is nothing said in regard to the very matter on which alone the defendant can be considered liable, if at all—that is, either particular negligence by which the horse was lost, or gross general negligence. The finding therefrom will not warrant the judgment, and the case must be reversed. "In all cases where the defendant is bound only to ordinary care, and is liable only for ordinary neglect, the plaintiff cannot recover upon the mere proof of loss of the articles intrusted to the bailee. He must give some evidence of the want of care in the bailee or his servants:" *Foote* v. *Storrs*, 2 Barb. 329. "Deposits for hire—bailees of this class are responsible, like other bailees who receive a reciprocal benefit from the bailment, for ordinary care and diligence, and are responsible only for ordinary negligence. Of this class are agisters of cattle, warehousemen, forwarding merchants, and wharfingers:" 2 Story on Cont., p. 133, sec. 742.

These bailees are bound only to take reasonable and ordinary care of the bailment. Unless the theft of this horse grew out of the negligence of the defendant, he is not liable; or unless he was lost to plaintiff by the want on the defendant's part of ordinary care and diligence. The finding here shows no want of

Digitized by Google

care or diligence. The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

SCOTT, J., concurred.

LEONARD, J., did not sit.

AGISTER OF CATTLE, LIABILITY OF, FOR THEIR SAFETY: See *Cecil* v. *Preuch*, 16 Am. Dec. 171.

THOMAS *v.* WYATT.

[25 MISSOURI, 24.]

PATENT ISSUED TO FICTITIOUS GRANTEE IS NULLITY, and cannot form the basis of a valid title.

EJECTMENT. The opinion states the facts.

S. Reber and T. J. Beirne, for the appellant.

J. D. Coalter, for the respondent.

By Court, RYLAND, J. This was an action of ejectment for a tract of land in the county of St. Louis. Thomas claimed title under a patent issued by the United States, bearing date the fifth of January, 1843, to Samuel Johnson, for the land, in virtue of an entry made in the land-office. Thomas obtained title to the land under a decree of the St. Louis land court, rendered against Johnson on notice of publication without the appearance of the defendant, vesting Johnson's title in the plaintiff. The defendant claimed title, and held possession under a patent issued on the same entry to Samuel M. Coleman, assignee of Samuel Johnson, dated the fourteenth of March, 1845.

At the trial, the defendant offered to prove that Samuel Johnson was a fictitious person, and that Thomas, the plaintiff, knew the fact when he obtained his decree, and prior thereto. This evidence the plaintiff Thomas objected to, and the court ruled it out. The defendant excepted. There was a verdict for plaintiff, and judgment. The defendant made his motion for a new trial, which being overruled, he brings the case here by appeal.

The only question which the appellant makes in this court is, whether the holder of a junior patent will be allowed to defeat an older patent for the same land by showing that the patentee or grantee named is a fictitious person. The plaintiff having showed his patent and his decree under it for the land, the defendant contended that it was competent for him to show that Samuel Johnson, the patentee, was a man of straw—a mere fictitious person—and in consequence no title could pass to such a

Digitized by Google

grantee. This evidence was rejected, and, as we think, improperly.

There must be in existence some person or corporation or body capable of taking at the time the patent issued. Nothing could pass to the patentee by virtue of a patent emanating after his death: *Collins* v. *Brannin*, 1 Mo. 384. In *McCracken's Heirs* v. *Beall*, 3 A. K. Marsh. 210, the court of appeals of Kentucky, in their opinion, delivered by Judge Owsley, say: "Indeed, we cannot imagine how it is possible for any act necessary to the acquisition of right to be done in the name of a dead person, and at the same time have any legal operation. After the decease the dead person has no rights, and no rights can be acquired by others in his name. In *McDonald's Heirs* v. *Smalley*, 6 Pet. 261, Chief Justice Marshall said: "David Anderson, in whose name the entry was made under which the plaintiffs claim, was dead at the time. The entry, therefore, as was determined in *Galt* v. *Galloway*, 4 Id. 332, is in the state of Ohio a nullity. This being the foundation of the plaintiff's action, they must fail." In *Galloway* v. *Finley*, 12 Id. 297, Mr. Justice Catron, in delivering the opinion of the court, said: "The principal ground relied on for relief being that the patents were void because made after Charles Bradford's death, we will proceed to examine it. That a patent thus made passes no title is true in the nature of things; there must be a grantee before a grant can take effect. So this court held, in *Galt* v. *Galloway*, 4 Id. 345, and *McDonald* v. *Smalley*, 6 Id. 261." Now, the proof offered here was not that there had been such a man living but was dead when the patent issued, but that the entry was originally made by some other person in the name of this fictitious person—this man of straw—who was not there, nor ever had been a real person, and that this was known to plaintiff Thomas. If such was the fact, the proof had a direct tendency to defeat the plaintiff's action. For if Samuel Johnson, the patentee, never had any existence, then he had no title, and the decree could pass out of him and vest in the plaintiff no title. The proof should have been received. This point reverses the judgment below, and this is the only point we now decide. Let the judgment be reversed, and the cause remanded.

SCOTT, J., concurred.

LEONARD, J., absent.

PATENT ISSUED TO DECEASED PERSON IS VOID at common law: *Davenport* v. *Lamb*, 13 Wall. 427, citing the principal case. The principal case again came before the court, and is reported in 31 Mo. 188.

Digitized by Google

GARRISON *v.* SAVIGNAC.

[25 MISSOURI, 47.]

ONE NOT MADE PARTY TO ACTION OF EJECTMENT for land of which he was in the possession when the action was commenced cannot be dispossessed by virtue of a writ of *habere facias possessionem* issued under a judgment for the plaintiff in that action.

WHERE OFFICER DISPOSSESSES PERSON IN POSSESSION OF LAND, by virtue of a writ of possession issued in an action to which he was not a party, although he was in possession when such action was commenced, and on the removal of the force the person so dispossessed returns to the possession, the plaintiff in that action will have acquired no such possession as will entitle him to maintain an action of unlawful detainer against the person so returning to the possession.

UNLAWFUL detainer. The evidence showed that the plaintiff, Garrison, had commenced an action of ejectment for the recovery of the premises in controversy, in the circuit court of the United States, against Alfred Savignac, and recovered judgment. The other facts are stated in the opinion.

Morehead, for the appellant.

Krum and Harding, and T. T. Gantt, for the respondent.

By Court, SCOTT, J. It is evident that as far as the merits of this case are concerned they are all against the plaintiff, as the possession, the disturbance of which he complains, was obtained by means of a writ of *habere facias possessionem* which issued on a judgment, which since the execution of the writ has been reversed.

The defendant in the original suit, Alfred Savignac, and against whom the writ of *habere facias possessionem* was issued, testified that he never was in possession of the lot in controversy. The defendant in this proceeding, Francis Savignac, was turned out of the possession of the lot by the marshal, though he was no party to the suit, was not named in the writ, and though he had been in the undisturbed possession of it for six years prior to the bringing of the suit.

Had application been made to the court whence the *habere facias possessionem* issued, we see no reason why the court would have refused to award restitution, as it would not suffer its process to be perverted to the oppression of those who were no parties to it. It is said to be a settled rule of practice that no tenant who was in possession anterior to the commencement of an ejectment can be dispossessed upon a judgment and writ of possession to which he is no party: *Ex parte Reynolds*, 1 Cai.

Digitized by Google

500; *Hickman* v. *Dale*, 7 Yerg. 149; *McCord's Heirs* v. *McClintock*, 5 Litt. 305. If the defendant, Savignac, had refused obedience to the process of the officer, as he had a right to do, it not being against him, the court, under the circumstances, never would have allowed a writ of attachment against him: Adams on Ejectment, 310.

As the officer had no authority to dispossess the defendant, and as the defendant refused submission to his authority, but yielded to force, and returned to his possession so soon as the force was away, we cannot say that the plaintiff by such means acquired such a possession as would entitle him to the remedy he has adopted. It is clear that if the officer had applied to the court for aid in dispossessing the defendant, it would have been refused him, and there is no reason why the plaintiff, by taking the law in his own hand, should be in a better situation than if he had appealed to the law. We are of opinion that a sanction given to this proceeding would be the means of creating a precedent that might be productive of much injustice and oppression. Just think of it! A man who has been in possession of his premises for six years; another, wishing to obtain possession of them, will not sue the actual occupant, but brings a suit against a stranger who never was in possession of the premises, who neither knows nor cares anything about them. Against such a defendant a judgment is a thing of course. A writ is afterwards sued out, and the real tenant, who is no party to the proceeding, and who may never have heard of it, is turned out of house and home without a moment's warning. The mere possession of land is frequently a matter of much importance where there is to be litigation respecting its title, and by sanctioning this proceeding an opening will be made whereby one may obtain possession of land, his title to which he was unwilling to expose in a court of justice. The case of *Higginbotham* v. *Higginbotham*, 10 B. Mon. 369, is one in which the same defense to a writ of forcible entry and detainer was set up that has been made in this suit. The defendants did not succeed; but that was not on the ground that their defense was not properly conceived, but that the facts in evidence did not make it out; had the defense proved here been made out, the case is an authority for saying that it would have been a valid one. Judge Ryland concurring, the judgment will be reversed and a judgment for the defendant.

LEONARD, J., absent.

Digitized by Google

EXECUTION MUST CORRESPOND WITH JUDGMENT AS TO PARTIES: *Thompson* v. *Bondurant*, 50 Am. Dec. 136. No tenant who was in possession anterior to the commencement of a suit in ejectment can be dispossessed under a judgment to which he was not a party: *Goerges* v. *Hufschmidt*, 44 Mo. 180, citing the principal case.

THE PRINCIPAL CASE IS FOLLOWED in *Bernecker* v. *Miller*, 40 Mo. 475.

FAGIN *v.* CONNOLY.

[25 MISSOURI, 94.]

CONSTRUCTION OF COMMERCIAL CORRESPONDENCE IS SOMETIMES NOT MERE QUESTION OF LAW, but more a question of fact; and when this is the case, it may properly be left to the jury.

THE opinion states the facts.

Knox and Kellogg, for the appellant.

Hitchcock, for the respondent.

By Court, RYLAND, J. Fagin, a miller in the city of St. Louis, shipped to Connoly & Co., who were his factors at the time in New Orleans, during the fall of the year 1853, quantities of flour for sale. Among the lots of flour thus sent were one thousand one hundred and forty-nine barrels of superfine. The flour was to be sold by defendants for the plaintiff Fagin, and under his directions. These one thousand one hundred and forty-nine barrels were in the possession of the defendants as factors and commission merchants of the plaintiff before the fifth of December, 1853, and so remained in their possession until the latter part of January, 1854, when the same were sold by the defendants for seven dollars per barrel, the then market price.

From the evidence presented by the bill of exceptions it appears that Fagin, by a dispatch by telegraph, dated the fifth of December, 1853, instructed the defendants to hold his flour at seven dollars for superfine, and extra flour in proportion; that after receipt of this dispatch the defendants wrote to Fagin at different dates, advising the plaintiff to leave them to sell his flour without any limit as to price, trusting to their discretion. On the thirteenth of December, 1853, the plaintiff wrote to defendants and removed all limits as to his flour, hoping that they would do ample justice to him in closing sales, and requesting them to close the plaintiff's business as soon as practicable. The court, who tried the case without a jury, found as a fact that this letter revoked all previous limits on the flour of plaintiff in the hands of defendants. This letter was received by defendants. The usual

Digitized by Google

course by mail required about eight days. On the twenty-first of December, 1853, Fagin sent a dispatch by telegraph to defendants, which was received by them the same day or the next day, instructing them to hold his superfine flour and retail his extra flour. The defendants did hold his superfine flour until the seventeenth day of January, 1854, on which day, and on the following days up to the twentieth of the same month, they sold the superfine flour of the plaintiff at seven dollars per barrel—the whole lot of one thousand one hundred and forty-nine barrels. This was done without any order from the plaintiff after the dispatch of the twenty-first of December. On the thirty-first of January, 1854, the plaintiff sent a dispatch by telegraph to defendants, directing them to sell his flour after the receipt of the Atlantic's news. This dispatch was received by defendants on the first of February, 1854; and on the same day the Atlantic's news was published in New Orleans. The market price for superfine flour in New Orleans on that day, and a few succeeding days, was from seven dollars and seventy-five cents to seven dollars and eighty-seven and one half cents per barrel. The flour would have realized in market, if it had been retained under the plaintiff's dispatch until the first of February, 1854, not less than seventy-five cents per barrel net more than the price at which it was previously sold.

Now, the question here which was submitted to the court below for trial was, whether the defendants had sold the plaintiff's flour contrary to orders; and the construction of the dispatches and letters on this subject was necessary to a proper solution of this question. In this case the meaning or construction of the dispatches has been found by the court as a fact in the same manner as the jury would have found facts.

In *Brown* v. *McGran*, 14 Pet. 493, Mr. Justice Story, in delivering the opinion of the court, said: "It is certainly true, as a general rule, that the interpretation of written instruments properly belongs to the court, and not to the jury; but there certainly are cases in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but improperly developed. McGran, in the

Digitized by Google

letter of the twentieth of April, says 'that he wishes the defendants to hold any cottons on hand until they hear from him again.' Now, this language certainly ordinarily imports only a desire, and not an order, and yet there can be no reasonable doubt that, under particular circumstances, a wish expressed by a consignor to a factor may amount to a positive command. So in the reply of the twenty-fourth of May the defendants say: 'Your wishes in respect to the cotton we now hold on your account are noted accordingly.' Here again the point is open whether the language imports that the defendants construed the wishes of the plaintiff to be simply a strong expression of desire or opinion, or a positive order; and also whether the words 'noted accordingly' import that the defendants took notice thereof, or took notice of and assented to obey the wishes or order of the plaintiff." In *Lucas* v. *Groning*, 7 Taunt. 164, the meaning of the expression, "Please to give them credit in exchange when the bills were duly honored," became important to be ascertained. Gibbs, C. J., said: "This was a question singularly fit for a jury, and one on which they were likely to arrive at a sounder conclusion than the court, because their knowledge of it arises from their daily experience. But the question whether the phrase 'when duly honored' means when they were accepted, or when they were paid, was a question not so much for the consideration of a court as of a jury." Park, J., said: "The solicitor-general argues that the phrase 'duly honored' means accepted. Whether it does so or not has been left to the jury, and they have found that it meant payment, which is the opinion I should myself have formed." In *Rees* v. *Warwick*, 2 Barn. & Ald. 113, the meaning of the words "your bill of one hundred pounds, in favor of W. Johnson & Co., shall have attention," was left to a jury to be ascertained; and they by no means thought that the words "shall have attention" were clearly and unequivocally an acceptance of the bill. What is the true interpretation of mercantile phrases in such instructions or orders is not always a question of law, but may in many cases be properly left to a jury to decide, where the phrases admit of different meanings: Story on Agency, sec. 75.

Under the principles contained in the above cases, and according to the authority above cited, the meaning of the dispatches and instructions given by plaintiff to defendants was not so much for the consideration of the court as a matter of law as for the consideration of a jury. Here the court, sitting as a

Digitized by Google

jury, found the meaning of these dispatches, and according to such meaning, the defendants sold the flour contrary to orders, and are liable to plaintiff for the injury arising from such breach of orders. If the meaning of the dispatches was in so much doubt, or if this court might have found differently even from the court below, still that will not warrant our interference with the finding where it might have been, from the evidence, either way. The construction of the dispatches not being a mere question of law, but more a question of fact, we cannot, as a matter of law, say the court below erred.

From a careful examination of the evidence preserved in the record, I am satisfied with the finding of the court below, and entertain not the slightest doubt that the sale of the one thousand one hundred and forty-nine barrels of superfine flour was made against express directions. The whole correspondence between these parties warrants that conclusion. Here, the superfine flour was under a limit—seven dollars. The defendants wrote to plaintiff, advising him to remove all limit and leave the flour in their hands free to be sold at their discretion. He answers this letter, removing all limits. This answer reaches the defendants, but not before the telegraphic dispatch ordering them to "hold superfine and retail extra." The telegraphic dispatch is dated the twenty-first, the letter removing limits is dated the thirteenth, of December. Now, no matter what the defendants might have supposed to be the meaning of the dispatch, the moment they got the letter they would then see that Fagin sent the dispatch to do away with what he might suppose would be the effect of his letter on the superfine flour. He had removed all limits. He then withdrew from market his superfine flour by his dispatch, waiting for a better market ahead. The defendants had no right to suppose the dispatch was the answer of Fagin to their letter, asking to withdraw all limit on the price of the flour, after he received his letter expressly purporting to answer it. They should have examined the dates of the letter and the dispatch, and then I think that there could have been no mistake about the intentions of Fagin. After Fagin's dispatch ordering defendants to "hold superfine and retail extra," if the market had risen to ten dollars per barrel, they had no right to sell the superfine without further orders from Fagin. The withholding the superfine was not until at a certain price in market, but must mean until further orders.

The judgment will be affirmed, the other judges concurring.

Digitized by Google

CONSTRUCTION OF WRITING, WHEN QUESTION FOR COURT AND WHEN FOR JURY.—It is a firmly established and universally recognized rule of law that the construction of a written instrument is a question of law for the court. It is the duty of the court, in all cases where the question is simply the determination of the meaning and effect of a written document, to declare its legal interpretation, and it is error to leave its construction to the jury: *Levy* v. *Gadsby*, 3 Cranch, 180; *Kidd* v. *Cromwell*, 17 Ala. 648; *Moore* v. *Leseur*, 18 Id. 606; *Price* v. *Mazange*, 31 Id. 701; *Illinois Cent. R. R. Co.* v. *Cassell*, 17 Ill. 389; *Leviston* v. *Junction R. R. Co.*, 7 Ind. 597; *Rohrabacher* v. *Ware*, 37 Iowa, 85; *Andrews* v. *Tedford*, Id. 314; *Snyder* v. *Kurtz*, 61 Id. 593; *Fowle* v. *Bigelow*, 10 Mass. 379; *Lapeer Ins. Co.* v. *Doyle*, 30 Mich. 159; *McKenzie* v. *Sykes*, 47 Id. 294; *Drew* v. *Towle*, 30 N. H. 531; S. C., 64 Am. Dec. 309; *Welsh* v. *Dusar*, 3 Binn. 329; *Diefenback* v. *Stark*, 56 Wis. 462; S. C., 43 Am. Rep. 719; *Neilson* v. *Harford*, 8 Mee. & W. 823. This rule is applied to written instruments of every description.

1. *Contracts.*—It is a general rule that all written contracts must be construed by the court. "It is a wise and well-established rule of law that the true construction of written contracts is to be declared by the court, and not submitted to the finding of a jury:" *Per* Dorsey, J., delivering the opinion of the court, in *Emery* v. *Owings*, 6 Gill, 199; *Williams* v. *Waters*, 36 Ga. 454; *Streeter* v. *Streeter*, 43 Ill. 155; *Lowry* v. *Megee*, 52 Ind. 107; *Thomas* v. *Thomas*, 15 B. Mon. 178; *Nash* v. *Drisco*, 51 Me. 417; *Cocheco Bank* v. *Berry*, 52 Id. 293; *Lapeer Ins. Co.* v. *Doyle*, 30 Mich. 159; *Wagner* v. *Egleston*, 49 Id. 218; *Perth Amboy M. Co.* v. *Condit*, 21 N. J. L. 659; *Rogers* v. *Colt*, Id. 704; *Glacius* v. *Black*, 67 N. Y. 563; *Brown* v. *Hatton*, 9 Ired. L. 319; *Roth* v. *Miller*, 15 Serg. & R. 100; *Wason* v. *Rowe*, 16 Vt. 525. The question whether a sum stipulated for in a written contract to be paid in case of a breach of the contract is a penalty or liquidated damages is a question for the court: *March* v. *Allabough*, 103 Pa. St. 335. And so also is the question whether or not statements contained in a written pamphlet constitute a warranty: *Claghorn* v. *Lingo*, 62 Ala. 230. The rule under consideration extends to the correct reading of the words of the contract as well as to their meaning. Thus, it was decided in *Lapeer Ins. Co.* v. *Doyle*, 30 Mich. 159, that the question whether the letters "oix" in a policy of insurance were meant for "six," which would make sense, or for "oix," which would not make sense, was one of law for the court. And even where a written contract has been lost, and parol evidence of its contents has been received, its construction is still for the court, and not for the jury: *Berwick* v. *Horsfal*, 4 C. B., N. S., 450.

2. *Deeds.*—It is also the province of the court to construe deeds, and to judge of their legal effect: *McCutchen* v. *McCutchen*, 9 Port. 650; *Seaward* v. *Malotte*, 15 Cal. 304; *Stark* v. *Barrett*, Id. 361; *Montag* v. *Linn*, 23 Ill. 551; *Miller* v. *Shackleford*, 4 Dana, 264; *Venable* v. *McDonald*, Id. 366; *Bonney* v. *Morrill*, 52 Me. 252; *American Bank* v. *Inloes*, 7 Md. 385; *Whiteford* v. *Munroe*, 17 Id. 135; *Warner* v. *Miltenberger's Lessee*, 21 Id. 264; *Whittelsey* v. *Kellogg*, 28 Mo. 404; *Dean* v. *Erskine*, 18 N. H. 81; *Smith* v. *Clayton*, 29 N. J. L. 357; *St. John* v. *Bumpstead*, 17 Barb. 100; *Cox* v. *Freedley*, 33 Pa. St. 124; *Mowry* v. *Stogner*, 3 S. C. 251; *Hodges* v. *Strong*, 10 Vt. 247; *Stephens* v. *Hollister*, 18 Id. 294; *Morse* v. *Weymouth*, 28 Id. 825. But although the construction of a deed or of a written contract belongs to the court, and ought not to be submitted to the jury, yet if it is so submitted, and the jury construe it aright, the submission will not constitute a good ground for ex-

Digitized by Google

ception: *Woodman* v. *Chesley*, 39 Me. 45; *Warner* v. *Miltenberger*, 21 Md. 264; *Smith* v. *Faulkner*, 12 Gray, 251; *Morse* v. *Weymouth*, 28 Vt. 825.

3. *Promissory Notes.*—It is for the court to determine the legal effect of a promissory note, and it is error to leave its construction to the jury: *Terry* v. *Shively*, 64 Ind. 106. And whether an alteration made in a note is material or not is also a question of law for the court: *Belfast Bank* v. *Harriman*, 68 Me. 522. So also as to an alteration in a contract: *Oliver* v. *Hawley*, 5 Neb. 439. But in *Hueske* v. *Broussard*, 55 Tex. 201, it was held that where the true meaning of an indorsement is doubtful, the question may be properly submitted to the jury.

4. *Wills.*—The construction of wills is for the court, and not for the jury: *Willson* v. *Whitfield*, 38 Ga. 269; *Warner* v. *Miltenberger's Lessee*, 21 Md. 264; *Sartor* v. *Sartor*, 39 Miss. 760; *Magee* v. *McNeil*, 41 Id. 17; *Burke* v. *Lee*, 76 Va. 386. And it is for the court to determine whether or not a will has been executed with the proper formalities: *Riley* v. *Riley*, 36 Ala. 496; *Roe* v. *Taylor*, 45 Ill. 485. So, too, the question whether a paper is testamentary in its nature or not is to be determined by the court, and not by the jury: *Watford* v. *Forester*, 66 Ga. 738.

5. *Statutes, City Ordinances, By-laws, etc.*—The construction of a statute, city ordinance, or by-law is a question of law to be determined by the court, and an instruction which leaves such construction to the jury is erroneous: *Barnes* v. *Mayor of Mobile*, 19 Ala. 707; *Fairbanks* v. *Woodhouse*, 6 Cal. 433; *Denver & Rio Grande R'y Co.* v. *Olsen*, 4 Col. 239; *Peoria* v. *Calhoun*, 29 Ill. 317; *Pennsylvania Co.* v. *Frana*, 13 Ill. App. 91; *Maltus* v. *Shields*, 2 Metc. (Ky.) 553. And the question whether or not a city is bound by its charter to keep its sidewalks in repair is one of law for the court to determine: *Bonine* v. *City of Richmond*, 75 Mo. 437.

6. *Foreign Law.*—The construction of a foreign law, and the interpretation of its meaning and effect, are for the court: *Consegua* v. *Willings*, 1 Pet. C. C. 225; *Cecil Bank* v. *Barry*, 20 Md. 287; *Kline* v. *Baker*, 99 Mass. 253; *Charlotte* v. *Chouteau*, 33 Mo. 194; *State* v. *Jackson*, 2 Dev. L. 563.

7. *Treaties.*—The construction of treaties belongs to the court, and not to the jury: *Harris* v. *Doe*, 4 Blackf. 369.

8. *Records.*—The construction of records is also a matter of law to be determined by the court: *Hempstead* v. *City of Des Moines*, 52 Iowa, 303; *Adams* v. *Betz*, 1 Watts, 425; S. C., 26 Am. Dec. 79.

9. *Acknowledgment of Debt.*—The question whether or not a written acknowledgment of a debt is sufficient to remove the bar of the statute of limitations is one of law for the court: *Warlick* v. *Peterson*, 58 Mo. 408. In the case of *Lloyd* v. *Maund*, 2 T. R. 760, it was held that the question whether the letter of the defendant, who pleaded the statute of limitations, was an acknowledgment of the debt or not, should have been left to the jury. But in the case of *Morrell* v. *Frith*, 3 Mee. & W. 402, Parke, B., said that the case of *Lloyd* v. *Maund*, *supra*, was not law. But whether or not letters containing a promise to take the case out of the statute refer to the original debt is a question of fact for the jury, and not of law for the court: *Dickinson* v. *Lott*, 29 Tex. 172.

10. *Receipts.*—The construction of a written receipt is a matter of law for the court, and not of fact for the jury: *Union Bank* v. *Heyman*, 15 S. C. 296. And whether a writing in evidence is a discharge of a judgment or not is a question of law for the court: *Agate* v. *Sands*, 8 Daly, 66.

11. *Town Plat.*—The construction of a town plat is also a question of law for the court: *Hanson* v *Eastman*, 21 Minn. 509.

Digitized by Google

12. *Decrees.*—The construction of the meaning and effect of a decree is a question of law for the court: *Shook* v. *Blount*, 67 Ala. 301.

LIMITATIONS OF RULE.—Where a written instrument contains technical terms or words peculiar to a particular trade or business, or where extrinsic evidence is admitted to remove a latent ambiguity, or to explain the circumstances connected with the subject-matter or surrounding the parties to the instrument, the interpretation of the language of the instrument may sometimes be left to the consideration of the jury for the purpose of effecting the true intention of the parties.

1. *Commercial Correspondence.*—This principle is most frequently applied in the case of mercantile contracts and transactions, and particularly to instructions or orders contained in correspondence between merchants. "What is the true interpretation of mercantile phrases in such instructions or orders is not always a question of law, but may, in many cases, be properly left to a jury to decide, where the phrases admit of different meanings:" Story on Agency, sec. 75. In the case of *Lucas* v. *Groning*, 7 Taunt. 164, it was left to the jury to determine whether the words "duly honored," contained in a letter referring to a bill of exchange, meant "duly accepted" or "duly paid." And Gibbs, C. J., in that case, said: "This was a question singularly fit for a jury, and one on which they were likely to arrive at a sounder conclusion than the court, because their knowledge of it arises from their daily experience. . . . . The question whether the phrase 'when duly honored' means when they were accepted, or when they were paid, was a question not so much for the consideration of the court as of a jury." In *Rees* v. *Warwick*, 2 Barn. & Ald. 113, it was decided that it was properly left to the jury to determine whether or not the words "the bill shall have attention," contained in a letter of the drawee, meant an acceptance. And in *Smith* v. *Thompson*, 8 C. B. 44, it was held that the meaning of the term "business purposes" was properly left to the determination of the jury. Mr. Justice Story, in discussing this subject, in delivering the opinion of the court in *Brown* v. *McGran*, 14 Pet. 493, said: "One objection taken to this instruction is that it leaves to the jury the construction of the language of the letters of the twentieth of April and the twenty-fourth of May. It is certainly true, as a general rule, that the interpretation of written instruments properly belongs to the court, and not to the jury. But there certainly are cases in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed. The present case sufficiently illustrates the distinction. McGran, in the letter of the twentieth of April, says that he wishes the defendants to hold any cottons on hand until they hear from him again. Now, this language certainly ordinarily imports only a desire, and not an order; and yet there can be no reasonable doubt that under particular circumstances a wish expressed by a consignor to a factor may amount to a positive command. So in the reply of the twenty-fourth of May the defendants say: 'Your wishes in respect to the cotton we now hold on your account are noted accordingly.' Here again the point is open whether the language imports that the defendants construed the wishes of the plaintiff to be simply a strong expression of desire or opinion, or a positive order; and also whether the words 'noted accordingly' import that the

Digitized by Google

defendants took notice thereof, or took notice of and assented to obey the wishes or order of the plaintiff. The language is susceptible of either interpretation, according to circumstances. If the case had been one of simple consignment, without any interest in the consignee, or any advance or liability incurred on account thereof, the wishes might fairly be presumed to be orders; and the noting the wishes accordingly an assent to follow them. But very different considerations might apply where the consignment should be, as the present is, one clothed with a special interest and a special property, founded upon advances and liabilities. We think, therefore, that this objection is not, under the circumstances of the case, maintainable. It would be quite another question whether the court might not, in its discretion, have assumed upon itself the right and duty of construing these letters."

In the case of *Stone* v. *Lothrop*, 109 Mass. 63, the owner of bonds ordered his agent to sell them, but the agent did not do so. Two or three months after, the owner telegraphed, "Have you sold? Will they go lower?" and the question whether this dispatch referred to the bonds, and whether or not it was a waiver of the order to sell, was for the jury. It must be admitted that there exists some difference of judicial opinion upon the question how far the construction of commercial letters is a question for the jury. In the case of *Macbeath* v. *Haldimand*, 1 T. R. 181, Willes, J., said: "The construction of deeds is a matter of law, but that of letters is proper for the consideration of the jury." But in the same case, Buller, J., said: "I do not agree with my brother Willes as to the construction of letters. If they be written in so dubious a manner as to be capable of different constructions, and can be explained by other transactions, the whole must be left to the jury to decide upon, for they are to judge of the truth or falsehood of such collateral facts which may vary the sense of the letters themselves; but if they be not explained by any other circumstances, then, like deeds or other written agreements, the construction of them is a mere matter of law." And Lord Mansfield, in his opinion in the same case, said: "Then it was objected that whether the defendant had made himself liable or not was a question which ought to have been left to the jury to decide. But there was no evidence which was proper for their consideration; for the evidence consisting altogether of written documents and letters which were not denied, the import of them was matter of law, and not of fact." The doctrine laid down by the two last-named judges is undoubtedly correct. No valid reason can be found for making a distinction in this respect between a contract contained in letters and one contained in a single instrument. And the authorities are decidedly in favor of applying the rule that written instruments are to be construed by the court, in its full force, to all contracts clearly made out from the correspondence of the parties thereto: *Goddard* v. *Foster*, 17 Wall. 123; *Luckhart* v. *Ogden*, 30 Cal. 547; *Auffmordt* v. *Stevens*, 46 Conn. 411; *Lea* v. *Henry*, 52 Iowa, 662; *Van Valkenburg* v. *Rogers*, 18 Mich. 180; *Russell* v. *Arthur*, 17 S. C. 477; *Ranney* v. *Higby*, 5 Wis. 62; *United States* v. *Shaw*, 1 Cliff. 317; *Begg* v. *Forbes*, 30 Eng. L. & Eq. 508.

2. *Technical Terms and Words Peculiar to Particular Trade or Business.* — When written instruments contain technical terms, or words used in a sense peculiar to some particular art, trade, or business, it is proper to leave it to the jury to ascertain and determine the sense in which such terms are employed: *Simpson* v. *Margitson*, 11 Ad. & El., N. S., 23; S. C., 63 Eng. Com. L. 23; *Morrell* v. *Frith*, 3 Mee. & W. 402; *Hutchinson* v. *Bowker*, 8 C. B. 535; *Bowes* v. *Shand*, L. R. 2 App. Cas. 530; *Alexander* v. *Vanderzee*, L. R. 7 C. P. 530; *Goddard* v. *Foster*, 17 Wall. 123; *McAvoy* v. *Long*, 13 Ill. 147; *Wil-*

Digitized by Google

liams v. *Woods*, 16 Md. 220; *Prather* v. *Ross*, 17 Ind. 495; *Eaton* v. *Smith*, 20 Pick. 156; *Smith* v. *Faulkner*, 12 Gray, 251; *Silverthorne* v. *Fowle*, 4 Jones L. 362; *Sellars* v. *Johnson*, 65 N. C. 104. Lord Abinger, C. B., in the case of *Morrell* v. *Frith*, 3 Mee. & W. 404, said: "One case in which the effect of a written document must be left to a jury is, where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts in which peculiar terms and abbreviations are employed. So, also, where a series of letters form a part of the evidence in the cause, they must be left, with the rest of it, to the jury." And Shaw, C. J., in delivering the opinion of the court in *Eaton* v. *Smith*, 20 Pick. 156, said: "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage."

In *Alexander* v. *Vanderzee*, L. R. 7 C. P. 530, the defendant contracted to purchase a large quantity of Danubian maize, to be shipped in June and July, 1869. In fulfillment of the contract, the seller offered two cargoes of maize, the bills of lading for which were dated respectively the fourth and sixth of June, 1869. The shipment of the cargoes began on the twelfth and sixteenth of May respectively, and was completed on the fourth and sixth of June. There was evidence that grain shipped in May was more likely to heat than grain shipped in June. A majority of the court of exchequer chamber held that it was properly left to the jury to say whether the shipments were "June shipments" in the ordinary business sense of the term. In the case of *Jolly* v. *Young*, 1 Esp. 186, Lord Kenyon left it to the jury to say whether by the word "month" in a mercantile contract was meant a lunar month or a calendar month. And in the case of *Phœnix Iron Co.* v. *Samuel*, 13 Week. Not. Cas. 50, it was held not to be error to leave to the jury the meaning of the words "early spring" in London, contained in a written contract. But when the jury have so found the meaning of the terms or words employed in such contracts, it is still the duty and province of the court to construe the contract itself and to determine its meaning and effect: *Hutchinson* v. *Bowker*, 8 C. B. 535; *Bowes* v. *Shand*, L. R. 2 App. Cas. 262; *Williams* v. *Woods*, 16 Md. 220. *Smith* v. *Faulkner*, 12 Gray, 254; *Curtis* v. *Martz*, 14 Mich. 506; *Silverthorne* v. *Fowle*, 4 Jones L. 362. The case of *Hutchinson* v. *Bowker*, *supra*, was an action of *assumpsit* for the non-delivery of barley. It was proved on the trial that the defendants wrote to the plaintiffs, offering them a quantity of "good" barley on certain terms. The plaintiffs answered, accepting the offer, but stating that they would expect "fine" barley. The defendants replied that their letter contained no such expression as "fine" barley, and declined to ship. The jury found that there was a distinction in the trade between "good" and "fine" barley. The court decided that although it was for the jury to find the meaning of these terms, yet when so found, it was for the court to determine the meaning of the contract. Lord Abinger, C. B., in his opinion in that case, said: "It appears to me that the question as to the interpretation of this contract is a question entirely for the court, and not for the jury. That they should ever be judges on such a matter was founded on this, that there might be technical words used in a contract which the jury might understand and the court might not; but it would be contrary to all practice to say, after the terms are explained to the satisfaction of the court, that the jury

Digitized by Google

are to have the interpretation of the contract, and not the court." And Parke, B., in the same case, said: "The law I take to be this, that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the court to decide what the meaning of the contract was." And in the case of *Bowes* v. *Shand*, L. R. 2 App. Cas. 462, Lord Chancellor Cairns, discussing this subject, said: "The court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade to any of the words of that contract, has to place the construction upon the contract." And Thomas, J., delivering the opinion of the court in *Smith* v. *Faulkner*, 12 Gray, 254, thus clearly and forcibly states the law on this question: "The letters are offered as proof of a contract between the administrator and the defendants. If a contract at all, they are a contract in writing. As such, the question of their interpretation—of their legal effect—was a question of law for the court. Nor is such interpretation the less a question of law because the construction may be aided by the use of extrinsic evidence, including what may be called the practical construction put upon the contract by the conduct and acts of the parties. The court, by the aid of extrinsic evidence, may put themselves in the situation of the parties and look at the contract from their standpoint. But from whatever source light may be thrown upon the contract, what is its meaning, what promises it makes, what duties or obligations it imposes, is a question of law for the court. It is, after all, the legal reading and interpretation of what is written."

The doctrine of these cases seems to be sound in principle, and to be based upon conclusive reasoning. There are, however, some cases which hold a contrary doctrine. It appears to be the settled doctrine in Pennsylvania that where a written instrument requires the aid of extrinsic evidence to ascertain the subject of the contract, or where the contract is partly in writing and partly in parol, or where the contract cannot be understood without reference to facts *dehors* the writing, the jury are to inquire into the facts, and judge of the whole matter, including the meaning and effect of the written instrument: *Harper* v. *Kean*, 11 Serg. & R. 280; *Watson* v. *Blaine*, 12 Id. 131; *Overton* v. *Tracy*, 14 Id. 311; *Edelman* v. *Yeakel*, 27 Pa. St. 26; *Beatty* v. *Lycoming Co. Ins. Co.*, 52 Id. 456; *Hughes* v. *Westmoreland Coal Co.*, 104 Id. 207. In the following cases, also, it is said that where the meaning of a written instrument is to be judged by extrinsic evidence, the construction is usually a question of fact for the jury: *School District* v. *Lynch*, 33 Conn. 330; *Symmes* v. *Brown*, 13 Ind. 318; *Ganson* v. *Madigan*, 15 Wis. 144; *Bedard* v. *Bonville*, 57 Id. 270. Other cases, however, hold, and as it seems to us with better reason, that where the meaning of a written contract can only be determined by reference to extrinsic facts or usages, the document and the facts must be submitted to the jury with such instructions as the court may think proper under the circumstances of the case: *Etting* v. *Bank of United States*, 11 Wheat. 59; *Gibbs* v. *Gilead Ecc. Soc.*, 38 Conn. 153; *Philibert* v. *Burch*, 4 Mo. App. 470; *First National Bank* v. *Dana*, 79 N. Y. 108; *Wheeler* v. *Schræder*, 4 R. I. 383; *Taylor* v. *McNutt*, 58 Tex. 71.

Where a writing is obscure or ambiguous by reason of its containing unfamiliar abbreviations, or where it is obscurely written, or partially erased, so as to be uncertain and ambiguous, it is proper to leave it to the jury to ascertain its meaning: *Holland* v. *Long*, 57 Ga. 36; *Thursby* v. *Myers*, Id. 155; *Paine* v. *Ringold*, 43 Mich. 341; but where the ambiguity is in the words of

Digitized by Google

the writing themselves, the court must determine the meaning if it can be done: *Morrell* v. *Frith*, 3 Mee. & W. 402. But all the authorities agree that where there is no ambiguity in a written contract, its construction is for the court alone: *Haney* v. *Caldwell*, 35 Ark. 156; *Reissner* v. *Oxley*, 80 Ind. 580; *Warner* v. *Miltenberger's Lessee*, 21 Md. 264; *Ganson* v. *Madigan*, 15 Wis. 144; *Bedard* v. *Bonville*, 57 Id. 270.

IN ACTION FOR LIBEL, the question whether or not the publication complained of is libelous is to be determined by the jury: *Beazley* v. *Reid*, 68 Ga. 380; *Woodling* v. *Knickerbocker*, 31 Minn. 268. It is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that it can rule, as a matter of law, that the publication is not libelous, and withdraw the case from the jury, or order a verdict for the defendant: *Twombly* v. *Monroe*, 136 Mass. 369. In California it is held that it is for the court to determine whether or not the language will bear a double meaning, one of which is libelous; and when it has determined that it will bear such meaning, it is for the jury to determine in which sense it was used: *Van Vactor* v. *Walkup*, 46 Cal. 124. In libel, the meaning of the words used is part of the intention, and is therefore to be found by the jury: *Morrell* v. *Frith*, 3 Mee. & W. 402. In England it is held that the question whether or not a publication is capable of a defamatory meaning is a question of law for the court, and if it finds that it is not, it should withdraw the case from the jury: *Mulligan* v. *Cole*, L. R. 10 Q. B. 549; *Hunt* v. *Goodlake*, 43 L. J., N. S., C. P. 54; *Capital and Counties Bank* v. *Henty*, L. R. 7 App. Cas. 741. But where the publication is reasonably susceptible of a construction that would make it libelous, its meaning ought to be submitted to the jury: *Hart* v. *Wall*, L. R., 2 C. P. Div., 146. In Maryland, however, it is settled that, in a civil action, the question whether a publication is libelous or not is a question of law for the court: *Negley* v. *Farrow*, 60 Md. 158; S. C., 45 Am. Rep. 715.

HAMILTON v. SCULL'S ADMINISTRATOR.

[25 MISSOURI, 165.]

PROOF THAT PROMISSORY NOTE HAD ITS ORIGIN IN FRAUDULENT COMBINATION between the parties to it, for the purpose of defrauding the creditors of the plaintiff, is a good defense to an action on such note.

DEPOSITION CONTAINING ILLEGAL EVIDENCE SHOULD NOT BE WHOLLY EXCLUDED if any part of it is proper evidence. The illegal portions should be pointed out and excluded by the court.

SUIT to establish a claim against the estate of the defendant's intestate. The evidence offered and excluded, as stated in the opinion, tended to prove that the consideration of the note was fraudulent in this, that Hamilton, the payee, had made a fraudulent sale of a stock of goods to Joseph P. Scull, to hinder, delay, and defraud said Hamilton's creditors, and that Scull had executed and delivered this note to Hamilton for the purchase money. Other facts appear from the opinion.

Digitized by Google

Garesché and Buckner, for the appellant.

L. K. Kinsey, for the respondent.

By Court, SCOTT, J. This was a suit begun in the probate court of St. Louis county for the purpose of establishing a demand against decedent's estate—being a balance on a note executed by the intestate to the plaintiff. Garesché, the defendant, offered evidence tending to show that the note had its origin in a fraudulent combination between the parties for the purpose of defrauding the creditors of plaintiff. This evidence was rejected, and the defendant excepted.

There is no doubt of the correctness of the principle asserted in the case of *Brown's Adm'r* v. *Finley*, 18 Mo. 375, that one who has made a fraudulent conveyance of his property cannot, by alleging his own turpitude, be permitted to set aside his conveyance, and regain the possession of property which he has fraudulently aliened. To do this would be encouraging fraud, for thereby a party would be induced to make fraudulent alienations without any concern for the consequences, confiding in the privilege the law would confer of setting them aside afterwards, if they did not answer the ends proposed by them. In such cases the maxim applies, *Nemo allegans suam turpitudinem est audiendus*. Having fraudulently passed away his property, the act is consummated—the deed is done; and the law will not relieve him from a situation in which he has been placed by his own fraud. But the case under consideration is different from that stated above. Here the act is not consummated. This is but a promise, and the law allows the turpitude of the transaction to be shown with the same view as in the preceding case, to take away inducements to fraudulent conduct. What would give greater encouragement to fraud than for courts of justice to lend their aid in carrying them into execution? But though the law suffers the transaction to be inquired into in the one case, and will not permit a party to expose his fraud in the other, yet this apparently inconsistent course arises from the different stages of the illegal acts at the time the inquiry is proposed, and is necessary to fufill the purpose of the law with regard to fraudulent contracts, which is to refuse all aid to the parties thereto in carrying them into execution; for it will be observed that in this case, while the law permits a party to raise the question of fraud, it is only done that it may, when the fact is established, refuse its aid to the party who had been concerned in it, and leave him just where he placed himself by his ill conduct. So in the end,

Digitized by Google

through this seemingly inconsistent course, the law produces the same result in each case, which is a denial of all assistance to those who will soil themselves with a foul transaction: Ch. Cont. 680.

If the depositions contained any illegal evidence, that was no reason for rejecting them altogether. If any portion of them was proper evidence, they should have been received, the court at the time pointing out the portions excluded. Judge Ryland concurring, the judgment is reversed and the cause remanded.

LEONARD, J., absent.

PLEA OF FRAUD IN ACTION ON PROMISSORY NOTE: See *Gushee* v. *Leavitt*, 63 Am. Dec. 116, note 117.

RIGHTS OF PARTIES TO ILLEGAL OR FRAUDULENT TRANSACTIONS: See *Ohio L. I. & T. Co.* v. *Merchants' I. & T. Co.*, 53 Am. Dec. 742, note 770, where other cases are collected. Proof that a promissory note had its origin in a fraudulent combination is a good defense to an action thereon: *Fenton* v. *Ham*, 35 Mo. 411, citing the principal case. In a suit for the purchase money of goods, the vendee may defend successfully on the ground that the sale was made to hinder and defraud creditors: *Chapman* v. *Callahan*, 66 Id. 311, citing the principal case.

PART OF DEPOSITION MAY BE ADMITTED IN EVIDENCE, and the rest excluded, when such parts are wholly independent of each other: *Miles* v. *Stevens*, 45 Am. Dec. 621.

DRAPER v. SHOOT.

[25 MISSOURI, 197.]

ENTRY ON LAND WITH COLOR OF TITLE MAY BE SUPPORTED WITH LESS WEIGHT OF EVIDENCE than a bare entry by an intruder under no claim of right.

NON-PAYMENT OF NOMINAL CONSIDERATION CANNOT BE SHOWN to defeat a deed.

WHAT WILL CONSTITUTE ADVERSE POSSESSION OF LAND must be determined by the circumstances of each case. In determining the question of adverse possession, much depends upon the nature and situation of the property, and the uses to which it can be applied; but the acts of ownership must be open and notorious, and of such a character as a person would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.

PAYMENT OF TAXES BY CLAIMANT OF LAND IS FACT TO BE WEIGHED by the jury in determining the question of adverse possession, although it is not in itself evidence of an ouster of the true owner.

ACTION in nature of ejectment to recover possession of a lot in the city of Hannibal. Both parties claimed title under a patent to Abram Bird. In 1818 and 1819 a company called the "Han-

Digitized by Google

nibal Company" laid out the town of Hannibal. In 1819 one Bates, acting for said company, sold the lot in question to Robert Masterson, the consideration being that the purchaser should build upon the lot. In the same year four of the six members of which said company was composed executed a deed of said lot to Masterson for the nominal consideration of one dollar, payable in three equal installments, one in six months, one in twelve months, and the third in fifteen months from the date of the deed. The title of the Hannibal Company to the town site proved defective. But after the deed to Masterson, one of the grantors therein acquired a one-eighth interest in the land from the heirs of Bird. Masterson built a house on the lot in 1819, which he sold to Vanlandingham in 1822. The evidence tended to show that persons holding under Vanlandingham occupied the house from that time down to 1832 or 1833, when the house fell or was torn down. In 1839 a new house was built on the lot by tenants of Vanlandingham, and it was admitted that defendants and Vanlandingham, under whom they claim, were in possession from 1839 down to the institution of this suit. Defendants also offered evidence to show that Vanlandingham had paid the taxes to the state and county on the lot from 1823 until the suit was brought. The instructions referred to in the opinion are as follows: "5. In order to enable defendants to succeed in their plea of 'possession for twenty years,' they must prove to the satisfaction of the jury that they and those under whom they claim their title have had possession of the lot in controversy for twenty years before the institution of this suit; and they must also believe that such possession was an actual, continued, visible, notorious, distinct, and unbroken possession in the said defendants and those under whom they claim; and unless the jury believe from the evidence that such a possession did exist for twenty years before the institution of this suit, they must find, as to this issue, for the plaintiff, Draper." "4. To make good the defense of the defendants under the statute of limitations, the jury must find that the defendants, or those under whom they claim, or their tenants, had actual, continuous, visible, possession of said lot, claiming the same adversely to the plaintiff, and those under whom he claims, for twenty years next before the commencement of this suit. This possession is not constructive; but it must have been by occupation or cultivation, or by other acts of ownership which were visible, notorious, and continuous. If these facts are found by the jury, they should find a verdict for the defendants; if not, as to this

Digitized by Google

defense the plaintiff should have a verdict." The former instruction was given on the plaintiff's request, and the latter by the court on its own motion. Other facts appear from the opinion.

Lamb and Lakenan, and Richmond, for the appellant.

E. G. Pratt, for the respondents.

By Court, SCOTT, J. As the defendants claimed a portion of the premises in controversy by title, and relied on the statute of limitations as a complete bar to the plaintiff's action, and there being a verdict against the plaintiff on the whole case, it is obvious that it turned on the statute of limitations, as that was the only defense made to the entire demand. This view of the record will relieve us of the necessity of inquiring into the propriety of the instructions relative to the acts set up by the defendants and alleged by them to confer a title to a portion of the lot in dispute; for if the statute of limitations is a bar to the entire demand, there can be no need of inquiring whether the defendants had any other defense to a portion of the lot claimed by plaintiff. The instructions given in relation to the statute of limitations were sufficiently stringent against the defendants, as courts have rarely laid down the law more strictly against those relying on the bar of the statute of limitations than was done by the court below. There has been one mistrial; and two verdicts have passed against the plaintiff on this issue, and it would seem needless to submit the matter a fourth time to the jury.

There was evidence on which the verdict of the jury could be vindicated. Although our courts hold that an entry without color of title will enable the party in possession making it to defend himself under the statute of limitations, yet an entry with a color of title may be supported by a less weight of evidence than a bare entry by an intruder under no claim of right. The person under whom the defendants claim actually performed the condition on which the lot was to become his property. The non-payment of the nominal consideration cannot be shown to defeat a deed: *Meriam* v. *Harsen*, 2 Barb. Ch. 267. The circumstance that the deed was executed only by some of the proprietors is one of no weight, as the evidence abundantly showed that as against them all the original purchasers would have been entitled to a conveyance for the lot. After Masterson had acquired a right to a title from those under whom he entered, their title failed, and a portion of them subsequently acquired a valid title to a tract on which the town was laid out, and he con-

Digitized by Google

tinued in possession in the manner stated by the witnesses, and never was disturbed by any one until Draper instituted this suit setting up title under a quitclaim deed. And it is worthy of observation that it does not appear that Glasscock, under whom Draper claimed, and who acquired title long subsequently to the entry of Masterson, ever had a conveyance for the specific lot in controversy, but claimed by a general description conveying a large tract alleged to include the premises in dispute. The town existed only on paper; to invite settlers, lots were granted on condition that they should be improved. The first title having failed, and some of the first proprietors subsequently becoming owners of a valid title, they may have been unwilling that the first *bona fide* settlers should be disturbed, or their sense of justice may have recognized the claim of Masterson.

As the statute proceeds upon the ground of the acquiescence of the owner of the land, visible and notorious acts of ownership must be exercised by the claimant, as otherwise there can be no ground for such a supposition, when the acts are clandestine or of such a character as can impress no person with the belief that they proceed from a claim of ownership. It is no easy matter to say what is an adverse possession. It is a question compounded of law and fact, and every case in which it is involved must be determined by its own circumstances. What is adverse possession is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village. The law, as stated by the supreme court of the United States in the case of *Ewing* v. *Burnet*, 11 Pet. 53, and other cases, seems very appropriate to the circumstances of this case, that to constitute an adverse possession there need not be a fence, building, or other improvement made; and that it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute; that much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule in all cases, but that it may be safely said that where acts of ownership have been done upon land which, from their nature, indicate a notorious claim of property in it, and are continued sufficiently long, with the knowledge of an adverse claimant, without interruption or an adverse entry by him, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, provided the jury shall think that the property

Digitized by Google

was not susceptible of a more strict or definite possession than had been so taken and held; that neither actual occupation, cultivation, nor residence are necessary where the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party, has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.

We do not maintain that the payment of taxes is evidence of an ouster of the true owner; but in a question of adverse possession, which depends on so many circumstances, such payment is a fact to be weighed by a jury in considering it. It would be an argument against one claiming to hold land that he should for twenty years fail to pay the annual assessments upon it. If unexplained, such omission would certainly weaken the pretense that he claimed the land as his own, as such conduct is contrary to the course of men of ordinary prudence in relation to property to which they set up a claim. The payment of taxes may go to the jury with other circumstances, and this was a case in which such a fact was very appropriate for the consideration of the triers of the fact.

There was no error in permitting evidence to be received respecting the circumstances under which Masterson originally entered into the possession of the lot. There is no doubt that one who enters under an agreement to purchase cannot set up the statute of limitations as a bar to an ejectment by the owner. His occupation under such circumstances will not be adverse to him by whose permission he entered. But if afterwards he asserts a title hostile to that under which he took possession for a sufficient length of time, with a knowledge of the owner, his possession will be protected by the statute. But this is no such case. Masterson did not enter under an agreement to purchase. He shows his deed, not as conferring a valid title, but as evidence that he took possession under color of title.

Judge Ryland concurring, the judgment will be affirmed.

LEONARD, J., absent.

ADVERSE POSSESSION, WHAT CONSTITUTES: See *Stamper* v. *Griffin*, 65 Am. Dec. 628, note 633, where other cases are collected; *Robertson* v. *Wood*, Id. 140. Actual occupation is not always indispensable; but its absence should be supplied by some act done on or about the land: *Turner* v. *Hall*, 60 Mo. 275, citing the principal case. When adverse possession is such that it may be presumed that the true owner had knowledge of it and acquiesced in it, he will be barred, provided it has continued the requisite length of time; and

Digitized by Google

if the indications of the claim are so patent and so open that if he remained in ignorance it must be his own fault, a like result will follow: *Key* v. *Jennings*, 66 Id. 367, citing the principal case.

COLOR OF TITLE, WHAT IS: See *Green* v. *Kellum*, 62 Am. Dec. 332, note 334, where other cases are collected.

THE PRINCIPAL CASE IS DISTINGUISHED in *City of St. Louis* v. *Gorman*, 29 Mo. 603; and in *Musick* v. *Barney*, 49 Id. 462.

STATE v. SLOSS.

[25 MISSOURI, 291.]

PARDONING POWER IS, BY CONSTITUTION OF MISSOURI, EXCLUSIVELY VESTED IN CHIEF EXECUTIVE officer of the state, and cannot be exercised by the legislature.

ACT OF 1857, RELEASING FROM PROSECUTION ALL PERSONS IN STATE OF MISSOURI who were then indicted for the violation of the act to regulate dram-shops, committed before the fifteenth of December, 1856, upon payment by each of such persons of the costs in the case, and a fee of two dollars to the circuit attorney, is unconstitutional, being an attempted exercise of the pardoning power, and an interference with the judicial department of the government.

APPEAL from the St. Clair circuit court. The opinion states the facts.

Ewing, attorney-general, for the state.

Johnson, for the respondent.

By Court, SCOTT, J. In 1857 the general assembly passed an act to the purport that all persons in the state of Missouri who are now indicted for the violation of the act to regulate dram-shops, committed before the fifteenth of December, 1856, be and they are hereby released from said prosecution, provided each individual shall pay all the costs in said case, and a fee of two dollars to the circuit attorney.

The defendant was one of the individuals embraced within the purview of this act, and produced to the court satisfactory evidence that he had complied with the conditions of its proviso, and thereupon, upon his motion, the court dismissed the cause and entered judgment for the defendant. To this action of the court below the state excepted, and took an appeal to this court.

The powers of the general assembly are not unlimited. All the departments of our government are confined in their operations. They have prescribed limits which they cannot transcend. The union of the legislative, executive, and judicial functions

Digitized by Google

of government in the same body, as shown by experience, had been productive of such injustice, cruelty, and oppression that the framers of our constitution, as a safeguard against those evils, ordained that the powers of government should be divided into three distinct departments, and that no person charged with the exercise of powers properly belonging to one of these departments should exercise any powers properly belonging to either of the others, except in the instances expressly directed or permitted by the constitution.

Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offenses properly appertains. All unite in pronouncing it an executive function. So the framers of our constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the state.

There can be no question as to the nature of the act under consideration. It is as effectually a pardon as though it were one in form under the great seal of the state. Its being clothed with the forms of legislation cannot vary its nature and effect. If such laws are warranted by the constitution, it is plain that the power of granting pardons is as fully in the general assembly as though it had been in express terms conferred on that body. The exercise of power involved in the passage of the act under consideration is not to be likened to that exerted in passing laws releasing sheriffs, collectors, and others from forfeitures incurred for failing to collect and pay over the public money. The existence of such a power is incident to the relation of creditor and debtor, and to the authority to pass laws for the management of the public revenue. The operation of the act under consideration is confined entirely to the release of individuals from prosecution who stand indicted for offenses. That is its sole object. The justice or propriety of the act of pardon has nothing to do with the question of its constitutionality. We are not to presume that the governor, under suitable circumstances, will not exercise the power with which he has been clothed by the constitution. He is the sole judge of the propriety of granting a pardon. The conditions prescribed in order to obtain the benefit of a release under the act do not the less make it a legislative pardon; they only change it from an absolute into a conditional pardon.

The time at which the act was passed renders it obnoxious to

Digitized by Google

the objection that it interferes with the judicial department. The act, before trial and conviction, directs the disposition that shall be made of the cause. Where is the warrant in the constitution for the general assembly to direct what disposition shall be made of causes depending in the courts? Is not the exercise of such a power a judicial function? The governor can pardon both before and after conviction. His pardon before conviction being pleaded would be a defense to the accusation. Here is a prosecution depending in court, and the legislature comes in and orders the party to be released from it. What is that in effect but entering a judgment of acquittal?

In the case of *State* v. *Fleming*, 7 Humph. 152, a law very similar in its effects to that under consideration was examined, and the court did not doubt but that it was unconstitutional.

Judgment reversed, and cause remanded.

RYLAND, J., concurred.

LEONARD, J., absent.

DEPARTMENT OF GOVERNMENT EXCEEDING CONSTITUTIONAL POWERS acts without authority: See *Kelly* v. *Bemis*, 64 Am. Dec. 50, note 55, where other cases are collected.

LEGISLATURE CANNOT EXERCISE JUDICIAL FUNCTIONS: See *Guy* v. *Hermance*, 63 Am. Dec. 85, note 86, where other cases are collected: *Parsons* v. *Tuolumne Co. W. Co.*, Id. 76, note 77; *Spragg* v. *Shriver*, 64 Id. 698, note 703.

PARDONING POWER, IN WHOM VESTED: See note to *State* v. *McIntire*, 59 Am. Dec. 572, where this subject is discussed.

STATE *v.* APPLING.

[25 MISSOURI, 315.]

UTTERANCE IN PUBLIC OF VULGAR, OBSCENE, AND INDECENT LANGUAGE is an outrage upon decency, and injurious to public morals, and is an offense indictable at common law, although not an open and notorious act of public indecency within the statute of Missouri.

APPEAL from the Laclede circuit court. The opinion states the facts.

F. P. Wright, for the appellant.

Ewing, attorney-general, for the state.

By Court, RYLAND, J. The only question in this case is raised upon the indictment. The defendant was convicted and judgment rendered against him for the fine; he moved in arrest of judgment; his motion being overruled, he appealed to this

Digitized by Google

court. The indictment is not good under any of the provisions in our criminal code; but we consider the offense therein charged to be an offense indictable at common law, and that the indictment is good as a common-law indictment. The charge is "that the defendant did on the twenty-fifth of August, A. D. 1856, at the county of Laclede, in a certain large assembly of males and females, in said county, and in the hearing of said assembly of persons, unlawfully, wickedly, and scandalously use vulgar, obscene, and indecent language, by then and there asking some of the males, etc. [here the questions are inserted in the indictment, which are too vulgar to be inserted in this opinion], and was then and there guilty of open and notorious acts of public indecency, grossly scandalous, to the manifest corruption of the morals of said assembly, contrary," etc.

We have no statute punishing a person for the use of vulgar, indecent, and obscene words in public. There has not been an attempt to legislate on this particular offense. It was an offense at common law, because it was against good morals—against public decency. Russell, in his treatise on crimes, vol. 1, p. 46, says: "And it seems to be an established principle that whatever openly outrages decency and is injurious to public morals is a misdemeanor at common law." "The common law," said Judge Whyte, in the case of *Grisham* v. *State*, 2 Yerg. 594, "is the guardian of the morals of the people, and their protection against offenses notoriously against public decency and good morals." Blackstone lays it down that "any grossly scandalous and public indecency is indictable and punishable in the temporal courts by fine and imprisonment:" 4 Bla. Com. 41. It was held in the case of *Bell* v. *State*, 1 Swan, 42, that "the utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable; and in a prosecution for the utterance of obscene language in public, it is not necessary that the words should be proved exactly as charged to have been spoken. Many cases have been held indictable as being *contra bonos mores:*" 4 Bla. Com. 41. "All indecent exposure of one's person to the public view, and it may be laid down in equal terms that all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, are indictable, whether committed by words or acts:" Id. 65, note.

Our respect for the chastity of the records of our court will not suffer the outrageously vulgar words that were spoken and sung by the defendant in this case, in the hearing of both males

Digitized by Google

and females, to be put on the records. But we have never had to examine the records of our inferior tribunals to find words more shocking to one's sense of decency than those charged and proved in this case. Tilghman, C. J., in *Commonwealth* v. *Sharpless*, 2 Serg. & R. 101, said: "That actions of public indecency were always indictable, as tending to corrupt the public morals, I have no doubt. What tended to corrupt society was held to be a breach of the peace, and punishable by indictment. The courts are guardians of the public morals, and therefore have jurisdiction in such cases. Hence it follows that an offense may be punishable, if in its nature and by its example it tends to the corruption of morals, although it be not committed in public: *Barker* v. *Commonwealth*, 19 Pa. St. 412. The offense charged in this indictment, being an offense against public morals and decency, was indictable as such at common law, and is indictable with us as a common-law offense. We consider the indictment sufficiently good, and that the court did not commit error in refusing to grant a trial, or in refusing to arrest the judgment.

Judge Scott concurring, the judgment is affirmed.

WHATEVER OUTRAGES DECENCY, AND IS INJURIOUS TO PUBLIC MORALS, is a misdemeanor at common law, and punishable as such: *State* v. *Rose*, 32 Mo. 561, citing the principal case.

THE PRINCIPAL CASE IS CITED in *State* v. *Boll*, 59 Mo. 323, to the point that an offense may be punishable under the common law, although not punishable under the statute.

VAUGHN v. TRACY.

[25 MISSOURI, 318.]

POSSESSION OF LAND UNDER UNRECORDED DEED, THOUGH BROUGHT HOME TO SUBSEQUENT PURCHASER, does not constitute, in point of law, actual notice of such prior deed, within the meaning of the Missouri registry act. But such possession and apparent ownership are facts from which a jury will be warranted in inferring actual notice.

KNOWLEDGE BY SUBSEQUENT PURCHASER THAT PERSON IS IN POSSESSION AS TENANT at sufferance of his vendor is not sufficient to charge such purchaser with actual notice of a prior purchase by such tenant.

SUIT for the possession of and to obtain the legal title to an acre of ground, upon which was a horse grist-mill. The plaintiff introduced in evidence an instrument under seal, which was an agreement between himself and one Huckstep, by which the latter agreed to convey to him a tract of eighty acres of land.

Digitized by Google

It was recited in this instrument that one acre of the tract, "whereon the mill now stands," had been previously sold by Huckstep to Vaughn for sixty dollars. This instrument, which was dated in 1845, was not acknowledged, but was recorded in 1846 The defendant claimed under a deed from Huckstep, dated in 1852. At the date of this latter deed Vaughn had been in possession of the acre lot for eight or ten years. The other facts are stated in the opinion.

Parsons, for the plaintiff in error.

Morrow, for the defendant in error.

By Court, LEONARD, J. When this case was here before, *Vaughn* v. *Tracy*, 22 Mo. 417, we remarked that we all concurred in reversing the judgment on the ground that "possession was not, as the circuit court seemed to suppose, as a mere matter of law, actual notice within the meaning of the recording acts;" and we then observed that we deferred, until all the circumstances of the transaction should be fully developed in a new trial, our opinion on the question, "how far and under what circumstances the fact of open and notorious possession and apparent ownership of real property was to be considered evidence of actual notice." A majority of the judges then intimated their opinion that the actual notice of the statute was a fact to be proved as any other fact, and that, as men rarely purchased farms without examining them personally, the fact of possession might, under ordinary circumstances, be fairly presumed to have been within the purchaser's knowledge when he bought; and that in this state, where the land is generally in the occupation of owners in fee, if knowledge be brought home to the purchaser that a third person is in the possession and apparent ownership of land it ought, under ordinary circumstances, to be deemed sufficient information to the second purchaser that the possessor is the owner in fee under a title derived from the former owner. They also remarked substantially that the circumstances might be such as to show that the purchaser did not in fact know that any third party was in possession, or, if he did know it, they might have shown that his occupation was not as owner, and that in such cases the jury could not find the fact of actual notice.

This new trial has now been had, and the evidence given was to the effect that there was a house and farm on the land, that the plaintiff was at the time of the defendant's purchase, and had been for eight or ten years previously, in the possession of

Digitized by Google

a mill situate on the land, with an acre of ground attached to it, and that the defendant resided, at the time he purchased, in the county of St. Louis, about one hundred and fifty miles from the land, and had not been previously in the county where the land lay. The plaintiff then, in order to show that the defendant knew, at the time he made the purchase, that the plaintiff was in the possession of the mill and acre of ground, gave in evidence the statements of defendant—made on several occasions, in answer to the inquiry whether Huckstep, his grantor, had not told him before the sale that he, Huckstep, had sold the mill and acre of ground to the plaintiff—to the effect that "he told him plaintiff had a mill on the land, and would have to move it now." Upon this evidence the court directed the jury that "if the plaintiff was on the acre of ground and mill thereon at the time of the defendant's purchase, and that fact was then known to the defendant, it was a sufficient notice in law of the plaintiff's previous purchase so as to effect the defendant with notice of the plaintiff's title" and that "possession of a tract of land by one claiming to have previously purchased it is sufficient evidence of such previous notice if such possession was known to the subsequent purchaser at the time of his purchase."

These instructions, taken in connection with the evidence, must, we think, have misled the jury, and for that reason the judgment will be reversed and the cause remanded. The question of fact for the jury was whether the defendant purchased with "actual notice" of the prior unrecorded conveyance to the plaintiff; or in other words, whether he believed, when he bought the land, that his grantor had previously sold the mill tract to the plaintiff. If there were no circumstances disclosed other than that it was the purchase of a farm, and that there was at the time a mill on the land, with an acre of ground attached to it, in the occupation of the plaintiff, as the apparent owner, these facts would, in my opinion, have been competent evidence to show that the defendant purchased with actual knowledge of the previous sale to the plaintiff. They would, I think, have been sufficient in point of law to have been submitted to the jury for this purpose; but whether, when received, they would have satisfied the jury of the truth of the alleged fact would be a matter for their consideration. In this state lands are usually found in the occupation of the owners in fee, and therefore we generally infer from this occupation and apparent ownership that the occupant is the real owner, and of

Digitized by Google

course that he has a title to it derived from the former proprietor; but this possession and apparent ownership, even if brought home to the subsequent purchaser, do not constitute in point of law actual notice of the prior deed, within the meaning of the statute. It is evidence of such knowledge, and under ordinary circumstances ought, I think, to satisfy a jury that the party purchased with knowledge of the prior deed; and such is the opinion expressed, or at least intended to be expressed, by the judge who delivered the former opinion in this case.

From the proof here the jury might have inferred, and no doubt did infer, that the defendant made the purchase at a distance from the farm and without any personal examination of it; and the plaintiff therefore resorted to the defendant's admissions in order to show his knowledge of the plaintiff's possession and apparent ownership of the mill and ground. These admissions, however, instead of establishing that fact, were rather to the effect that the defendant's information was that the plaintiff owned the mill, and was occupying the land upon which it stood at the will of the owner, Huckstep; or in other words, that the plaintiff, instead of being in possession of the land as owner, was there as the mere tenant at sufferance of the owner, and was bound to remove his mill whenever Huckstep disposed of the land.

Upon this evidence, the jury was told that if the plaintiff was on the land and the defendant knew it, this was sufficient notice in law of the plaintiff's previous purchase; when of course such a possession, not as owner, but as the mere tenant at will of the owner, afforded no evidence whatever of any conveyance to the plaintiff.

The judgment must be reversed, and the cause remanded.

POSSESSION AS NOTICE OF UNRECORDED INSTRUMENT: See *Beattie* v. *Butler*, 64 Am. Dec. 234, note 241, where this subject is discussed.

EVIDENCE OF POSSESSION AND APPARENT OWNERSHIP brought home to the knowledge of a second purchaser should go the jury, and ought to be deemed sufficient information that the possessor is the true owner in fee under a title derived from the former owner: *Maupin* v. *Emmons*, 47 Mo. 307; *Whitman* v. *Taylor*, 60 Id. 135, both citing the principal case. Possession, though not actual notice, is evidence of such notice to be submitted to the jury: *Shumate* v. *Reavis*, 49 Id. 336, citing the principal case. Notorious possession by the grantee in an unrecorded deed is not of itself notice to subsequent purchasers, but there must be evidence that they knew of such possession: *Maupin* v. *Emmons*, 47 Id. 308, citing the principal case.

Digitized by Google

GARRETT v. CITY OF ST. LOUIS.

[25 MISSOURI, 505.]

CITY CHARTER PROVIDING THAT WHEN CITY TAKES PRIVATE PROPERTY FOR STREET the city shall pay to the owner the value of the improvement to the public generally, and that the remainder of the value of the property taken shall be assessed against the property fronting on such street and in the blocks next adjacent, on either side thereof, "according to the value of the property so assessed, and in the proportion that the owners thereof may be respectively benefited by the improvements," is constitutional. And the assessment upon the lot-owners fronting on the street is a legitimate and constitutional exercise of the taxing power.

AGREED case submitted to the St. Louis land court on the following facts: Under the charter and ordinances of St. Louis, the mayor was required to open Main street, and to take whatever property was necessary for that purpose. The mayor impaneled a jury, as the law directs, who found that the land of Peter Garrett, taken for the street, was worth, without reference to the proposed improvement, the sum of seven hundred and sixty-eight dollars and forty-five cents, and that the buildings on the land so taken were worth one thousand four hundred and forty dollars. The jury also assessed the benefits to the land of said Garrett at seven hundred and sixty-three dollars. The city refused to pay to said Garrett, when he applied for his money, any more than one thousand four hundred and forty-five dollars and forty-five cents, being the difference between the amount of damages and benefits awarded by the jury. The question referred to the court was whether the assessment of benefits under the law was constitutional. If the court found the assessment to be valid judgment was to be rendered against the city for one thousand four hundred and forty-five dollars and forty-five cents; if it found the assessment to be unconstitutional—judgment was to be rendered against the city for two thousand two hundred and eight dollars and forty-five cents. The court rendered judgment against the city and in favor of Garrett for one thousand four hundred and forty-five dollars and forty-five cents, and he appealed.

Hudson and Thomas, for the plaintiff in error.

Bay, city counselor, for the defendant in error.

By Court, NAPTON, J. The only question in this case is the constitutionality of the second section of the amended charter of St. Louis, passed February 23, 1853. This section, among other provisions, authorizes the city counsel to open a street;

Digitized by Google

and when, for this purpose, it becomes necessary to take private property, it provides the following mode of ascertaining the compensation. After notice to the owner, the mayor is directed to impanel a jury, whose duty it is made to ascertain the actual value of the land proposed to be taken, without reference to the proposed improvement. To pay the sum thus ascertained, the city is taxed in an amount equal to the value of the improvement to the public generally, and the remainder is assessed against the property fronting on such street, and in the blocks next adjacent on either side or end thereof, "according to the value of the property so assessed, and in the proportion that the owners thereof may be respectively benefited by the improvements." Where, under this provision, the entire lot is taken for the street, it is plain that nothing more has been done than an exercise of the right of eminent domain, and in a mode in strict conformity to the constitution. The owner of the lot taken has no cause for dissatisfaction, since he is paid the full actual value of his lot; and the means adopted by the city to raise the funds for this payment are a matter of indifference to him. But where the entire lot is not taken, or where the owner has other land on the same street, the question arises whether he can be compensated in the mode provided by the charter.

That this assessment upon the lot-owners fronting on the street is an exercise of the taxing power seems too plain to admit of argument. Whether it is a *bona fide*, legitimate, and constitutional exercise of that power is the matter to be considered; but that it is an attempt to exert this taxing power, and not the power of eminent domain, may, I think, be assumed. In the case of *Newby* v. *Platte County*, 25 Mo. 258, this court held that the assessment upon land-owners whose lands were taken under our railroad laws for sums proportioned to the benefit they received from the road was an exercise of the taxing power; and without meaning to express any concurrence in or dissent from this view, it is clear that the position assumed in that case necessarily includes the assumption we have just made. The views entertained in that case were attended with difficulties which do not embarrass this. If the assessment for benefits in the case of the railroads was an exercise of the taxing power, then the tax was levied only upon those whose lands were taken, and not upon other lands abutting on the line of the roads where no part of them was taken by the companies. Here the assessment is upon all who own property on the street, whether any part of their property is taken for the improvement or not.

Digitized by Google

It is admitted on all hands that the power of taxation is confided to the legislative department of the government; and the manner in which it is to be exercised, the persons and things upon which it is to operate, are left entirely to the discretion and judgment of the legislature, except where the constitution has imposed restraints. The only provision on this subject in our constitution is, "that all property subject to taxation in this state shall be taxed in proportion to its value." There is another provision in relation to property of the United States, but that has no bearing on the question now under consideration.

It may be doubted whether this provision of our constitution requiring an *ad valorem* tax upon property, when property is the subject of taxation, was designed to apply to local assessments for local purposes; whether it was not intended as a restraint upon the legislature only in passing general revenue laws. But waiving this question for the present, and conceding that the restriction applies to every kind of taxation upon property, it still remains to be considered whether the local assessment here disputed is a tax upon property within the meaning of the restrictive clause referred to; and if it is, whether the constitutional injunction has been disregarded in the provisions of the St. Louis charter.

This nineteenth section of our bill of rights does not deprive the legislature of any power of taxation, nor does it confer any. That department of the government possesses every species of taxing power with or without this clause. What shall be selected by the legislature as objects of taxation is as much within the discretion of that body, with this provision in the constitution, as it would have been without it. Where the legislature do, however, undertake to exercise one branch of the taxing power—that is, to levy a tax upon property—they must conform their action to this constitutional requisition. They must tax property according to its value, and not specially without regard to value. But when the legislature choose to exercise some other branch of the taxing power, they are left entirely untrammeled by this clause of the bill of rights. They may tax and do tax a variety of professions and pursuits and occupations, and in such case their action is under no other control but such as responsibility to their constituents, a regard to their own interests, and a sense of duty, may create. It is true that in one sense all taxes may be said to be taxes upon property, since they are to be collected in money, and money is property. Indirectly, it is property that is reached by every species of taxa-

Digitized by Google

tion. Hence I have heard it maintained that a tax on a merchant's license is a tax upon property, seeing that the legislature, in fixing the amount of the taxes, have thought proper to regulate it by the amount and value of merchandise purchased or disposed of between certain intervals. And in this sense a tax *per caput* may be also called a tax upon property; for a man's property, and not his head, can only be taken to pay it. But this is not the sense in which a property tax is to be understood when it is referred to in the constitution or legislative enactments.

In this case the city of St. Louis is taxed to the extent that she is benefited, and each owner of a lot fronting on the street is taxed in proportion to the value of his lot and the benefit such improvement is to him. The tax is a combined one, based upon the present value and increased value produced by the improvement. The benefit for which the owner of the lot is taxed is not the benefit to the public at large, or to the city of St. Louis, or to any other person whatever, but to the owner of the lot. The phrases "benefits" and "increased value" may therefore be regarded as convertible terms; and if the constitutional provision referred to is to be considered as applicable to this kind of taxation, it would seem that the spirit, if not the very letter, of its injunctions has been embodied in the act. The tax is exactly proportioned according to the "increased value" of the lot, which is the same thing as the value of the "benefit" which the owner receives from the improvement.

It will be further observed that the tax in this case is not confined to the lot-owner, a portion of whose lot has been taxed, but is levied upon all other lot-owners on the street, whether any portion of their lots is required for the improvements or not; and it is levied upon all according to the same rule of assessment. The compensation which the legislature have provided for persons whose lands are taken for railroads is diminished or abated by the benefits which the road confers upon him; and if this set-off is to be regarded as a tax, then it is levied only on those persons whose lands are taken, and not upon those whose lands lie directly on the side of the road, but through which the road does not pass. The St. Louis charter conforms more nearly to the spirit of the constitution, and is every way more just. Not only the citizen whose lot is taken, but every other lot-owner on the street proposed to be opened, is taxed for the improvement, and the tax is apportioned according to the value of the lot and the value of the improvement to such lot.

Digitized by Google

The tendency of recent legislation, in states where great additions to population and wealth and multiplied railroads and other artificial channels of trade have induced caution, has been to exclude all considerations of benefit to the property holder in computing the compensation to which he is entitled when a portion of his property is taken from him by the state in its exercise of eminent domain. Here, as yet, the question has been one of but little practical importance; and until very recently has scarcely ever been the subject of litigation or investigation. We have not as yet many miles of railway, nor has the great body of land in the interior yet attained great value. By restricting the benefits, which the legislature have declared may be set off against the value of land taken for a public improvement, to such as are peculiar to the land-owner, and not shared by others whose land is not taken equally with him, growing dissatisfaction with existing legislation will probably be checked. It is evident that the advantages or benefits spoken of must have some limit. If an owner of land on the line of a railroad, part of which was taken for the road, should happen to own another tract half a mile from the road, the benefits which this last tract would receive from the improvement would not be considered; and yet such increased value of this second tract would be practically and in fact a benefit remotely derived from the road. But the constitution intends to place the public burdens upon all, and, to do this, pays the proprietor of land for what is taken by the public. If he is paid in advantages which the community at large, whose land is not taken, enjoy equally with himself, the spirit of the provision might be said to be violated. His loss is certain and specific, and in relation to the land which is not taken he only receives the same benefit which others receive who have sustained no loss. These views are very forcibly presented by Judges Tucker and Brockenbrough, in the case of *James River and Kanawha Company* v. *Turner*, 9 Leigh, 313. The act of the Virginia legislature, substantially like ours, declared that the valuers "should combine therewith [that is, with the value and injuries to the land taken] a just regard to the advantages which the owner of the land will derive from the construction of the road or canal." In construing this, the court of appeals held that the advantages alluded to, and which the assessor was to regard, were such advantages as particularly and exclusively affected the particular land, a portion of which was condemned, and not advantages of a general nature, which may be derived to the

Digitized by Google

owner in common with the country at large from the improvement. Our construction of the railroad laws has been in accordance with this decision.

But whatever may be thought of the clauses of the railroad laws which allow the land-owner to be compensated in benefits—whether they be held to be an exercise of the taxing power or of the eminent domain, and if the former, whether they conform to the constitutional requisition in relation to property taxation or not—it is clear that the section of the St. Louis charter now under consideration operates by virtue of the taxing power; and we are also satisfied that it is no violation of the nineteenth section of the bill of rights. It conforms, as we have said, to the spirit of this constitutional provision; and if necessary, we might go further, and declare that in our judgment the tax in question is not such a property tax as is within the meaning of that provision. The tax is local, and for local purposes, and is a tax upon benefits, and not directly upon property. It is based upon a principle which seeks not merely to avoid a breach of a constitutional restriction, but commends itself to our notions of equity and justice. The cost of the public benefit is made a public burden, and the expense of the individual benefit is placed upon the shoulders of the person who receives it. The question is not whether individual instances of injustice and oppression may not occur in the execution of this law; it is not whether the tax will produce perfect equality of burdens, nor whether the power intrusted to this corporation may not be abused. We know too well that, under any system of taxation, these things may and do happen. There are evils not within the power of courts to remedy. It is for the legislature to guard against them; and we must, in justice to them, say that this charter seems, in the provisions we have been called upon to consider, as carefully framed to prevent these evils as the nature of the case would permit.

We may add that, in support of the conclusions we have reached, there is a current of authority in the highest tribunals of other states scarcely interrupted by conflicting decisions: *People* v. *Mayor of Brooklyn*, 4 N. Y. 420 [55 Am. Dec. 266]; *Livingston* v. *Mayor etc.*, 8 Wend. 101 [22 Am. Dec. 622]; *Beekman* v. *Saratoga etc. R. R. Co.*, 3 Paige, 45 [22 Am. Dec. 679]; *Striker* v. *Kelly*, 7 Hill, 9; *Oakey* v. *Mayor etc.*, 1 La. 1.

The case of *People* v. *Mayor of Brooklyn*, 6 Barb. 213, is the only case in New York, to which our attention has been directed, where the question has been directly determined in opposition

Digitized by Google

to this view. That decision was reviewed and overruled by the court of errors; which circumstance is calculated to destroy its authority in that state, but would not and ought not to impair its value here, if the reasonings and conclusions of the court were such as to command the assent of our judgment. But that, in my judgment, is not so; neither the arguments nor conclusions are satisfactory. The court declare the power exercised by the legislature to be that of the eminent domain; and this is true where any portion of a lot is taken for the improvement, but is plainly not true when the assessment is upon those whose lots are not touched. When such persons are assessed, it can only be under the taxing power, since the power of eminent domain operates only on individuals and "without reference to the amount or value exacted from any other individual or class of individuals;" but taxation "operates upon a community or upon a class of persons in a community, and by some rule of apportionment." When, therefore, it is clear that this assessment upon one class of lot-holders is an exercise of the taxing power, there is no reason why it should not be held to be an exercise of the same power upon the other class, whose lots are taken under the power of eminent domain, and paid for according to their exact value. But it is further intimated in this opinion that local taxation for local objects must be extended so as to embrace all the persons and property within a district known and recognized by law as possessing a local sovereignty for local purposes; and whilst it is not shown that the constitution of New York contains any such restriction upon the power of taxation, the assumption might be conceded, and yet it would by no means follow that the courts were to determine how limited or how extensive such districts might be. In fact, the Kentucky courts, who seemed at one time to have entertained similar views, at last came to the conclusion that the legislature might declare a single square or block or lot to be a district for such purposes. The value of the distinction in this way disappeared, since after all it turned out to be a mere matter of legislative discretion, which the judiciary could not supervise or control. It is quite apparent that much of the reasoning of the supreme court, in this case of *People* v. *Mayor of Brooklyn*, *supra*, is directed against the policy of exercising the right of eminent domain at all, and especially of intrusting its exercise to municipal corporations; and the hardship, inconvenience, and injustice resulting from its exercise in individual cases are depicted by the court in vivid colors. But if the legislature have been

Digitized by Google

intrusted with the power and must meet the responsibility of its exercise, such considerations are beyond the control of the courts.

Several decisions in Kentucky have also been referred to which maintain the views advanced by the supreme court of New York in *People* v. *Mayor of Brooklyn*, *supra;* but as these decisions have been materially modified, if not virtually abandoned, by the same court in the case of *City of Lexington* v. *McQuillan's Heirs*, 9 Dana, 513 [33 Am. Dec. 497], it is unnecessary to examine them.

The other judges concurring, judgment affirmed.

COMPENSATION FOR LAND TAKEN FOR PUBLIC USE: See *Henderson & N. R. R. Co.* v. *Dickerson*, 66 Am. Dec. 148, note 153, where other cases are collected.

BENEFITS RESULTING FROM PUBLIC IMPROVEMENT WHEN MAY BE SET OFF AGAINST DAMAGES for property taken: See *Henderson & N. R. R. Co.* v. *Dickerson*, 66 Am. Dec. 148, note 153, where other cases are collected. The benefits to be assessed to the owner of land taken for a road are such as his land derives therefrom, over and above the benefits to his neighbors, whose land is not taken: *Lee* v. *Tebo & N. R. R. Co.*, 53 Mo. 180, citing the principal case.

ASSESSMENTS FOR BENEFITS CONFERRED BY LOCAL IMPROVEMENTS are a valid exercise of the taxing power: *State* v. *City of St. Louis*, 62 Mo. 245; *City of St. Louis* v. *Speck*, 67 Id. 406; *Emery* v. *San Francisco Gas Co.*, 28 Cal. 352, citing the principal case. Special tax assessments for that purpose are not repugnant to the provisions of the constitution: *Uhrig* v. *City of St. Louis*, 44 Mo. 463; *Halpin* v. *Campbell*, 71 Id. 494, both citing the principal case. This kind of tax is not a property tax within the meaning of the constitution: *City of Chicago* v. *Larned*, 34 Ill. 273, citing the principal case. The provision of the constitution requiring all property subject to taxation to be taxed in proportion to its value is applicable only to taxation in its usual, ordinary, and received sense, not to local assessments, where the money raised is expended on the property taxed: *Egyptian Levee Co.* v. *Hardin*, 27 Mo. 498; *Emery* v. *San Francisco Gas Co.*, 28 Cal. 371, both citing the principal case.

DISTINCTION BETWEEN RIGHT OF EMINENT DOMAIN AND TAXATION: See *Louisville & N. R. R. Co.* v. *County Court*, 62 Am. Dec. 424, note 456, where other cases are collected.

ASSESSMENTS FOR PUBLIC IMPROVEMENTS MAY BE MADE ACCORDING TO BENEFITS CONFERRED: See *Louisville & N. R. R. C.* v. *County Court*, 62 Am. Dec. 424, note 456, where other cases are collected.

Digitized by Google

DRAPER v. BRYSON.

[26 MISSOURI, 108.]

PURCHASER AT SHERIFF'S SALE IS PURCHASER within the meaning of the Missouri recording acts.

PURCHASER AT SHERIFF'S SALE WHO TOOK WITH NOTICE OF PRIOR UNRECORDED DEED is postponed to the prior purchaser, under the Missouri act of 1817.

EJECTMENT. The facts are stated in the opinion reported in 57 Am. Dec. 257.

Broadhead, for the appellants.

By Court, NAPTON, J. This case presents virtually the same question determined by the court when this case was here in 1852, a full report of which may be found in *Draper* v. *Bryson*, 17 Mo. 71 [57 Am. Dec. 257]. The case was remanded for a trial of the comparative value of the title under the sheriff's deed to Block, recorded December 11, 1823, and that derived from the deed to Bryson, which was recorded August 3, 1824. This court then held, if Block purchased at the sheriff's sale with notice of Bryson's title, he was not within the protection of the act of 1817; but as his deed from the sheriff was recorded on the day succeeding its execution, and of course was recorded in time under the act of 1817, his title was the better title, if the purchaser was without actual notice of Bryson's deed. The case was tried upon this point, and the jury found there was no notice.

It is now contended, and was urged by instructions offered in the court below, that as Shaw had no title when he died, but had passed it to Allen, there was no title in his heirs or administrator upon which the judgment obtained against his administrator could operate, and consequently that the sale passed nothing to the purchaser. But to say nothing of the fact that Shaw had not executed any conveyance in his life-time, and consequently that the legal title descended to his heirs, subject to the payment of his debts, a judgment and execution operate to convey the same interest which the judgment debtor could himself convey by deed. A purchaser at a sheriff's sale under an execution and judgment is a purchaser within the meaning of the recording acts; and it might as well be said that if a grantor conveys to one to-day, he has no interest, and can therefore convey no interest to another the next day. Yet if he does so, and the second purchaser puts his deed on record first, without any knowledge of the first conveyance, he holds

Digitized by Google

the title. The cases of *Jackson* v. *Town*, 4 Cow. 599 [15 Am. Dec. 405], and *Jackson* v. *Post*, 9 Cow. 120, have been reviewed, and, so far as this point is concerned, overruled by the same court: *Jackson* v. *Chamberlain*, 8 Wend. 624; *Jackson* v. *Post*, 15 Id. 588. Such is also the principle maintained in Pennsylvania, in the case of *Heister* v. *Fortner*, 2 Binn. 40 [4 Am. Dec. 417]. The Pennsylvania statute differed from our act of 1817 in limiting the recording act to mortgages or deeds defeasible. The act of 1817 declared that all deeds, conveyances, bonds, etc., should be recorded within three months, or be void against subsequent purchasers. Although a judgment creditor is not a purchaser within the act, a purchaser at the execution sale is.

The judgment is affirmed.

RICHARDSON, J., having been of counsel, did not sit in this case.

UNRECORDED DEED IS GOOD AGAINST EVERYBODY BUT CREDITORS AND PURCHASERS without notice: See *Vose* v. *Morton*, 50 Am. Dec. 750, note 754, where other cases are collected; *Draper* v. *Bryson*, 57 Id. 257, note 265, where additional cases are collected.

THE PRINCIPAL CASE IS CITED in *Maupin* v. *Emmons*, 47 Mo. 306, to the point that the statute invalidating an original unrecorded deed operates in favor of a *bona fide* purchaser at a sheriff's sale, as well as in favor of one who purchases at a private sale, provided the original deed be not recorded until after the sale.

FUHR *v.* DEAN.

[26 MISSOURI, 116.]

TRESPASS QUARE CLAUSUM FREGIT MAY BE MAINTAINED ON NAKED POSSESSION against a wrong-doer, but not against a party who had the title and right of entry.

COMMON LAW AFFORDS NO CIVIL REMEDY AGAINST ONE WHO, HAVING RIGHT, ENTERS FORCIBLY, but the party injured must resort to the statutory action of forcible entry and detainer.

PRACTICE OF FEW PERSONS IN BUSINESS IN WHICH MANY ARE ENGAGED does not establish a custom which all persons who are engaged in the same pursuit are presumed to know and recognize.

RIGHT TO EASEMENT CAN BE CREATED ONLY BY DEED.

RIGHT TO ENTER ON ANOTHER'S LAND, AND REMAIN THERE for a certain time, or indefinitely, at the pleasure of the party claiming the privilege, is an interest in the land, which can be created only by deed.

LICENSE CANNOT BE COUNTERMANDED AFTER IT HAS BEEN EXECUTED so as to permit acts done under it to be treated as trespasses.

APPEAL from Washington circuit court. The plaintiff, in his petition, alleged that for some two years prior to January

Digitized by Google

23, 1854, he was legally in possession, for the purpose of mining lead ore, of a lot of land in Washington county; that he had sunk a shaft and run drifts on said lot from which he could daily raise a large quantity of ore; that on the said twenty-third of January, 1854, the defendants forcibly entered said shafts and drifts and took possession thereof, and expelled the plaintiff therefrom; that they were raising the lead ore from said lot and converting it to their own use. The plaintiff further alleged that he had sustained damages to the amount of one thousand six hundred dollars, for which he brought this suit. It appeared from the evidence that John Dean, who was the proprietor of a tract of land including said lot, sold it to the Missouri Lead Company, of which the defendants were the agents; that the plaintiff had, for some time prior to the sale, been in possession of the lot mentioned in his petition; and that he had been engaged in mining for lead ore. After the sale, early in January, 1854, the defendants, as agents of the company, gave notice to Fuhr to quit said lot. And on the twenty-third of January, 1854, the defendants entered and forcibly ejected the plaintiff. The court, of its own motion, instructed the jury as follows: "1. The extent as to quantity and the duration in point of time of a 'miner's right,' in the absence of any special arrangement between the miner and the proprietor, is a matter to be determined and regulated by the custom prevailing in that behalf in the particular locality where the right attaches; and where it appears that such right has attached with the consent of the proprietor, then it continues and is obligatory upon all persons claiming under such proprietor until forfeited, or otherwise determined by the act and consent of the miner; and if, while such right continues, the proprietor interferes and puts the miner out of his ground, then by such act he becomes a trespasser, and is liable in damages for the value of the privilege of which the miner is thus deprived." The jury found for the plaintiff.

Noell, for the appellants.

Frissell, for the respondent.

By Court, RICHARDSON, J. The action of trespass *quare clausum fregit* may be maintained on a naked possession against a wrong-doer, but it will not prevail against a party who had the title and right of entry. A defendant can justify under the plea of *liberum tenementum*, and can successfully defend the action if he can show superior title and right of possession,

Digitized by Google

although possession is acquired by force: *Speed* v. *Braxdell*, 7 T. B. Mon. 568; *Turner* v. *Meymott*, 1 Bing. 158; *Wilde* v. *Cantillon*, 1 Johns. Cas. 123. The common law affords no civil remedy against a person who having a right enters forcibly: *Taunton* v. *Castor*, 7 T. R. 431; but the injured party must appeal to the statutory action of forcible entry and detainer: *Krevet* v. *Meyer*, 24 Mo. 107. If, then, the plaintiff in this case has no interest in the land, but seeks to recover for the unlawful disturbance of an incorporeal right to dig ore on another's land, he cannot recover on the case made in his petition, but must amend.

The first instruction given by the court was erroneous, for it assumes that a custom had been proved regulating the rights of miners, but the bill of exceptions is silent except as to the usage of a particular mine. The practice of a few persons in a business in which many are engaged will not establish a custom which all persons who are engaged in the same pursuit are presumed to know and recognize. A custom which would confer a right so important as that asserted in the instruction—being no less than the right of one person to occupy for the purpose of mining the land of another as long as he pleases without a deed or other writing—ought at least to be well established by proof. A local custom must be proved on the trial; and we may suppose there was more evidence given on the trial of this case than we see in the record, but it ought to have been preserved in the bill of exceptions, so that it could be ascertained what interest the plaintiff had in the land.

The judgment will be reversed and the cause remanded to be retried; and without intending to anticipate all the questions that may arise on another trial, it may be appropriate to notice some of them that will necessarily be presented. It will be developed by the evidence whether the plaintiff claims the right to mine on the defendant's land as an easement or under a license. If he claims an easement, it must be established by deed, for being an incorporeal hereditament, it lies in grant and cannot pass by livery: *Arnold* v. *Stevens*, 24 Pick. 109 [35 Am. Dec. 305]. A mere license may exist by parol, and ordinarily is not assignable, and is revocable unless it has been executed, and the party has incurred expense on the faith of it, so that he would be injured by its revocation: 3 Kent's Com. 452; *Pierrepont* v. *Barnard*, 6 N. Y. 279; *Wood* v. *Leadbitter*, 13 Mee. & W. 838.

In *Cook* v. *Stearns*, 11 Mass. 536, the court held that a license

Digitized by Google

is technically an authority to do something on the land of another without passing an estate in the land, and a license to do a particular act does not invade the policy of the law that requires conveyances of title or interest in land to be in writing, for it may amount to nothing more than an excuse for an act which would otherwise be a trespass; but an easement cannot be acquired without a deed, or prescription which implies one. Savage, C. J., in *Mumford* v. *Whitney*, 15 Wend. 380 [30 Am. Dec. 60], after reviewing the authorities, observes: "They all agree in this, that any permanent interest in the land itself cannot be transferred except by writing. Much of the discrepancy may have arisen from the different ideas attached to the word 'license.' If we understand it as Chancellor Kent defines it, it seems to me there can be no difficulty. It is an authority to do a particular act upon another's land; is founded in personal confidence, and is not assignable. For example: A agrees with B that B may hunt or fish on his, A's, land; A thereby gives B a license for that purpose. This gives B no interest in the land; he cannot authorize any other person to go upon the land; it is a personal privilege granted to B alone. If after A has given his consent, and before B has entered upon his land, A changes his mind, he has a right to do so and forbid B from entering upon his land for the specified purpose. The license is thus far executory, and may be revoked at pleasure. If B afterwards enters, he is a trespasser. If, however, B enters before any revocation of the license, the license is then executed, and it is not competent for A to revoke it and make B a trespasser. This doctrine is applicable only to the temporary occupation of land, and confers no right nor interest in the land."

Though it is difficult often to determine between an easement and a license, it seems to be settled that the right to enter and remain on another's land for a certain time or indefinitely, at the pleasure of the party claiming the privilege, is an interest in the land which can only be created by deed. A license cannot be countermanded after it has been executed, so as to permit acts done under it to be treated as trespasses; and though sometimes it may not be easy to ascertain the point of time at which a parol license may be revoked, when it is no longer executory and the licensee has expended money on the faith of it, and is in the enjoyment of the privilege connected with it, yet there must be a time at which it is revocable; otherwise it would create a permanent interest in land. It may be, however, that when acts have been performed upon the faith of a license, the party giving it

Digitized by Google

may be equitably estopped from revoking it to the injury of the other party, but the estoppel will be limited by the injury it is invoked to prevent; as if A gives B the privilege of passing over his land, it may be countermanded at any time, and no harm will be done, for the parties will stand after the revocation where they were before; but if the license is that B may build a house on A's land, and B, on the faith of the license, erects the house, he might have the right of removing it, and A would perhaps be denied the power of revocation until B has been indemnified by the use of the property for the money he had expended on it.

The other judges concurring, the judgment will be reversed and the cause remanded.

FORCIBLE ENTRY, WHAT IS: See *Croff* v. *Ballinger*, 65 Am. Dec. 735, note 737.

CUSTOM, PROOF OF: See *Barlow* v. *Lambert*, 65 Am. Dec. 374, note 379, where numerous cases are collected.

EASEMENT MUST BE FOUNDED ON DEED OR WRITING, OR UPON PRESCRIPTION: See *Hazelton* v. *Putnam*, 54 Am. Dec. 158, note 167, where other cases are collected; *Dyer* v. *Sanford*, 43 Id. 399, note 404, where other cases are collected.

LICENSE IS BARE AUTHORITY TO DO CERTAIN ACTS UPON ANOTHER'S LANDS without possessing any estate therein: See *Riddle* v. *Brown*, 56 Am. Dec. 202, note 206, where other cases are collected; *Desloge* v. *Peace*, 38 Mo. 599, citing the principal case.

PAROL LICENSE TO WORK MINES: See *Riddle* v. *Brown*, 56 Am. Dec. 202, note 206, where other cases are collected.

LICENSE, WHEN AND HOW REVOCABLE: See *Riddle* v. *Brown*, 56 Am. Dec. 202; *Hazelton* v. *Putnam*, 54 Id. 158, note 166, where other cases are collected, and this subject is considered. A mere license may exist by parol, and is revocable unless it has been executed and the party has incurred expense on the faith of it, so that he would be injured by the revocation: *Baker* v. *Chicago etc. R. R. Co.*, 71 Mo. 272, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Matson* v. *Calhoun*, 44 Mo. 370, to the point that the mere erection of a fence on land of another by mistake does not vest the title in him; and on the discovery of the mistake the owner may enter and remove it; and in *Thomas* v. *Babb*, 45 Id. 388, to the point that if in ejectment the evidence shows that the occupation was by the plaintiff's license, the defendant will not be liable to the same extent that he would be if his possession had been wrongful.

Digitized by Google

CASES

IN THE

SUPREME JUDICIAL COURT

OF

NEW HAMPSHIRE.

BOW *v.* ALLENSTOWN.

[34 NEW HAMPSHIRE, 351.]

INCORPORATION OF TOWN MAY BE PROVED BY REPRESENTATION, LEGISLATIVE GRANTS necessarily implying a town corporation, or by claim and user of the corporate powers of a town with the knowledge and assent of the legislature, and without objection or interruption for a period long enough to furnish evidence of a prescriptive right, where no charter or act of incorporation of the place as a town can be found.

EVIDENCE TENDING TO PROVE EXISTENCE OF TOWN BY PRESCRIPTIVE RIGHT IS ALSO EVIDENCE proper to be weighed in the attempt to establish its existence by reputation.

NEW CHARTER DOES NOT EXTINGUISH OLD PRIVILEGES; AND ACT OF INCORPORATION does not raise any conclusive presumption that the town thus incorporated was not a corporate town before the act was passed. It is evidence to be weighed by the jury.

DEEDS AND OTHER PRIVATE DOCUMENTS ARE ADMISSIBLE AS EVIDENCE OF REPUTATION of the matters of general and public interest recited in them.

FOUNDATION FOR ADMITTING EVIDENCE OF REPUTATION, OR DECLARATIONS OF OLD AND DECEASED PERSONS, must, in subjects interesting to a comparatively small portion of the community, as a city or a parish, first be laid by showing that from the situation of such persons they were probably conversant with the matter of which they were speaking, or such evidence will be rejected.

VERDICTS ARE RECEIVABLE EVIDENCE OF REPUTATION IN QUESTIONS OF GENERAL OR PUBLIC INTEREST, and the circumstance that the verdict was *post litem motam* does not affect its admissibility.

VERDICT AND JUDGMENT AGAINST TOWN IN ACTION FOR SUPPORT OF PAUPER, THOUGH RENDERED AFTER ACT OF INCORPORATION, IS EVIDENCE OF REPUTATION of the place as a town, if they were founded on a claim and settlement of a prior date; and they are admissible to rebut the presumption that the town was not incorporated before, though they would have no tendency to prove an incorporation fifteen years prior to the act

Digitized by Google

of incorporation. Their effect would not be modified by the fact that the plaintiff in the action afterwards supported the same pauper; and such fact would have no tendency to rebut the effect of the verdict and judgment as evidence of the reputation of the corporate character of the town.

INCOMPLETENESS OF STATE RECORDS MAY BE SHOWN TO ACCOUNT FOR FACT THAT NO CHARTER OR ACT OF INCORPORATION OF TOWN CAN BE FOUND. Thus a private act reciting the burning of the secretary's office, and an account of the same fire communicated to the New Hampshire Historical Society's Collections by one formerly secretary of state, are competent evidence of that historical fact for such a purpose. Evidence of an unsuccessful search in the office of the secretary for charters of other towns is also admissible to show the records to be incomplete.

RECORDS OF TOWN ARE RECEIVABLE IN EVIDENCE, AS SHOWING CHARACTER IN WHICH PLACE ASSUMED TO ACT; whether they show acts only which a town could do, or such as unincorporated places might also do.

PUBLIC BOOKS, THOUGH NOT STRICTLY TOWN RECORDS, ARE RECEIVABLE IN EVIDENCE as almost necessarily giving character to the action of the people of a place claiming to be a town, or a place not incorporated, where such books contain entries made by the officers of the place and of their doings as such.

BOOKS CONTAINING STATEMENT OF TAXES AND ACCOUNTS ARE EVIDENCE PROPER TO BE WEIGHED BY JURY that the people of a place claimed to exercise the peculiar powers of a town, where they voted in their meetings to raise taxes for purposes for which unincorporated places could not raise money, as for the building of highways and the support of paupers, and where the proper officers proceeded to assess, collect, and appropriate such taxes. They are admissible, too, without being certified by the town clerk, as they are not records requiring his attestation; and are receivable on the ground that they are the written statements of persons conversant with the place and its affairs. The same facts might be shown without any books, by the testimony of any person to whom they were familiar.

ACTS OF LEGISLATURE INCIDENTALLY RECOGNIZING PLACE AS TOWN ARE RECEIVABLE AS EVIDENCE OF REPUTATION of the place as a town, and also as evidence of the assent of the legislature to the exercise of the powers of a town.

VENIRES FOR JURORS, OF THEMSELVES ALONE, ARE WITHOUT WEIGHT AS EVIDENCE OF REPUTATION OF PLACE as a town, because the courts cannot confer corporate powers.

COURTS WILL TAKE JUDICIAL NOTICE OF TOWNS as the public bodies from which jurors are to be drawn, and to whose officers their writs for jurors are to be sent.

TOWNS ONLY ARE AUTHORIZED TO DRAW JURORS, AND FACT THAT PLACE WAS REQUIRED by the courts to return jurors, and that jurors were drawn and returned to the courts, is evidence that the place was reputed to be a town and assumed to act as such.

ACT OF INCORPORATION CANNOT BE PROVED BY EVIDENCE THAT PLACE HAS BEEN CLASSED for the choice of a representative; because unincorporated places are usually classed for that purpose.

PLACES EXERCISING TOWN PRIVILEGES ARE TOWNS BY IMPLICATION.

Digitized by Google

POWER TO ELECT REPRESENTATIVES WITHOUT CLASSIFICATION IS, UNDER CONSTITUTION OF NEW HAMPSHIRE, CONFINED TO TOWNS; viz., those places having one hundred and fifty ratable polls, or places with town privileges, which are really towns. No others have such power.

NO PARTICULAR FORM OF WORDS IS EVER REQUIRED TO CONSTITUTE CORPORATION.

GRANT BY STATE WILL OF ITSELF CONFER CORPORATE CHARACTER.

PARTIES NOT FOUND TO POSSESS CORPORATE POWERS WILL BE DEEMED CORPORATION, if the intention of the legislature would be otherwise defeated.

LEGISLATIVE ANNEXATION OF OTHER TERRITORY TO TOWN WILL MAKE IT TOWN IN FUTURE, even if it was not a town before.

POWERS OF UNINCORPORATED PLACES UNDER CONSTITUTION AND LAWS OF NEW HAMPSHIRE POINTED OUT, and the gradual approximation of the condition and powers of such places to those of towns shown.

CONCLUSIVE PRESUMPTION OF GRANT FROM STATE IS FURNISHED BY UNQUESTIONED USER and enjoyment of the franchise of a town for twenty years without interruption and with the assent of the government.

TITLE BY PRESCRIPTION, WHICH ALWAYS PRESUPPOSES GRANT, IS ACQUIRED BY UNQUESTIONED USER and enjoyment of the franchise of a town for twenty years without interruption and with the assent of the government.

ASSUMPSIT for the support of E. Holt, a pauper, from August 27, 1847, to January 10, 1850. The plea was the general issue. It was admitted that Holt was a pauper, standing in need of relief; that the supplies, as charged, had been furnished by the plaintiff; that proper notices under the statute had been served on defendant according to law; that Holt had resided in Allenstown for a long time prior to 1816; that for four successive years, from 1816 to 1820, he dwelt and had his home in said Allenstown, and owned and occupied real estate there to the value of one hundred and fifty dollars and more; that he paid all taxes duly assessed on him and his estate during said time; and that plaintiff was entitled to recover the amount claimed in this action if Allenstown was an incorporated town prior to 1816. The defendant introduced a copy of a legislative act of incorporation of Allenstown, approved July 2, 1831, and proved that diligent search had been made among the state records, and that no evidence on record of any colonial grant or act, or any act by any legislature or otherwise, constituting the town of Allenstown, prior to 1831, could be found. The defendant's position respecting this act, and the views of the lower court concerning it, will be found in the opinion. The plaintiff contended that Allenstown had been incorporated by some charter or act prior to 1815, and that the incorporating instrument had been lost or destroyed by lapse of time or accident. To prove the existence

Digitized by Google

of such charter or act, he introduced evidence of reputation, consisting of various ancient deeds, records, and documents, and the declarations of persons formerly resident in Allenstown, now deceased, etc. Plaintiff offered in evidence the copy of a writ, verdict, and judgment in *Pembroke* v. *Allenstown*, as evidence that Allenstown was an incorporated place prior to 1831. The judgment was recovered in February term, 1834. The writ was entered September term, 1832, and was founded on an account for the support of a pauper from June 4, 1829, to August 1, 1832. This was admitted under the objection that it was of too recent a date. Defendant offered, during the course of the trial, to prove that the pauper, whose settlement was in question in said action, had been since the date of the judgment, and was still, supported as a pauper by said Pembroke, but the court excluded the testimony. To rebut this evidence of reputation, defendant introduced various ancient deeds, records, and documents, and the declarations of deceased persons, late of said Allenstown. To disprove the fact of incorporation, the defendant, on this question of reputation, offered in evidence a deed where both the parties lived away from Allenstown, and without laying any foundation showing them to be familiar with Allenstown. This evidence was excluded by the court below. Defendant also attempted to prove what Judge Livermore said at the trial of a cause at which he was presiding, about Allenstown being incorporated, but without showing him to have been familiar with the affairs of Allenstown. This, too, was rejected. Plaintiff introduced the copy of a private act of the legislature, approved April 1, 1737, to prove that certain public records of the state had been lost or destroyed by fire, and which was received under the defendant's objection of incompetency. He then offered in evidence for the same purpose a written history of the fire, and which is briefly stated in the opinion. Defendant objected: 1. That the plaintiff had not shown by any proper search that any charters of towns or other public records had ever been lost; 2. That if this had been shown, the book offered was not a history so well authenticated as to make it authority. But the evidence was admitted. Plaintiff also offered, for the same purpose, evidence tending to prove that the secretary of state had made diligent search among the state records, and that no charters or acts of incorporation of a number of towns named could be found. This was admitted under objection. Plaintiff then offered in evidence the records of Allenstown from 1789 to 1831, from the town clerk's office, for the purpose

Digitized by Google

of showing that in all their acts, from their earliest organization down to 1831, they had assumed to act, and had acted, in the capacity of a town. Defendant objected to the reception of any evidence from the records proving acts on the part of Allenstown which unincorporated places might do; but the records were admitted. Plaintiff offered in evidence, as a part of said records, a book purporting to be a record of the sale of non-residents' lands for taxes in Allenstown for the years 1822 and 1823. This was objected to, on the ground that it did not show any legal taxes assessed upon Allenstown upon which such sale could lawfully be made. This was admitted. The plaintiff also offered the books of the selectmen of Allenstown prior to 1831, and they were admitted under objection from defendant. In these books there were frequent references made to particular pages of a book referred to as the pauper-book and the school-book, for the particular items which made up the amounts charged in the accounts of the selectmen. These books were produced under a subpœna *duces tecum*, and after proper proof of their custody, and that they were with other books and records of the selectmen of Allenstown, they were offered as a portion of the selectmen's records, but were objected to because they were not verified or signed by the clerk, and because they were private books of the selectmen, and therefore incompetent evidence of any acts of Allenstown, or the capacity in which she acted. The court admitted them. Various acts of the legislature, tending to show that the state had recognized Allenstown as a town, were offered in evidence by plaintiff, and admitted under defendant's objection that no acts of the state government could be a recognition of Allenstown as a town unless the act, in direct terms or by necessary implication, conferred the powers of a corporation. This was claimed to be a question of law for the court, and not one of fact for the jury. Acts for the apportionment of public taxes, the "beef act," passed in 1780, and other documents, were admitted, under defendant's objection, as tending to show reputation and recognition on the part of the state. In these documents Allenstown was enumerated among towns without any mark of discrimination, though it appeared that other places, usually regarded as unincorporated, were enumerated in the same manner. Plaintiff also offered evidence to show that writs of *venire facias* had been issued by the courts each year from 1824 to 1831, directed to the town of Allenstown, and that Allenstown had, in compliance with the requirements of said writs, drawn and returned

Digitized by Google

jurors to serve at said courts. Defendant objected that this evidence was too recent to prove reputation, and not of a character to prove recognition; but it was admitted. Plaintiff then offered in evidence various acts of Allenstown between 1816 and 1831, tending to prove that they had acted as a town, and had also performed acts which an unincorporated place could not legally do; and also various acts of the state government in the same period of time, tending to show a recognition of Allenstown as a town by the state. The court admitted the evidence, under defendant's objection, but instructed the jury that they would consider this in connection with all the other similar acts of Allenstown and the state prior to 1816, and find from the whole evidence whether Allenstown was incorporated prior to the act of 1831; and if they so found, then to find, further, as to the time of its incorporation, whether it was before or after 1816. The court also instructed the jury that an unincorporated place was liable to be taxed by the government, and when thus taxed, its inhabitants had a right, by the constitution and laws of the state, to vote for state senators, and to choose selectmen, assessors, and collectors, to assess and collect all taxes thus imposed upon them by the government, but that they had no power by law to impose a tax upon themselves, or to raise one dollar by any such tax upon themselves for any purpose whatever; that they could not vote to raise money to make highways or to repair them; that they had no authority to raise money for the support of paupers; and that an action could not be maintained by or against any such place. Defendant excepted, and asked the court to instruct the jury that unincorporated places had the right to a representation in the house of representatives, the same as towns. This the court declined to do, but did instruct them that although such unincorporated places were not entitled to such representation in the house of representatives by virtue of the express provisions of the state constitution, yet that by an act of the legislature such places might properly be classed, as they frequently were, and authorized to send a representative, or that even a single unincorporated place might, by special act of the legislature, be authorized to send a representative; but that without some such act of the legislature, such place would not be entitled to a representative in said house of representatives. Defendant excepted. Two other points of instruction to the jury were: 1. To consider and find, upon all the evidence before them, whether or not Allenstown had been in fact incorporated by any charter, grant,

Digitized by Google

or act of incorporation of the provincial or state government prior to 1816; which said charter, grant, or act had been lost or destroyed by lapse of time or by accident; 2. To consider and find whether or not Allenstown had for twenty years prior to 1816 acted as a town, and had claimed and assumed the position of a town, and exercised and enjoyed the privileges of a town, without interruption, and with the assent of the state government. The jury were directed to return a verdict for the plaintiff if they found affirmatively on the first point; but that if on that point they should not find that Allenstown had ever been incorporated in fact prior to 1816, they would proceed to the second point; and if they found that Allenstown had not acted as a town, etc., for twenty years prior to 1816, their verdict would be for the defendant. But they were informed that if they should find affirmatively on the second point, the court would, for the purposes of this trial, hold that this furnished a conclusive presumption of a grant from the state, and order a verdict for the plaintiff. The jury found affirmatively on both the questions submitted to them, and having returned that fact to the court, rendered a general verdict for the plaintiff.

Flint and Morrison, for the defendant.

W. H. Bartlett and D. Clark, for the plaintiff.

By Court, BELL, J. It has been settled by the decisions of the superior court in the case of *New Boston* v. *Dunbarton*, 12 N. H. 409, S. C., 15 Id. 201, that in a case where no charter or act of incorporation of a town can be found, it may be proved to be a town by reputation, or it may be shown to have claimed and exercised the powers of a town, with the knowledge and assent of the legislature, and without objection or interruption, for so long a period as to furnish evidence of a prescriptive right.

All the evidence which may properly bear upon the second of these points is also evidence proper to be weighed under the first.

The case was tried by the court and by the counsel upon these assumptions, and the questions we are now called to decide relate to the admissibility and effect of certain parts of the evidence offered, and to the propriety of the instructions given by the court to the jury.

1. It was held that the act of 1831 did not raise any conclusive presumption that the town was not before incorporated, but that it was evidence to be weighed by the jury. It is contended that it was conclusive evidence that the town was never before incorporated.

Digitized by Google

Presumptions of fact are inferences from evidence, and they may be resisted by evidence leading to an opposite conclusion. As matters of fact they are to be submitted to a jury; this is not the point raised here. Legal presumptions are artificial rules, established by the law, upon considerations of public policy or public convenience, against which no evidence is received. We have not been referred to any work of the law where the presumption contended for here is recognized, and we are aware of none. There is nothing in the history of local corporations to justify the presumption. Towns in England were ordinarily incorporated by a royal charters, and in disturbed times they often solicited new charters, to avoid the risks of forfeitures. If a corporation by accident or neglect became disorganized, it could be restored only by a new charter, and some of the kings are charged with extorting money from corporations by compelling them to take new charters, for which they were obliged to pay large fees and heavy fines: 8 Hume's Eng. Hist. 132; 1 Macaulay's Eng. Hist., c. 2; 12 Lingard's Eng. Hist. 341. It is a settled principle that a new charter does not extinguish old privileges: *Haddock's Case*, 2 T. Raym. 439; *Coller* v. *Coller*, Vent. 355; 6 Vin. Abr. 267, 283; and Corp. I, 3; *Regina* v. *Ipswich*, 2 Ld. Raym. 1239; Com. Dig., tit. Franchise, F, 9; which could not be true if the presumption insisted upon was admitted. The case of *Rex* v. *Mayor etc. Stratford-upon-Avon*, 14 East, 360, is a direct authority against this position.

2. The deeds offered on the one side and the other were competent evidence, though of no great weight. The principle upon which oral declarations are admitted in matters of general and public interest, as a means of proving traditionary reputation, applies to documentary and all other kinds of proof denominated hearsay. If the matter in controversy is ancient, and not susceptible of better evidence, any proof in the nature of traditionary declarations is receivable, whether it be oral or written, subject to the proper qualifications. Thus deeds, leases, and other private documents have been admitted as declaratory of the public matters recited in them: 1 Greenl. Ev., sec. 139; 1 Phill. Ev. 249. Such evidence was received without objection in *New Boston* v. *Dunbarton*, 15 N. H. 201, before cited; *Adams* v. *Stanyan*, 24 Id. 405. The deeds introduced to prove as well as to disprove the fact of incorporation were of persons heretofore resident in Allenstown. One which was offered of land in that town, but excluded, between parties residing at a distance, was rejected. It was properly excluded. In subjects interest-

Digitized by Google

ing to a comparatively small portion of the community, as a city or a parish, a foundation for admitting evidence of reputation, or the declarations of ancient or deceased persons, must first be laid by showing that from their situation they probably were conversant with the matter of which they were speaking: 1 Greenl. Ev., sec. 136; 1 Phill. Ev. 255.

Upon this principle, the evidence of what was said by Judge Livermore, who is not shown to have been conversant either with the place or the affairs of Allenstown, was properly rejected.

The verdict and judgment in *Pembroke* v. *Allenstown*, 21 N. H. 107, was admitted as evidence of reputation, though it was objected that the suit was commenced a year after Allenstown was incorporated by statute, in 1831, and for a claim accrued partly before and partly after the act of incorporation. It would, of course, have been objected to for that cause if the recovery had been upon a claim arising after the incorporation alone. We must therefore assume that the recovery appeared to be for a cause arising before that date. The question involved must have been a settlement acquired by at least four years' residence before the first charge. It had no tendency to prove an incorporation before 1816, which the plaintiffs were bound to establish, but was admissible to rebut the position taken by the defendants, that the town was not incorporated till 1831. The circumstance that the verdict was *post litem motam* does not affect its admissibility, is the rule laid down by 1 Greenl. Ev., sec. 139, for which he cites many authorities.

The fact that Pembroke subsequently maintained the same pauper, for whose support a recovery was had in that action, had no tendency to rebut the effect of the verdict as evidence of reputation of the corporate and town character of Allenstown.

Evidence showing that no charter or incorporation of Allenstown as a town could be found in the state records being introduced, it was competent for the plaintiff to show that the records were not so complete that it could be inferred that there had never been any such charter or incorporation. As tending to show this, evidence that the house of the secretary of the province was burned in 1736, and many public records and papers destroyed, was properly admissible. The copy of the private act reciting these facts, which are to be established as matters of history of public and general interest, seems to have been properly admitted. It cannot be presumed that the legislature would have passed an act containing a false recital as to such a

Digitized by Google

matter. The history of the same fire, given in the fifth New Hampshire Historical Society's Collections, by the late Richard Bartlett, esq., former secretary of state, is entitled to as high credit as any history. Mr. Bartlett was well known as an able lawyer, and a gentleman of high personal character. The article in question bears striking evidence of the diligence and care which were habitual to him. It is admissible on the ground of reputation. The fact of the burning of the secretary's house, and of a part of the public records, is recited in the public statutes: 26 Geo. II., Prov. Stats. 1771, p. 175, of which the court may properly take notice *ex officio*.

The evidence of the search for charters of other towns was admissible also to show the records incomplete. And it is not material that in some instances other explanations of the fact may be given than the loss of the records. Dover, Exeter, Hampton, and Portsmouth were doubtless incorporated or recognized as towns during the period when the government of New Hampshire, in the time of the great rebellion in England, was usurped by Massachusetts. Others were probably incorporated as districts and parishes, and have been made towns by the operation of general laws conferring the character of towns on such districts or parishes.

The records of Allenstown were all admissible, whether they tended to show such acts as a town alone could do, or such acts as an unincorporated place might equally do. The mere fact that acts were done which any unincorporated place might rightfully do, would have no tendency to prove the place a town, but the manner of doing them must generally carry evidence that they were done in the character of a town, or otherwise. The material question is whether the people of the place assumed to act in the character of a town, and their records must almost necessarily have a distinct bearing, either negatively or affirmatively, upon this point.

The book containing the taxes and accounts, though not properly a town record, was yet a public book containing entries made by the officers of the place, of their doings as such; and the same remark applies to the school-book and pauper-book. They were of the character of declarations, or admissions, of the place itself, made by its officers in the course of their business, and almost necessarily giving character to the action of the people as claiming to be a town, or a place not incorporated.

Taxes for state and county purposes might be rightfully assessed in unincorporated places, under general laws passed as

Digitized by Google

early as 1789: Laws 1789, p. 211; and for the support of schools, after 1808: Laws 1815, p. 38; but at no time for highways or paupers, according to the decision in *Hillsborough* v. *Deering*, 4 N. H. 86. Whether the action of the place or its officers was legal or not as to the method of proceeding is not material to the inquiry, since the inference is equally strong as to the character in which they assumed to act, whether they proceeded legally or otherwise. If the people, in their meetings, voted to raise taxes for purposes for which unincorporated places could not raise money, as for the building of highways, and the support of paupers, and the proper officers proceeded to assess, collect, and appropriate such taxes, it is evidence that they claimed to exercise the peculiar powers of a town, though the proceedings might not be conformable to law. Though not conclusive, it would be evidence to be weighed by a jury.

That they are not certified by the town clerk is not material. They are not records requiring his attestation. They are original minutes of the acts done by the officers of the place in the course of their official duties, and of the nature of admissions of the place by its officers. The same facts might be shown without any books, by the testimony of any person to whom they were known.

Considered as the written statements of persons conversant with the place and its affairs, they were admissible as evidence of reputation.

The character of the acts of the legislature offered in evidence is somewhat various. The acts of the convention of 1775, being of a revolutionary character, ought not to be of much weight; but these and the acts of the legislature which speak of Allenstown incidentally as if it were a town may be properly weighed by the jury as evidence of the general impression of the community at those times that Allenstown was a town. They may stand on the same ground as the deeds to which we have before referred, and as the *venires* for jurors. The latter are without weight as a recognition, because the courts cannot confer corporate power. They may, however, take judicial notice of towns as the public bodies from which jurors are to be drawn, and to whose officers their writs for jurors are to be sent. It is not suggested that unincorporated places, before the revised statutes, were authorized to draw jurors, and we are aware of no statute which gave them that authority. That they were required by the courts to return jurors is evidence that Allenstown was reputed to be a town. And it is evidence that the

Digitized by Google

place assumed to act as a town, that jurors were drawn and returned to the courts.

The acts of the legislature incidentally recognizing the town of Allenstown as a town are evidence of their knowledge of the claim and of their acquiescence in the assumption, if it was such, of the corporate powers of a town, which it would be necessary to show, together with the continued exercise of such powers for the period of twenty years, either to establish their title to be a town by prescription, or to authorize the jury to presume the existence and loss of a town charter.

Besides the statutes to which we have referred, we find among the documents put in evidence in this case two acts of the legislature, which are not simply evidence of recognition, or of the reputation of Allenstown as a town. The first is a joint resolution of the legislature, passed June 21, 1811, upon the petition of the selectmen of Allenstown, signed also by a majority of the voters, praying the legislature "to empower said town of Allenstown to elect a representative." This resolution provides that "the town of Allenstown have leave to send a representative to the general court of this state till the legislature shall otherwise order."

In the case of *New Boston* v. *Dunbarton*, 12 N. H. 409, it was held that evidence that Allenstown had been classed for the choice of a representative is not a fact of a character to be submitted to a jury on which to find an act of incorporation, inasmuch as unincorporated places are usually classed for that purpose. By the constitution, the power to elect representatives without classification is confined to towns. By section 9 of part second, "every town, parish, or place with town privileges [those of the last being in effect towns, and now by law declared to be such: Acts of 1792 and since], having one hundred and fifty ratable male polls of twenty-one years of age and upwards, may elect one representative," etc.

By section 10, "such towns, parishes, or places [omitting all reference to town privileges] as have less than one hundred and fifty ratable polls shall be classed by the general court for the purpose of choosing a representative."

It then proceeds, section 11: "Whenever any town, parish, or place with town privileges, as aforesaid, shall not have one hundred and fifty ratable polls, and be so situated as to render the classing thereof with any other town, parish, or place very inconvenient, the general court may, upon application of a majority of the voters in such town, parish, or place, issue a writ

Digitized by Google

for their selecting and sending a representative to the general court."

The power of electing a representative under a resolution of the general court is here expressly limited to towns, and places with town privileges, which are really towns. No others were capable of acting under such an authority.

The second is an act passed June 22, 1815, entitled "An act for disannexing lands, owned by Robert Buntin, etc., from the town of Bow, and annexing them to the town of Allenstown." This act recites a petition to annex the lands to the town of Allenstown, and provides that the land, etc., be disannexed from the town of Bow, and is annexed to and made part of said town of Allenstown, as fully and amply as though contained in, etc., the original grant, charter, or incorporation of said Allenstown.

It cannot be questioned that no particular form of words is ever required to constitute a corporation. It was so expressly held in the case of *Sutton's Hospital*, 10 Co. 30, and is so laid down in Kyd on Corp. 62; 2 Kent's Com. 27; 1 Roll. Abr., tit. Corporations, F, 1.

Wherever it is apparent that the intention of the legislature will be defeated if certain parties are not found to possess corporate powers, they will be held to be created a corporation: Dyer, 100 a; *Russell* v. *Men of Devon*, 2 T. R. 672; *Stebbins* v. *Jennings*, 10 Pick. 183; *North Hempstead* v. *Hempstead*, 2 Wend. 109. In the last case, it is said that it had been decided in *Jackson* v. *Cory*, 8 Johns. 385, that the people of Otsego county could not take by a grant, because they are not a corporation; and in *Hornbeck* v. *Westbook*, 9 Id. 73, the town of Rochester could not take for the same reason; yet if those grants had been made by the state, the grant itself would have conferred a corporate character. And the like principle was held, that the grant of the state gives to the grantee a capacity to take land, when otherwise incapable, as in the case of the heir of an Indian: *Goodell* v. *Jackson*, 20 Id. 706 [11 Am. Dec. 351]; of a foreigner: *Jackson* v. *Etz*, 5 Cow. 314; and of a slave: *Jackson* v. *Lervey*, Id. 397. In *State* v. *Fourth N. H. Turnpike*, 15 N. H. 162 [41 Am. Dec. 690], it was held that if the acts of the legislature recognized the subsequent and continued existence of a corporation, such recognition will be a waiver of any forfeiture previously incurred; and the same doctrine was held in *People* v. *President etc. of Manhattan Co.*, 9 Wend. 382; and by Cowen, J., in *People* v. *Kingston etc. Turnpike Co.*, 23 Id. 193.

Digitized by Google

It is on this principle that it has always been held in England that a writ of summons to a commoner to attend the house of lords, if acted upon, makes the party a peer, because none but peers can hold a seat in that body: 3 An. Dig. 157 et seq.; and a charter or statute granting a right to elect representatives in parliament makes the place a borough.

And it is on this principle, so far as we can discover, that the grantees of common lands in this state under royal or legislative grants have always acted as corporate bodies, and been recognized as such.

It must be taken, we think, that the legislature by their resolution of 1811, intended to recognize Allenstown as a place entitled to all the powers of a town, and to confer them upon it, if it had them not already; and there seems no reason to doubt that by the act of 1815 the legislature intended to annex the lands described to the town of Allenstown—to a town and not to an unincorporated place. This act is therefore not only a recognition of Allenstown as a town, but it must be construed to confer the powers of a town in future, if it had not been before incorporated.

These acts being regarded by us as conclusive of the fact in controversy, most of the questions raised in the case are rendered immaterial.

The charge of the court as to the right to send a representative was, upon the views we have stated, sufficiently favorable to the defendant, and not open to any exception by them. So the instructions relative to the mode of considering the evidence relative to the acts of Allenstown and of the state were suitable and proper: Angell & Ames on Corp. 57, 58.

The charge of the court as to the powers of unincorporated places seems entirely correct. By statutes passed in 1789, 1791, and afterward, certain corporate powers were conferred on what were then and still are called unincorporated places. An extended examination of the statutes, by the aid of the counsel, shows that the places called unincorporated had all the powers of towns as to state and county taxes, as to schools, as to elections of state and county officers, except representatives, and of members of congress, as to the choice of selectmen, assessors, and town clerk, collectors, fence-viewers, and measurers of wood, and as to perambulations, and that their officers had the powers of the like officers in towns as to licenses, strays, the small-pox, fences, boundaries, attachments, records of deaths, etc., and as to the taxation of non-residents' lands, and such

Digitized by Google

places were subject to extents like towns; while they had not the powers of towns as to highways, nor, by the decision in *Hillsborough* v. *Deering*, 4 N. H. 86, as to paupers, nor as to jurors, tithing-men, mills, pounds, floating timber, watchmen, sealers of weights and measures, firewards, nor as to arms for soldiers, nor as to representatives.

The condition and powers of these so-called unincorporated places have been gradually approximating to those of towns, so that under the revised statutes, which provide, c. 1, sec. 4, that the word "town" may be construed to extend and be applied to any place incorporated, or the inhabitants of which are required to pay any tax, it may well be doubted if any substantial difference now exists between them.

The question between New Boston and Dunbarton, which related to a settlement gained before 1796, was very materially different from that presented in this case, which relates to a settlement commenced in 1816.

The charge that the unquestioned user of the franchise of a town for twenty years without interruption, and with the assent of the government, furnished a conclusive presumption of a grant from the state, is in accordance with repeated decisions of our courts: *Watkins* v. *Peck*, 13 N. H. 360 [40 Am. Dec. 156]; *Wallace* v. *Fletcher*, 30 Id. 434, and others; 2 Greenl. Ev., sec. 539.

In *Wallace* v. *Fletcher*, *supra*, it was held that though in England a prescription must have existed beyond time of legal memory, yet here, by analogy to the statute of limitations, an uninterrupted user of an incorporated hereditament, under a claim of right for twenty years, as between parties under no disability, with the knowledge and without interruption of those adversely interested, affords conclusive evidence of a grant or a right, as the case may be. Such user and enjoyment may be used as proof of a deed or record which has been lost by time or accident, or of a prescriptive right which always presupposes a grant. Such a title may be well called a prescription, agreeably to the ancient use of that term, though it depends upon a period of twenty years, and has no connection with the time of legal or actual memory: *Dare* v. *Heathcote*, 36 Eng. L. & Eq. 564.

The rulings of the court below being sustained, there must be judgment on the verdict.

PERLEY, C. J., and FOWLER, J., having been of counsel, did not sit.

Digitized by Google

ANCIENT DEEDS MAY BE GIVEN IN EVIDENCE WITHOUT PROOF OF EXECUTION, WHEN: *Griswold* v. *New York Ins. Co.*, 3 Am. Dec. 490, note; *Jackson* v. *Davis*, 15 Id. 451; *Crane* v. *Marshall*, 33 Id. 631; *Settle* v. *Alison*, 52 Id. 393, and note 399.

TITLE BY PRESCRIPTION, HOW ESTABLISHED: See note to *Lewis* v. *Herndon*, 14 Am. Dec. 71. That grants may be presumed from a lapse of time, see *Mitchell* v. *Walker*, 16 Id. 710; *Fitzhugh* v. *Croghan*, 19 Id. 139.

TO CONSTITUTE GRANT OF LEGISLATURE, no particular terms are necessary: *Proprietors of Enfield* v. *Permit*, 20 Am. Dec. 580.

LEGISLATURE MAY CREATE CORPORATION WITHOUT REQUIRING CONFORMITY to the usual mode of organization known to the common law: *Penobscot Boom Corporation* v. *Lamson*, 33 Am. Dec. 656.

CHARTERS AND BY-LAWS OF CORPORATION MUST BE PROVED; they cannot be judicially noticed: *Haven* v. *New Hampshire Asylum*, 38 Am. Dec. 512. Legislative journals are evidence to show that a bank was not chartered by the requisite vote: *Skinner* v. *Deming*, 54 Id. 463.

RECORDS OF CORPORATION ARE BEST EVIDENCE TO PROVE ITS ACTS in a suit against it: *Haven* v. *New Hampshire Asylum*, 38 Am. Dec. 512, and note; but see *Commonwealth* v. *Woelper*, 8 Id. 628, and note 640, where other doctrines are announced.

CHARTER WILL BE PRESUMED TO EXIST FROM LONG EXERCISE OF CORPORATE RIGHTS, or from other circumstances: *Selma & Tenn. R. R. Co.* v. *Tipton*, 39 Am. Dec. 344, and notes 358. Every presumption is made in favor of legal existence of corporation after it has once gone into operation and rights have been acquired: *Duke* v. *Cahawba Nav. Co.*, 44 Id. 472.

COMMON REPUTATION, WHICH IS COMPETENT AS EVIDENCE IN CASES OF CUSTOM, PRESCRIPTION, ETC., must be reputation as to the right, privilege, or franchise claimed, and not hearsay as to any particular fact from which the right might be inferred: *Vaughn* v. *Phebe*, 17 Am. Dec. 770.

TOWNS ARE NOT RESPONSIBLE FOR ERRORS OR WRONGFUL ACTS OF ASSESSORS AND COLLECTORS OF TAXES in assessing and collecting excessive or unauthorized taxes: *Lorillard* v. *Town of Monroe*, 62 Am. Dec. 120, and extended note thereto 123–125, discussing the question; and also how far towns are corporations in New York, and the liability of towns, etc., for illegal taxes and moneys paid over to them.

COMPETENCY OF OFFICIAL BOOKS AND PAPERS AS EVIDENCE: *Dikeman* v. *Parrish*, 47 Am. Dec. 455, and cases cited in note to same 465.

LEGISLATIVE JOURNALS AS EVIDENCE: See extended note to *Jones* v. *Jones*, 51 Am. Dec. 616, discussing the question.

THE PRINCIPAL CASE WAS CITED in *Haynes* v. *Brown*, 36 N. H. 561, to the points that in a case where no charter or act of incorporation can be found, a charter may be presumed from the long-continued exercise of corporate powers without objection; and that a grant of corporate powers may be implied when otherwise the manifest purpose of any legislative act would be defeated.

Digitized by Google

DANIELS v. BROWN.

[34 NEW HAMPSHIRE, 454.]

LANDLORD AND TENANT ARE TENANTS IN COMMON OF CROPS RAISED ON SHARES, until a division is made.

TENANT, AFTER EXPIRATION OF HIS LEASE AND HIS REMOVAL FROM LEASED PREMISES, HAS RIGHT to a reasonable ingress upon the land in order to remove his property.

TENANT CANNOT JUSTIFY USE OF FORCE IN OBTAINING POSSESSION OF HIS PROPERTY left on the leased premises after the expiration of the lease.

TENANT CANNOT MAINTAIN TRESPASS AGAINST HIS CO-TENANT for taking and carrying away the common property.

ENTRY OF TENANT FOR PURPOSE OF TAKING AWAY PROPERTY TO WHICH HE HAS RIGHT AS TENANT IN COMMON is justifiable of itself; but is so by force of a license in law.

TENANT IN COMMON CANNOT JUSTIFY USE OF FORCE IN TAKING POSSESSION of the common property when held by his co-tenant.

ONE TENANT IN COMMON CANNOT MAKE DIVISION OF COMMON PROPERTY without the consent of the other, so as to affect the rights of either.

ENTRY OF TENANT UPON REAL ESTATE OF HIS LANDLORD FOR PURPOSE OF TAKING AWAY PROPERTY TO WHICH HE HAD RIGHT AS TENANT IN COMMON, if accompanied by violence to the owner of the property, makes him a trespasser *ab initio*, and liable, not only for the entry, but for the landlord's share of the crop carried away.

MEASURE OF DAMAGES IN TRESPASS DE BONIS ASPORTATIS, where the landlord and tenant are tenants in common of certain property, and where the tenant has taken the whole, is the value of the landlord's share, and compensation for all that he loses by the operation of the wrong and consequent judgment, which vests the property in the trespasser, and ordinarily no more.

TRESPASS for breaking and entering plaintiff's close in Nottingham, and taking and carrying away, among other things, three bushels of beans. Daniels, in the spring of 1853, leased to Brown a piece of land to be farmed upon the shares, each to receive a half of the crop. The crop of beans in question was harvested and put in the barn on the premises, but no division of them was made between plaintiff and Brown. Plaintiff in November of the same year notificd Brown in writing to quit the premises on December 1st following. On the third or fifth of the latter month Brown moved away, and proposed to remove the articles in the barn; but Daniels forbade this, saying that they must not be taken away until there was a settlement between him and Brown. On December 7th, Brown and several other defendants went to the barn and informed plaintiff, who was there, that they had come to make a division of the crops and take away Brown's property. Plaintiff told them Brown had no

Digitized by Google

property there, and he should, therefore, do nothing about a division. Defendants then proceeded to divide the beans against the protestations of plaintiff, who attempted to hold the barn door against them, but they opened it by force. Defendants took away one half of the beans. The court instructed the jury that if the beans were in the possession of the plaintiff, and had never been divided by the consent of the plaintiff, the defendants would have no right to enter with force into the close of the plaintiff and make a division of the beans against his will, and carry away one half of them; and if they did so, the plaintiff was entitled to recover in this action for the beans so carried away. Defendants excepted, and moved that the verdict for plaintiff be set aside and a new trial granted.

Stickney and Tuck, for the defendants.

Marston and Bell, for the plaintiff.

By Court, BELL, J. The only question raised by this case relates to the instructions to the jury. The propriety of these depends upon the property of the beans; the right of the tenant to enter upon the leased premises after his lease has expired, and he has removed from them, to remove his property; the right of a co-tenant to take common property from the possession of his co-tenant; the right to use force in such a case, and upon the proper measure of damages.

It is settled by the court in the case of *Moulton* v. *Robinson*, 27 N. H. 550, that crops raised at the halves are the common property of the landlord and tenant until a division is made: Id. 557; and this is so considered by the counsel in the argument.

A tenant, though his tenancy is dissolved and he has quit the possession, has the right to a reasonable ingress upon the land in order to remove his goods and utensils: Comyn's Land. & Ten. 356; Lit., sec. 69; 2 Bla. Com. 147; 4 Kent's Com. 111; *Elliott* v. *Paige*, 1 Pick. 49; Com. Dig., tit. Estates, H, 9.

If, therefore, the property here in question was the sole property of the tenant, he would have a clear right to enter on the premises to remove it, within a reasonable time. It does not seem that any question is made as to the reasonableness of the time of returning for the articles here in question.

The abstract right of a co-tenant of personal property to take it from the possession of his fellow, it is not necessary to discuss. For the present purpose, it may be only necessary to consider if one co-tenant can maintain trespass against another for taking and carrying away the common property; and upon

Digitized by Google

this point the law is well settled. It is thus stated by Littleton, sec. 323: "If two be possessed of chattels personal in common by divers titles, as of a horse, an ox, or a cow, and if the one take the whole to himself out of the possession of the other, the other hath no remedy but to take this from him who hath done to him the wrong to occupy, etc., when he can see his time," etc.: Co. Lit. 200 a; Archb. Civ. Pl. 39; 1 Ch. Pl. 170; Ham. N. P. 250.

A tenant cannot justify the use of force in obtaining possession of his property left on the leased premises. A tenant in common cannot justify the use of force in taking possession of the common property when held by his co-tenant: 3 Bla. Com. 4. The entry on the property of another for either purpose, if justifiable, is so by force of a license in law. Any abuse of the power thus given, of which any resort to violence would be clearly an example, makes the party a trespasser *ab initio*: *Barrett* v. *White*, 3 N. H. 227 [14 Am. Dec. 352]; *State* v. *Moore*, 12 Id. 42; *Ferrin* v. *Symonds*, 11 Id. 363.

The entry of the tenant for the purpose of taking away his goods, or goods to which he had a right as tenant in common, was justifiable of itself; but when accompanied by violence to the owner of the property, it became a trespass from the first, and the action maintainable for all damage resulting from the tort to the real estate, and from the removal of the common property.

The rule of damages laid down by the court was erroneous. By the judgment in trespass *de bonis asportatis*, the property in the goods carried away becomes vested in the trespasser, and this furnishes a rule as to the damages for such property. The plaintiff is to be compensated for his entire interest, for all that he loses by the operation of the wrong and consequent judgment, and ordinarily no more. The rule prescribed to the jury was the whole value; the plaintiff owned but an undivided half. One tenant in common cannot make a division of the common property without the consent of the other, so as to affect the rights of either. The verdict, being founded on this error, must be set aside, unless the plaintiff shall remit one half the damages assessed by the jury.

Half the damages being remitted by the plaintiff, judgment was rendered on the verdict.

WHERE ONE LETS LAND ON SHARES TO ANOTHER, the parties are tenants in common of the crop: *De Mott* v. *Hagerman*, 18 Am. Dec. 443; note to *Bailey* v. *Fillebrown*, 23 Id. 531; *Putnam* v. *Wise*, 37 Id. 309; but see ex-

Digitized by Google

haustive note thereto 317–323, on agreements for cultivation of land on shares, and in which the subject of division is discussed; see also, on this subject, *McNeely* v. *Hart*, 51 Id. 377; *Symonds* v. *Hall*, 59 Id. 53.

CO-TENANT'S REMEDY FOR CONVERSION OR SALE OF COMMON PROPERTY: *Chambers* v. *Chambers*, 14 Am. Dec. 585, and note 586; *Bell* v. *Layman*, 15 Id. 83; *Hyde* v. *Stone*, 22 Id. 582; *Gilbert* v. *Dickerson*, Id. 592, and cases in note 594; *Gibson* v. *Vaughn*, 23 Id. 143; *Porter* v. *Hooper*, 29 Id. 480, and note thereto 483, on trespass by one co-tenant against another; *Putnam* v. *Wise*, 37 Id. 309; *Rains* v. *McNairy*, 40 Id. 651; *Nowlen* v. *Colt*, 41 Id. 756; *Warren* v. *Aller*, 44 Id. 406; *Smith's Ex'rs* v. *Wiley*, 58 Id. 262; *Burbank* v. *Crooker*, 66 Id. 470.

RIGHTS OF TENANT AFTER EXPIRATION OF LEASE.—1. REMOVAL OF GOODS AND CHATTELS, EFFECT OF HOLDING OVER.—After the tenant's lease has expired, his duty is to yield possession of the premises to his landlord: *Noel* v. *McCrory*, 7 Coldw. 623; although he still retains a reasonable right of egress and regress for the purpose of removing his goods and chattels: *Simpkins* v. *Rogers*, 15 Ill. 397; *Folsom* v. *Moore*, 19 Me. 252. And these cases show that this rule applies to a tenant at will as well as to a tenant for years. The lease may expire by natural death, by the tenant's surrender of possession, or be terminated by the landlord's entry: *Hanham* v. *Sherman*, 114 Mass. 19; *Krank* v. *Nichols*, 6 Mo. App. 72; *May* v. *Luckett*, 48 Mo. 472; *Todd* v. *Jackson*, 26 N. J. L. 525; *Adams* v. *Adams*, 7 Phila. 160; *Stearns* v. *Sampson*, 59 Me. 568; *Supp* v. *Kensing*, 5 Robt. 609. In either of these cases the tenant has still a right to go upon the land, within a reasonable time, for the purpose of removing his personal property and family: *Ellis* v. *Paige*, 1 Pick. 43; *Sheldon* v. *Davey*, 42 Vt. 637. He has no longer any other rights except those mentioned below: *Moore* v. *Boyd*, 24 Me. 242. Where a tenancy has expired, the landlord may take possession of the premises by any means short of personal violence; and having obtained it, he may remove goods which he finds there, and protect such possession as well against the tenant who attempts to hold over as against a stranger who intrudes upon it: *Todd* v. *Jackson*, *supra*. And the tenant so holding over against the landlord's permission cannot maintain trespass against the latter: *Hyatt* v. *Wood*, 4 Am. Dec. 258; *Overdeer* v. *Lewis*, 37 Id. 440, and cases cited in note thereto 441. Nor is the landlord liable for injury in removing the tenant's goods under such circumstances, if no wanton damage was done: See case last cited. But trespass will lie for any unnecessary violence or injury to goods in the removal: *Adams* v. *Adams*, 7 Phila. 160. Where the statute provides that in case a tenant shall continue in possession at all after the expiration of his term the lessor may eject him and his goods by summary proceedings, the holding over by the tenant is not justified by its necessity for the removal of his goods, although no more time be consumed in such removal than is necessary for that purpose: *Witt* v. *Mayor etc. of New York*, 5 Robt. 248. A tenant at sufferance may be dispossessed at the pleasure of the landlord; and it is certainly the wisest and safest course the tenant can pursue to have his property removed by the end of the term: *Adams* v. *Adams*, *supra*; *Stearns* v. *Sampson*, *supra*; *Todd* v. *Jackson*, *supra*. A tenant at will, when his interest is determined by a demand of possession on the part of the landlord, has no right to continue his possession for even a reasonable time to remove his goods; though it seems he may enter to remove them, if he does not exclude the landlord: *Doe* v. *Jones*, 10 Barn. & Cress. 718. There can be no "holding over" in the ordinary sense of these words, unless there has been a certain term named in the lease: *Morgan* v. *United*

Digitized by Google

States, 14 Ct. of Cl. 326; and the tenant holding over after the expiration of his term, unlike the landlord, has no right to elect whether he shall be treated as a tenant or as a trespasser: *Conway* v. *Starkweather*, 1 Denio, 113; and is without power to throw off the character of tenant, however onerous it may be: *Scuyler* v. *Smith*, 51 N. Y. 309. The tenant who holds over after the expiration of his lease, and interferes with the reletting of the premises, is liable for the damage thereby sustained by the landlord: *Stoddard* v. *Waters*, 30 Ark. 156; but if, at the expiration of his term, possession is not demanded by the landlord, and he is not ready for possession, neither the tenant nor his surety is liable in damages for the act of not returning the house on the day the lease expired. It is not the duty of the tenant to leave the house unoccupied at the expiration of the lease, without demand or expressed readiness for possession by the landlord: *Kyle* v. *Proctor*, 7 Bush, 493. Where the tenant holds over after the expiration of his lease, the landlord may treat him as a trespasser, or as a tenant under the terms upon which he entered: *Fitzpatrick* v. *Childs*, 2 Brewst. 365; *Smith* v. *Allt*, 7 Daly, 492; *Noel* v. *McCrory*, 7 Coldw. 623; *Moore* v. *Moore*, 41 N. J. L. 515; *Scuyler* v. *Smith*, 51 N. Y. 309. As a trespasser, he cannot invoke the aid of a court of equity to protect him in the peaceable possession of the premises: *Fitzpatrick* v. *Childs*, *supra;* and as a tenant, the landlord is entitled to recover the rent as fixed by the terms of the original contract: *Noel* v. *McCrory*, *supra*. But it is not every continued occupation of the premises after the expiration of the term that constitutes a holding over within the rule establishing the rights and liabilities of the parties. Thus, pending negotiations for a new lease, with the understanding that in case a new lease was not made the tenant should surrender the premises and not be liable for any rent accruing thereafter, the act would not constitute a holding over; and the question of holding over should be submitted to the jury, if the evidence is not clear that the tenant held under such understanding: *Smith* v. *Allt*, 7 Daly, 492. A tenant holding over is not a tenant at will unless he holds over by the express or implied consent of his landlord, and a tenant who wrongfully holds over his lease does not acquire equities as a tenant at will by any brief delay in proceeding against him, and is not entitled to such notice to quit as a tenant at will could claim: *Benfey* v. *Congdon*, 40 Mich. 283. And a tenant who holds over after the expiration of his term becomes a tenant by sufferance, and is not entitled to notice to quit: *Hauxhurst* v. *Lobree*, 38 Cal. 563; *Meno* v. *Hæffel*, 46 Wis. 287; unless the holding over be continued for such a length of time after the expiration of the lease, and under such circumstances as to authorize the implication of assent on the part of the landlord to such continuance. In such case, the tenancy existing by the implied assent of the landlord ought to be terminated before the tenant can be removed. The statute authorizing summary proceedings against tenants holding over after the expiration of their terms, and requiring notice to be given, applies to such cases as the latter; but it does not apply to a tenant who holds over a definite term for a brief period without the consent of his landlord, as this does not constitute a tenant by sufferance within the meaning of the statute requiring notice to be given: *Smith* v. *Littlefield*, 51 N. Y. 539; *Meno* v. *Hæffel*, 46 Wis. 287; *Rowan* v. *Lyttle*, 11 Wend. 617. The matter of notice, where the demise is for a fixed term, will be found discussed in an elaborate note to *Stedman* v. *McIntosh*, 42 Am. Dec. 130, and which treats at length of notice to quit generally. It is a fundamental principle of landlord-and-tenant law that a tenant holding over after the expiration of his term, amid circumstances which import a continuance of the relation of landlord and tenant, continues to hold upon

Digitized by Google

the conditions of the lease, and to be liable for such rent as it reserves: *Smith* v. *Allt*, 7 Daly, 492; *Noel* v. *McCrory*, 7 Coldw. 623; *Hunt* v. *Wolfe*, 2 Daly, 298; *Parker's Adm'r* v. *Hollis*, 50 Ala. 411; *Kyle* v. *Proctor*, 7 Bush, 493; *Morgan* v. *United States*, 14 Ct. of Cl. 326; *King* v. *Woodruff*, 60 Am. Dec. 625. Such holding over is subject to all the conditions and covenants of the lease, so far as applicable to the new condition of things: *Gardner* v. *Com. of Dakota Co.*, 21 Minn. 33. Where the relation of landlord and tenant exists, and has not been legally terminated at the expiration of the lease, the tenant acquires the right to continue the tenancy at sufferance, or for another year, and a court of equity will not intervene and oust him because he is a bad manager, or is vicious and disagreeable to his landlord, or is insolvent: *Blain* v. *Everitt*, 36 Md. 73. But this must be understood with the qualification that the landlord has either expressly or impliedly assented to such tenancy; and where the tenancy for another year is thus created, it cannot be terminated in the middle of the term and in the midst of the crop, but only at the end of the year: *Usher* v. *Moss*, 50 Miss. 208. And where the parties have abandoned the original verbal agreement under which the tenant took possession, and they fail to agree upon new terms, the tenant will be liable to pay whatever the rent is reasonably worth for the time he holds over: *Forbes* v. *Smiley*, 56 Me. 174. The tenant may refuse to pay rent after eviction: *Home Life Ins. Co.* v. *Sherman*, 46 N. Y. 370; *Royce* v. *Guggenheim*, 106 Mass. 201; S. C., 8 Am. Rep. 322.

2. TENANT CAN DISPUTE LANDLORD'S TITLE WHEN.—The settled general rule is that a tenant cannot dispute the title of his landlord until he gives up possession of the premises leased: *Bailey* v. *Kilburn*, 43 Am. Dec. 423; note to *Gilliam* v. *Bird*, 49 Id. 389; *George* v. *Putney*, 50 Id. 788, and note 791; *Niles* v. *Ransford*, 51 Id. 95; note to *Marcy* v. *Stone*, 54 Id. 741; *Emerick* v. *Tavener*, 58 Id. 217; *Camley* v. *Stanfield*, 60 Id. 219, and note 222; *Winston* v. *Franklin Academy*, 61 Id. 540; but this rule is subject to exceptions and limitations, many of which will be found in the cases cited and the notes thereto. Other authorities too numerous to mention support the general rule; but there are special cases which authorize the tenant to dispute the landlord's title after the expiration of the term, and surrender of the premises leased. Thus a tenant, after the tenancy has terminated, and he has restored the possession to his landlord, may assert a title paramount against him, and the previous tenancy cannot bar his right to recover: *Smith* v. *Mundy*, 18 Ala. 182. A tenant, however, in possession during the term, and not having been evicted afterwards, and where the title of his landlord has remained the same, no misrepresentation having been made or fraud practiced on the tenant, cannot, after the expiration of his term, set up a paramount title in another to whom the tenant attorned to defeat the landlord's recovery in an action of ejectment: *Rogers* v. *Boynton*, 57 Id. 501. Even where the tenant is in possession, and offers to prove facts going to show that he is not holding possession of the premises as the tenant of the apparent landlord, but under parties having paramount title thereto, the court should allow the evidence to be received in order to ascertain the truth of the case, and then instruct the jury as to the law of landlord and tenant applicable to the facts as proved in relation thereto: *Wilborn* v. *Whitfield's Ex'rs*, 44 Ga. 51. It is held in *Shelton* v. *Eslava*, 6 Ala. 230, that the tenant cannot call his landlord's title in question even after the tenancy has terminated; and that he cannot, at the termination of the tenancy, assert an outstanding title in a stranger. The first proposition is evidently unsound, for it is difficult to see why a tenant after the termination of the tenancy should be deprived of a

Digitized by Google

right which may be enjoyed by any one else holding such outstanding title, and it is not supported by the authorities. Thus if the landlord's title has, by judgment or decree of a competent tribunal, been adjudged invalid for the protection of the tenant, the allegiance of the tenant ceases, the relation between them may be renounced, and the tenant may protect himself by taking shelter under the paramount title, or may even show in himself the acquisition of a superior title: *Hodges* v. *Shields*, 18 B. Mon. 828; *Swann* v. *Wilson*, 1 A. K. Marsh. 73; *Lunsford* v. *Turner*, 5 J. J. Marsh. 104. The second point, however, in *Shelton* v. *Eslava*, *supra*, is supported by reason so long as the tenant remains in possession, for it would be in his power, at the termination of the lease, to set up an outstanding paramount title in a stranger, and thus deprive the landlord of the benefit of his possession. But after the termination of the tenancy and the redelivery of the premises, the tenant has a right to even assert a title which he bought during the life of the lease: *Williams* v. *Garrison*, 29 Ga. 503. And the tenant is entitled to the benefit of a title purchased during the term and while he was in possession if his landlord had no title when the demise was made: *Hodges* v. *Shields*, 18 B. Mon. 828. A tenant may show that his landlord's title has been terminated by his own conveyance; that it has expired by its own limitation; that the land has been decreed to himself; that the estate has become vested in himself; or that the landlord had no right of entry: *St. John* v. *Quitzow*, 72 Ill. 334; *Swann* v. *Wilson*, 1 A. K. Marsh. 73; *Ryder* v. *Mansell*, 66 Me. 167. A holding over after the expiration of the lease, by the tenant or his son coming in under him, is not, however, evidence of an adverse possession: *Brandter* v. *Marshall*, 1 Cai. 394; and during the holding over the tenant cannot disclaim his relation, or claim title to the premises in his wife, although he has cohabited with her there during the term: *Mattis* v. *Robinson*, 1 Neb. 3; *Miller* v. *Lang*, 99 Mass. 13. After surrendering the possession, the tenant is at full liberty to assert the truth: *Zimmermann* v. *Marchland*, 23 Ind. 474. While the doctrine of estoppel has been beneficially applied to prevent tenants from denying the titles of their landlords during the continuance of the lease, and also of the possession gained thereunder, it must be observed that it is dependent upon the estate and the possession consequent upon it. So after the lease has expired, and the possession fairly surrendered, the lessee may rightfully and lawfully be remitted to any title he had in the land before the relation of landlord and tenant commenced: *Smart* v. *Smith*, 2 Dev. L. 258. And where the tenancy is of a part only of lands in dispute, the tenant may quiet the title to that portion of the property to which the estoppel does not apply: *Brenner* v. *Bigelow*, 8 Kan. 496. So a tenant is not estopped from asserting his own title and right of possession in a suit to quiet title against a mortgagor of his landlord, as long as such mortgagee has nothing but a lien on the mortgaged property, and has no title and no right of possession. And in such a case, if the mortgage should be foreclosed and the property sold under the mortgage judgment, and the mortgagee purchase the same and get his sheriff's deed therefor, still the tenant would not be estopped from denying title and right of possession to that portion of the property sued for not covered by the mortgage: Id.

3. TENANT'S RIGHT TO EMBLEMENTS, ETC., AFTER EXPIRATION OF HIS TERM.—a. *Right of Tenants for Life, Tenants from Year to Year, and Tenants at Will.*—A tenant for life, or his legal representatives and under-tenants, as well as a tenant from year to year, is entitled to emblements; which means a right to take and carry away within a reasonable time after his tenancy has ended such annual productions of the soil as are raised by his labor; such

Digitized by Google

as corn, hops, flax, roots, grains, and the like: *Bevans* v. *Briscoe*, 4 Har. & J. 139; *Clark* v. *Harvey*, 54 Pa. St. 142; *Reiff* v. *Reiff*, 64 Id. 134; *Graves* v. *Weld*, 5 Barn. & Adol. 105. Tenants at will also have a right to this privilege: *Martin* v. *Knapp*, 57 Iowa, 336; *Sherburne* v. *Jones*, 20 Me. 70; *Davis* v. *Thompson*, 13 Id. 209; *Davis* v. *Brocklebank*, 9 N. H. 73. And the tenant at will being the legal owner of the crop raised during the tenancy, it is subject to execution; as where a crop of hay in the barn is levied on, and which has not been actually delivered to the lessor, notwithstanding an agreement by the tenant that the lessor may hold all the hay cut on the farm as security for rent: *Bailey* v. *Fillebrown*, 23 Am. Dec. 529, and note 531. This right to emblements, however, does not extend to such things as are not of annual growth, and do not require the labor of the tenant to produce them, but are the permanent and natural product of the earth, such as trees, fruit, grass, etc.: *Reif* v. *Reiff*, *supra*; *Evans* v. *Iglehart*, 6 Gill & J. 188. But if a tenant at will be in actual possession of the demised premises, he may maintain trespass *quare clausum fregit* against a stranger to the title for cutting and carrying away trees: *Hayward* v. *Sedgley*, 14 Me. 439. Nor does the right to emblements extend to a crop which does not ordinarily repay the labor by which it is produced within the year in which that labor is bestowed; and has, therefore, been held not to include a second crop of clover, although the first crop, taken at the end of the term, did not repay the expense of cultivation: *Graves* v. *Weld*, 5 Barn. & Adol. 105. The tenant for life, at will, or from year to year, and even the tenant for years, where his estate may be terminated by some uncertain event, has the right to emblements after the expiration of his term; and the reason for this right exists in the uncertain nature of their estates, and in the fact that to deprive them of this right might deter them from the proper cultivation of their lands: *Davis* v. *Thompson*, 13 Me. 209; *Clarke* v. *Rannie*, 6 Lans. 210; *Davis* v. *Brocklebank*, 9 N. H. 73; *Kingsbury* v. *Collins*, 4 Bing. 202. As a general rule, the tenant will have a right to his annual crops as emblements, if his term is so uncertain when he sows his crops that he cannot know that his tenancy will not continue until he shall have reaped them: *Van Doren* v. *Everitt*, 8 Am. Dec. 615; *Debow* v. *Titus*, 10 N. J. L. 128; *Kingsbury* v. *Collins*, 4 Bing. 202; but if his term is certain, not contingent, and he knows when he sows his crops that his term will not continue long enough in which to gather them, he has no right to take them away as emblements after the expiration of his term: *Sanders* v. *Ellington*, 77 N. C. 258; *Clarke* v. *Rannie*, 6 Lans. 210; *Dircks* v. *Brant*, 56 Md. 500; *Whitmarsh* v. *Cutting*, 10 Johns. 360; *Bain* v. *Clark*, Id. 425; *Hendrickson* v. *Cardwell*, 9 Baxt. 391; S. C., 40 Am. Rep. 93. The tenant may, however, claim the crop as an off-going one, or the value of it, by express stipulation with his landlord or by the custom of the country, if such custom exists: See cases cited on custom, *infra*. In all cases where a tenancy has been unexpectedly terminated without the tenant's fault, or where it has, in legal phraseology, been put an end to by an act of God or the law, the tenant has a right to emblements: *Debow* v. *Titus*, 10 N. J. L. 128; *Talbot* v. *Hill*, 68 Ill. 106. Thus if a tenant for life dies before harvest-time and his estate comes to an end, it is ended by an act of God, and his executors will be entitled to the crop; or if a lease be made to a husband and wife so long as they continue husband and wife, and they shall afterwards be divorced, the tenancy being dissolved by an act of the law, the husband may enter upon the land and take his emblements: *Oland's Case*, 5 Co. 116 a; see also *King* v. *Fowler*, 14 Pick. 238. The rule allowing emblements to the tenant also holds where a tenancy has been terminated by the act of the landlord or by a notice to quit proceeding from him: *Hendrickson* v. *Card-*

Digitized by Google

well, 9 Barr. 389; S. C., 40 Am. Rep. 93; *Stewart* v. *Doughty*, 9 Johns. 108; *Biggs* v. *Brown*, 2 Serg. & R. 14; *Harris* v. *Frink*, 49 N. Y. 24; *Putnam* v. *Ritchie*, 6 Paige, 403; but it is entirely different where the tenancy is extinguished by the act of the tenant himself. In such a case he has no right to take away any of the productions of the land after the expiration of the lease: *Debow* v. *Colfax*, 10 N. J. L. 128; *Bulwer* v. *Bulwer*, 2 Barn. & Ald. 470; *Talbot* v. *Hill*, 68 Ill. 106; *Shahan* v. *Herzberg*, 73 Ala. 59; *Samson* v. *Rose*, 65 N. Y. 411; particularly where there is no express stipulation with his landlord that he shall have the crops, and in the absence of a custom of the country allowing the tenant to take them; *Dircks* v. *Brant*, 56 Md. 500. This is also the case if the tenant is guilty of a breach of any condition in his lease which forfeits the estate; but a tenant's right to sell growing crops on abandoning the land during the life of the lease is not shown to be lost by failure to perform the conditions of the lease, unless it also appears that there was a clause of forfeiture for non-performance: *Dayton* v. *Vandoozer*, 39 Mich. 749. Neither can the tenant take the emblements where he holds for a certain term, subject to be defeated upon a particular event, and such event is brought about by an act of the tenant; as, if land be leased to a widow for twenty years, provided she shall remain a widow so long, and she marries, and so terminates the tenancy by her own act: *Oland's Case*, 5 Co. 116 a; *Davis* v. *Eyton*, 7 Bing. 159; *Hunter* v. *Jones*, 7 Phila. 233; *Bulwer* v. *Bulwer*, 2 Barn. & Ald. 472. So where the tenant is in under one who holds by adverse possession, he cannot enter to remove crops after a judgment of possession against his lessor: *Rowell* v. *Klein*, 44 Ind. 290. He is supposed to take the risk of the defective title: *Sampson* v. *Rose*, 65 N. Y. 411. But if a woman holding *durante viduitate* leases her estate to an under-tenant, who sows land, and she afterwards marries, her act will not deprive him of emblements: *Debow* v. *Colfax*, 10 N. J. L. 130. If the tenant voluntarily goes away after the expiration of his term, as where he runs away without paying his rent and leaves a crop of cotton standing in the field, it becomes the property of the landlord. And this is so whether or nor the tenant has assigned the crop: *Sanders* v. *Ellington*, 77 N. C. 255. But if a tenant and landlord have raised a crop of hay on the shares, each to have a half when divided, and the tenant takes away all of the hay, although it is in the landlord's possession, the latter cannot maintain trespass against the tenant: *Briggs* v. *Thompson*, 9 Pa. St. 338. The tenant, in North Carolina, has the right to take away "scrape," which is crude turpentine formed on the body of the tree, provided he does so within a reasonable time after the end of his term, and which is before the sap begins to flow in the subsequent spring of the year: *Lewis* v. *McNatt*, 65 N. C. 63; *Brittain* v. *McKay*, 1 Ired. L. 265; *State* v. *Moore*, 11 Id. 70. And after the expiration of his term he has the right to enter, cut, and carry away his immature grain crop, unless there be an agreement to the contrary: *Van Doren* v. *Everitt*, 8 Am. Dec. 615. But where a lessee, under his authority to bore salt-wells, brings oil to the surface, the oil belongs to the owner of the soil, and cannot be converted to the tenant's own use either before or after the expiration of his term: *Peterson* v. *Kier*, 2 Pittsb. 191.

b. *Right of Tenant for Years—Customs, etc.*—The right to take emblements after the expiration of his lease does not extend to a tenancy for years, and which is to be terminated at the expiration of a certain period, because, in such a case, if the tenant, with his eyes open, sows corn which he knows cannot become ripe until after the term is expired, the law will afford him no relief: *Sanders* v. *Ellington*, 77 N. C. 258; *Bain* v. *Clark*, 10 Johns. 426;

Digitized by Google

Davies v. *Connop*, 1 Price, 53; *Clarke* v. *Rannie*, 6 Lans. 210; *Whitmarsh* v. *Cutting*, 10 Johns. 360; *Dircks* v. *Brant*, 56 Md. 500; *Hendrickson* v. *Cardwell*, 9 Baxt. 389; S. C., 40 Am. Rep. 93; *Mason* v. *Moyers*, 2 Rob. (Va.) 606; *Harris* v. *Carson*, 7 Leigh, 632. If, however, the lease, though for a term of years, is silent as to who shall have the crop, and the rent is equal for each year, and the tenant's right to sow during the last autumn of the term is recognized in the lease, the tenant is entitled to the crop: *Kelley* v. *Todd*, 1 W. Va. 197; *Willey* v. *Conner*, 44 Vt. 68. Yet under-tenants of a tenant for years, who have not participated in destroying the estate, may assert their right to emblements at the expiration of the term: *Bevans* v. *Briscoe*, 4 Har. & J. 140; and it is upon this principle that a lessee is entitled to emblements as against the purchaser of lands sold under a decree of foreclosure: *Cassilly* v. *Rhodes*, 12 Ohio, 88; or upon a judgment at law: *Biggs* v. *Brown*, 2 Serg. & R. 14; *Adams* v. *McKesson's Ex'x*, 53 Pa. St. 81. Gardeners and nurserymen may, after the lease expires, remove trees, shrubs, etc., planted by them with an express view to sale, and in the necessary course of their trade: *Penton* v. *Robart*, 2 East, 90; *Lee* v. *Risdon*, 7 Taunt. 191. But they must do so immediately, or within such time as may be agreed upon, or the title will vest in the owner of the reversion: *Brooks* v. *Galster*, 51 Barb. 200. Emblements may be claimed in hemp, flax, saffron, and other like things, in melons and potatoes, in grain, and in hops, although they spring from old roots, because they are annually manured and require cultivation: *Latham* v. *Atwood*, Cro. Car. 515; *Evans* v. *Roberts*, 5 Barn. & Cress. 832. As to the tenant's right to remove manure accumulated on the leased premises, see "Tenant's Right to Remove Fixtures," *infra*. It is also very important in this country to note the fact that emblements include the straw which supports the grain: *Craig* v. *Dale*, 1 Watts & S. 509; S. C., 37 Am. Dec. 477; *Fobes* v. *Shattuck*, 22 Barb. 568; *Iddings* v. *Nagle*, 2 Watts & S. 22; but they do not include growing grass, even if produced from seed and ready to be cut for hay, because it cannot be sufficiently distinguishable from the natural product: *Reiff* v. *Reiff*, 64 Pa. St. 134. Preparing land for the reception of seed does not confer a right to emblements; it does not attach at all until the seed is sown: *Price* v. *Pickett*, 21 Ala. 741. If the tenant, during his occupation, by his labor annexes to the farm part of a waste tract of land formerly unsubdued, it will inure to the benefit of the landlord, and the tenant has no right to claim compensation: *Doe* v. *Murrell*, 8 Car. & P. 134. A mortgagee, as against the mortgagor and his grantees, has the paramount title to emblements, and therefore a lessee of the mortgagor, under a lease executed subsequent to the mortgage, is not entitled, as against the mortgagee, to crops growing on the mortgaged premises at the time of the foreclosure and sale of the premises; and the mortgagee, becoming the purchaser, may maintain trespass against the lessee for taking and carrying away the crops: *Lane* v. *King*, 8 Wend. 584; *Howell* v. *Schenck*, 24 N. J. L. 89. It is otherwise, however, as to a tenant on shares with the assent of the mortgagee: *Congden* v. *Sanford*, Lalor's Sup. 196; *Armstrong* v. *Bicknell*, 2 Lans. 216; and see *Mayo* v. *Fletcher*, 14 Pick. 525. The reason of the rule allowing the usual emblements to a tenant for life, or at will, properly excludes a tenant for years from the exercise of this privilege. He must suffer the consequences of his own folly, as already stated above, if, with a full knowledge of the period when he will be obliged to quit, he sows what he knows he cannot reap: See cases cited to this point above. But by the custom of the country in particular districts, he will be allowed to re-enter and cut the corn, etc., which he has sown, after his lease has run out. The law concerning local customs between landlord and tenant

Digitized by Google

will be found discussed in an extended note to *Governor* v. *Withers*, 50 Am. Dec. 101. Every demise, in respect to matters of which the parties are silent, is open to explanation by the general usage and custom of the country or district where the land lies; and every person, under such circumstances, is supposed to be cognizant of the custom, and to contract with reference to it: *Van Ness* v. *Pacard*, 2 Pet. 148. By the custom of Pennsylvania, a lessee for a term certain is entitled to the way-going crop, that is, the grain sown in the autumn, to be reaped the next harvest, though such right be not recognized in the contract; and he may enter to gather it, or may maintain trespass for it against the lessor or his vendee, after the expiration of the lease: 34 Am. Dec. 465; *Stultz* v. *Dickey*, 5 Binn. 285; *Comfort* v. *Duncan*, 1 Miles, 231; *Biggs* v. *Brown*, 2 Serg. & R. 14; *Clark* v. *Harvey*, 54 Pa. St. 142; *Iddings* v. *Nagle*, 2 Watts & S. 22; *Hunter* v. *Jones*, 2 Brewst. 370; S. C., 7 Phila. 233. So in New Jersey: *Van Doren* v. *Everitt*, 5 N. J. L. 460; but not for spring crops, as oats, where the tenancy expires at the usual termination of the agricultural year, unless sown by the consent of the landlord: *Howell* v. *Schenck*, 24 Id. 89. So does the custom exist in Ohio: *Foster* v. *Robinson*, 6 Ohio St. 90; and in Delaware it exists as to wheat, but not as to oats: *Templeman* v. *Biddle*, 1 Harr. (Del.) 522; see also *Hudson* v. *Porter*, 13 Conn. 59; *Dircks* v. *Brant*, 56 Md. 500. *Contra*, as to custom, and as to what constitutes a good custom, see *Harris* v. *Carson*, 30 Am. Dec. 510. In general, all the hay, straw, grass severed, dead and live stock, and every personal thing upon the farm at the end of the term belongs to the tenant, and he may rightfully remove them, unless there be some custom of the country to the contrary, or an express stipulation with the landlord. Stipulation, of course, is paramount to custom. If, however, there be neither custom nor stipulation to the contrary, the crops which are in the ground, or shall not have been severed before the expiration of the term, will belong strictly to the landlord: *Caldecott* v. *Smythies*, 7 Car. & P. 808; *Hudson* v. *Porter*, 13 Conn. 59. And finally, where the tenant is entitled to emblements, he also has the right of access and entrance to and departure from the leased premises for the purpose of reaping and carrying away his crops. His vendee or under-tenant has the same right; but neither of them has any exclusive right of occupation: *Griffiths* v. *Puleston*, 13 Mee. & W. 357; *Beavan* v. *Delahay*, 1 H. Black. 5; *Bevans* v. *Briscoe*, 4 Har. & J. 139.

4. TENANT'S RIGHT TO REMOVE FIXTURES AFTER EXPIRATION OF HIS TERM.—The general subject of fixtures, when erected by owner of the freehold, is treated in a well-written and philosophical note to *Gray* v. *Holdship*, 17 Am. Dec. 686. As to what are fixtures, see also brief note to *Hunt* v. *Mullanphy*, 14 Id. 303; *Gaffield* v. *Hapgood*, 28 Id. 290, and cases cited in note thereto 293; *Estate of Hinds*, 34 Id. 542; *Stockwell* v. *Marks*, 35 Id. 266. The relaxation in favor of tenants, of the strict general rule of law concerning fixtures, is quite fully shown in the important case of *Combs* v. *Jordan*, 22 Id. 236, 259. The value of this case will be found in the numerous authorities cited; and in *Holmes* v. *Tremper*, 11 Id. 241-244, will be found a note devoted to the discussion of the question when, or within what time, a tenant must exercise the right to remove his fixtures, or be precluded from asserting his claim to them. Manure, as a fixture, is treated of at length in a note to *Kittredge* v. *Woods*, 14 Id. 396. The following cases also treat of it as such: *Daniels* v. *Pond*, 32 Id. 269; *Craig* v. *Dale*, 37 Id. 477; *Smithwick* v. *Ellison*, 38 Id. 697; *Lewis* v. *Jones*, 50 Id. 550, and note 554; *Needham* v. *Allison*, 24 N. H. 355; *Middlebrook* v. *Corwin*, 15 Wend. 169. That straw left on the field is not manure, see *Fobes* v. *Shattuck*, 22 Barb. 568; *Craig* v. *Dale*, 1

Digitized by Google

Watts & S. 509; S. C., 37 Am. Dec. 477. There seems to be a few other cases not cited in the foregoing authorities, and which may here be referred to. Some of these cases hold that a tenant who has put trade fixtures into a building has a right to remove them if it can be done without permanent injury to the freehold, provided the right is exercised within a reasonable time after the expiration of the term; and such time appears to refer only to the period that the tenant remains in possession after the death of his lease: *Allen* v. *Kennedy*, 40 Ind. 142; *Kissam* v. *Barclay*, 17 Abb. Pr. 360; *Whiting* v. *Brastow*, 4 Pick. 310. The right of the tenant to fixtures which he may lawfully remove is lost only by quitting; and if the landlord has prevented the removal by an attachment of the fixtures, the right is not lost, even by leaving the premises: *Ex parte Hemenway*, 2 Low. 496; *Hill* v. *Sewald*, 53 Pa. St. 271. Some of the other cases above referred to hold that a tenant who has erected buildings, even for the purposes of trade, upon the demised premises has a right to remove them at or before the end of his term, but not afterwards: *Beers* v. *St. John*, 16 Conn. 322; *Rickett* v. *Johnson*, 8 Cal. 36; *Kissam* v. *Barclay*, 17 Abb. Pr. 360; *Tate* v. *Blackburne*, 48 Miss. 1; while others hold that where the tenancy has been unexpectedly terminated, the tenant should have a reasonable time thereafter in which to effect the removal: *Ombony* v. *Jones*, 19 N. Y. 238; that where the landlord had enjoined the removal of fixtures while the tenant was in possession, he could not object to the tenant removing them within a reasonable time after the dissolution of the injunction, though the tenant was not then in possession: *Mason* v. *Fenn*, 13 Ill. 525; and that where the tenant has erected buildings which, by agreement, he has the right to remove, he may make such removal after his term expires, and while he remains in possession of the premises: *Dubois* v. *Kelly*, 10 Barb. 496; but they must be removed within a reasonable time, and without substantial injury to the freehold: *Powell* v. *McAshan*, 28 Mo. 70; *Kuhlmann* v. *Meier*, 7 Mo. App. 260. What is a reasonable time for the removal is to be determined from all the facts and circumstances of the case: See *Kuhlmann* v. *Meier*, *supra*. Renewal of the lease without a reservation of the fixture does not affect the tenant's rights as owner thereof: *Devin* v. *Dougherty*, 27 How. Pr. 455; *contra: Shepard* v. *Spaulding*, 4 Met. 416; see *Hopkins* v. *Gilman*, 47 Wis. 581.

STATE *v.* McDUFFIE.

[34 NEW HAMPSHIRE, 523.]

DOGS ARE DOMESTICATED OR TAME ANIMALS, and as much the subject of property or ownership as horses, cattle, or sheep.

TRESPASS OR TROVER WILL LIE FOR DOG.

DELIVERY OF DOG IS GOOD CONSIDERATION FOR ASSUMPSIT.

ASSAULT MAY BE JUSTIFIED IN DEFENSE OF ONE'S DOG.

DOGS WERE NOT SUBJECTS OF LARCENY AT COMMON LAW, although the owner could maintain a civil action for injuries to them.

DOG WITHOUT COLLAR IS SUBJECT OF PROPERTY, AND TROVER MAY BE MAINTAINED FOR ITS CONVERSION, even where the statute legalizes the killing of such dog.

ACTION FOR KILLING DOG MAY BE MAINTAINED WITHOUT SHOWING that it is of any pecuniary value. That is a question for the jury, after hearing evidence of the peculiar qualities and properties of the animal.

Digitized by Google

LEGISLATIVE ENACTMENT THAT NO PERSON SHALL BE LIABLE BY LAW FOR KILLING ANY DOG not having around his neck a collar of brass, tin, or leather, with the name of its owner or owners carved thereon, is equivalent to a legislative declaration that the killing of all dogs having the required collars is unlawful and unjustifiable.

DOGS KEPT WITH LAWFUL COLLARS ON are as fully within the purview of the statute against willful and malicious injury to personal estate as any other species of personal property.

INDICTMENT LIES FOR WILLFUL AND MALICIOUS DESTRUCTION OF DOG alleged to have been worth fifty dollars, and to have had around its neck a brass collar with its owner's name engraved thereon, where the statute imposes a punishment for malicious mischief to personal property, makes dogs the legitimate subject of property, and specially protects those having the required collars on.

INDICTMENT for killing a dog. The facts are in the opinion.

Wheeler, for the respondent.

Hamlin, for the state.

By Court, FOWLER, J. The indictment in this case is founded on the eighteenth section of the two hundred and fifteenth chapter of the revised statutes, which is in these words: "If any person shall willfully and maliciously commit any act whereby any tree placed or growing for ornament or use in any garden, yard, street, square, or other place, or whereby the real or personal estate of another shall be injured, such person shall be punished by imprisonment in the common jail for a term not less than thirty days nor more than one year, or by fine not exceeding one hundred dollars, or by both of said punishments, in the discretion of the court."

It alleges that the respondent, on the thirteenth day of October last, at Rochester, in this county, did unlawfully, willfully, and maliciously shoot, kill, and destroy a dark, brindled dog, the property of one Daniel McDuffie, and part of his personal estate, of the value of fifty dollars, and then and there having around his neck a brass collar, with his owner's name engraved thereon, whereby the personal estate of said Daniel McDuffie was injured.

The only objection that has been urged to the maintenance of this indictment rests on the assumption that dogs are not the subject of property, and therefore not personal estate capable of being willfully and maliciously injured within the meaning of the statute. We can perceive no foundation for this objection. Dogs are domesticated or tame animals, and as much the subject of property or ownership as horses, cattle, or sheep. Trespass or trover will lie for them. The delivery of a

Digitized by Google

dog is a good consideration for an *assumpsit*. An assault may be justified in defense of one's dog: *Case of Swans*, 7 Co. 18 a; *Ireland* v. *Higgins*, Cro. Eliz. 125; Com. Dig., tit. Biens, F; 2 Bla. Com., Chitty's ed., 391–393, notes.

A dog without a collar is the subject of property, and trover may be maintained for its conversion, even where the statute legalizes the killing of such dog: *Cummings* v. *Perham*, 1 Met. 555.

It is not necessary for the maintenance of an action for killing a dog that it should be shown to be of any pecuniary value. It is for the jury to judge of the value after hearing the evidence of the peculiar qualities and properties of the animal: *Dodson* v. *Mock*, 4 Dev. & B. L. 146 [32 Am. Dec. 677]; *Dunlap* v. *Snyder*, 17 Barb. 561; *Leutz* v. *Strok*, 6 Serg. & R. 34.

By the common law, although the owner might have a lawful property in dogs, and maintain a civil action for any injury in respect to them, larceny could not be committed of them: 1 Hale P. C. 512. This was said to be in respect to the baseness of their nature, because, though reclaimed and made tame, they serve not for food, but pleasure, and so differ from pheasants, swans, etc., made tame, which, though wild by nature, serve for food: Id. 511, 512.

But a man may have property in some things which are of so base a nature that no felony can be committed of them; and no man shall lose life or member for them, as of a blood-hound or mastiff: *Case of Swans*, 7 Co. 18 a; *Rex* v. *Searing*, Russ. & Ry. 350; *Norton* v. *Ladd*, 5 N. H. 204 [20 Am. Dec. 573].

By an act of the 10 Geo. III, c. 18, the stealing of dogs subjected the offender to fine or imprisonment and whipping for summary proceedings: Bain's Justice, tit. Dogs; *Rex* v. *Helps*, 3 Mau. &. Sel. 331.

In New York, a justice of the supreme court refused to release one indicted for grand larceny in stealing a dog, valued at one hundred dollars, and committed to prison for want of bail, inclining to the opinion that dogs were the subject of larceny under the statutes of that state: *People* v. *Maloney*, 1 Park. Cr. 593.

But we do not deem it material to the decision of the question before us whether dogs are or are not the subject of larceny. Admitting that by our laws they are not, it by no means follows that they may not be the subject of the willful and malicious injury punished by the act under which the present indictment was found. The evident design of that act was to afford more effectual protection against injuries to property under aggra-

Digitized by Google

vated circumstances, by punishing as criminal offenses acts which before its passage had been regarded only as civil injuries. And we can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the willful and malicious injury of the reckless and malignant, as property in fruit, shade, or ornamental trees, whether standing in the garden or yard of their owner, or in a public street or square, or any other species of personal property.

It is true, the legislature, in order to secure proper responsibility for damages sometimes committed by these animals, have deemed it advisable to enact that no person shall be liable by law for killing any dog found not having around his neck a collar of brass, tin, or leather, with the name of its owner or owners carved or engraved thereon: R. S., c. 127, sec. 5. But these very provisions presuppose the unlawfulness prior to their enactment of killing any dogs, and undertake, by a species of outlawry, to sanction the killing of such as shall be found without a particular kind of collar, marked in a particular manner with their owners' names; the adoption of such an enactment is equivalent to a legislative declaration that the killing of all dogs having the required collars is unlawful and unjustifiable.

The dog which the respondent is charged with having maliciously killed is alleged to have been of the value of fifty dollars, and to have worn around its neck a brass collar, with its owner's name engraved thereon, as required for its protection under the statute. As this dog was the legitimate subject of property, was specially protected by the statute, and must be taken, for the purposes of the present motion, to have been worth fifty dollars to its owner, we entertain no doubt that its willful and malicious destruction, as charged in the indictment, was an injury to the personal estate of its owner, within the meaning of the statute on which the indictment is founded.

The motion to quash must therefore be denied.

DOGS WERE NOT SUBJECT OF LARCENY AT COMMON LAW: See notes to *State* v. *Hornes*, 57 Am. Dec. 277, discussing the subject of larceny at length; *Dodson* v. *Mock*, 32 Id. 679.

KILLING DOG IS INDICTABLE OFFENSE, although a dog was admitted to have at common law no recognized value as property: See notes to *State* v. *Robinson*, 32 Am. Dec. 665; *Dodson* v. *Mock*, Id. 679. But the injury must amount to a killing, because merely wounding an animal was not an indictable offense at common law: See note to *State* v. *Robinson*, cited *supra*.

TRESPASS WILL LIE FOR KILLING ANOTHER'S DOG, and the pecuniary value of the dog need not be proved to sustain the action: *Dodson* v. *Mock*, 32 Am. Dec. 677.

Digitized by Google

THE PRINCIPAL CASE WAS CITED in the briefs of counsel in *Hurd* v. *Cheley*, 55 N. H. 21, where it was held, under the statute providing that no one should be liable for killing any dog not having a lawful collar around his neck, that a count in trespass, in common-law form, for killing a dog, might be amended by inserting an allegation that the dog had around his neck a collar of brass, with the owner's name engraved thereon.

HUBBARD *v.* CITY OF CONCORD.

[35 NEW HAMPSHIRE, 52.]

INCOMPETENT EVIDENCE FOR PLAINTIFF, IN ACTIONS AGAINST TOWNS, FOR INJURIES CAUSED BY DEFECTIVE SIDEWALKS.—It is incompetent for the plaintiff to prove that other persons, in passing upon the sidewalk at the place of the accident, had met with difficulty, and slipped there, where the alleged defect in the highway was its slippery condition caused from ice. It is excluded for the reason that, if admitted, it would present a collateral issue, with all its attendant circumstances, and thus raise an issue, material in the case, which the other party was not bound to be prepared to meet.

INCOMPETENT EVIDENCE FOR DEFENDANT, IN ACTIONS AGAINST TOWNS, FOR INJURIES CAUSED BY DEFECTIVE SIDEWALKS.—It is incompetent for defendant to prove that sidewalks similarly constructed, or constructed in any given manner, were common in other cities, towns, or localities, either for the purpose of showing that the sidewalk was properly constructed, or that the plaintiff did not exercise proper care and prudence in passing over it.

IN ACTION AGAINST TOWN FOR INJURY OCCASIONED BY DEFECTIVE HIGHWAY, it is erroneous to instruct the jury, with reference to the degree of care and prudence to be exercised by one traveling over a highway, "that if the highway was defective, and the plaintiff knew of the defect, yet if it were not of a character from which an injury must so manifestly result as to render it unreasonable to attempt to pass, the plaintiff was entitled to recover, otherwise not." It is erroneous in omitting all reference to the degree of care and prudence required in the case, in suggesting no common standard to which the answer of the jury can be referred, and in giving more latitude to the traveler than what is sufficient to exonerate the town from liability.

IN ACTION AGAINST TOWN FOR INJURY CAUSED BY DEFECTIVE HIGHWAY, it is correct to instruct the jury that the town was bound at all times to have its highways in a reasonably safe condition for the customary travel, if the instruction is accompanied with a proper explanation of the phrase "reasonably safe," and a proper qualification of the expression "at all times," so as to limit it to all times when the circumstances were such as to admit of their highways being in the reasonably safe condition required. So explained and qualified, it is unexceptionable; otherwise, it is not.

IT IS ERRONEOUS TO INSTRUCT JURY, IN ACTION AGAINST TOWN FOR INJURY CAUSED BY DEFECTIVE HIGHWAY, that it would form no answer

Digitized by Google

to the claim of the traveler for damages who should suffer an injury resulting from a defect in the highway, without any fault on his part, even though the defect was produced by the elements, and the defendants had no notice of it, or opportunity to repair it. This position is too unreasonable and too severe upon towns to be sustained. It subjects them to penalties for misfortunes falling upon the traveler, not merely without fault or negligence on their part, but against which the most unremitting vigilance and the most lavish expenditure are unavailing.

JURY SHOULD BE INSTRUCTED, IN ACTION AGAINST TOWN FOR INJURY CAUSED BY DEFECT IN SIDEWALK, produced by the elements, that if the injury resulted from the condition of the sidewalk, produced by the recent sudden action of the elements, the defendants were not chargeable unless, under the circumstances, they ought to have repaired the defect before the accident happened, and had reasonable opportunity to do so; and that if they could have had no such notice and reasonable opportunity as would have enabled them to repair it, the defect was not an "obstruction, insufficiency, or want of repairs" contemplated by the statute, giving to travelers a remedy against the town.

LAW EXONERATES TOWN FROM LIABILITY FOR INJURY caused in attempting to pass over a dangerous and defective sidewalk where the traveler takes such a degree of risk, such a probability or possibility of injury, that men of common care and prudence would not, under ordinary circumstances, try the experiment at their own risk.

WHETHER HIGHWAY IS OR IS NOT IN SUITABLE STATE OF REPAIR for the travel passing thereon is a question for the jury under the particular circumstances of each case; among which are the nature of the route, the character of the ground, the kind and amount of travel, and the ability and means of the town to improve it in the particular involved in the inquiry.

"OBSTRUCTIONS," "INSUFFICIENCIES," AND "WANT OF REPAIRS" DEFINED. In determining what constitutes a defect within the statute subjecting towns to liability for injuries resulting from obstructions, insufficiencies, or want of repairs in their highways, it must be considered that nothing is an obstruction which the town was not bound to have removed at the time of the injury, under the circumstances of that particular case; nothing an insufficiency which it was not reasonably, having reference to those circumstances, bound then to have improved; nothing a want of repairs which in the same view it was not bound to have amended.

TOWNS ARE NOT INSURERS AGAINST DAMAGES ARISING FROM CAUSES WHICH NO HUMAN FORESIGHT CAN ANTICIPATE, no human power can avert, and no human means, without time and opportunity, can remedy; under a statute making them liable for injuries resulting from obstructions, insufficiencies, or want of repairs in their highways.

ACTUAL NOTICE IS NOT REQUIRED TO BE GIVEN TO TRAVELER OF EVERY SPECIFIC OBSTRUCTION on a public highway. Knowledge that there is a probability of danger is more than enough. It is sufficient that he has notice or knowledge enough of facts to put him on inquiry.

CASE for an injury to the plaintiff, alleged to have been occasioned by a defect in a highway in the city of Concord,

Digitized by Google

which the city was bound to keep in repair. The defective sidewalk in question was constructed with a step from it down to a passage-way, crossing it at right angles, and another step on the opposite side of the passage-way, from that up to the sidewalk beyond, and with a slope each way from the middle of the sidewalk to the right and left, where it crossed the passage-way. It was on this passage-way that plaintiff fell and broke his arm. Both the sidewalk and the passage-way, at the time of the accident, were very icy and slippery, as were all parts of the streets in the city, ice having accumulated thereon by reason of rain and sleet that had been falling during the day previous to the evening of the accident, and in the earlier part of the evening of the same day. The sidewalk was the way most traveled by persons having occasion to pass from the hotel which plaintiff left to the one to which he was going. The night was exceedingly dark, but very many persons were on the streets that evening, and many passed over the place of the accident. One witness testified that the sidewalk where it crossed the passage-way was wide enough only for one person to pass at a time upon the ridge in the middle of the sidewalk without stepping upon the slope to the right or left. Other witnesses testified that the width between the slopes was greater. The court rejected evidence offered by defendants tending to show that sidewalks constructed in a similar manner to the one in question were to be found in Boston and other cities, but allowed the plaintiff to show that other persons, in passing upon the sidewalk at the place of the accident, had met with difficulty and slipped there. Besides the instructions discussed at length in the opinion of the court, the jury were instructed that the plaintiff was not entitled to recover unless they should be satisfied upon the whole evidence in the case that he was conducting himself with ordinary care and prudence at the time of the injury. Verdict for the plaintiff.

W. H. Bartlett, for the defendants.

Cushing, for the plaintiff.

By Court, SAWYER, J. The principal questions in this case arise upon the instructions of the jury in relation to the liability of towns for injuries resulting from defects in their highways, produced by the action of the elements, natural causes, over which human power has no control, without notice to the town or opportunity to repair them, and in relation to the degree of care and prudence necessary to be exercised by the traveler in passing upon a defective highway.

Digitized by Google

Among the other questions raised by the case are two in relation to the admissibility of evidence, which, in the event of a new trial, may again become material, and which I will proceed to dispose of before considering the other more important questions.

First: Was it competent for the plaintiff to prove that other persons, in passing upon the sidewalk at the place of the accident, had met with difficulty and slipped there?

In *Collins* v. *Dorchester*, 6 Cush. 396, evidence of a similar character was offered for the purpose of proving the highway defective, and rejected by the court at the trial, on the ground that it would raise a collateral issue, and result in testing the point in dispute by another equally doubtful. This ground was sustained by the whole court, it being said by Metcalf, J., in delivering the opinion, that this testimony concerning collateral facts would furnish no legal presumption as to the principal facts in dispute, and the defendants were not bound to be prepared to meet it.

The distinction suggested by the counsel for the plaintiff in the argument of this cause, that the evidence in *Collins* v. *Dorchester*, *supra*, show what was the condition of the highway at a time prior to the happening of the accident, and could not therefore be evidence of what it was at the time of the accident, was not adverted to by the court in that case as the ground of the decision. In that case, and also in *Aldrich* v. *Pelham*, 1 Gray, 510, in which a question of the same character was involved as in *Collins* v. *Dorchester*, *supra*, the ground distinctly presented is, that the evidence, if admitted, would present a collateral issue, with all its attendant circumstances, and thus raise an issue material in the case, which the other party was not bound to be prepared to meet. In this case the evidence could have no other effect than to lead the jury to the conclusion that the sidewalk was defective. Whether it ought to have that tendency would depend upon the same questions in reference to the care and prudence exercised by those other persons, and all the other circumstances attending these particular cases, as arise in this case in connection with the plaintiff's accident. Before those instances of difficulty and slipping at the place of the accident should be permitted thus to bear upon the questions at issue here, it ought to be proved to the jury what were the precise circumstances attending them, and whether they did or not happen under such circumstances as would show a defect for which the town would be answerable in those cases. In other

Digitized by Google

words, a trial must be had of those cases as between the town and each of the persons who met with the difficulty alleged, in the same manner and upon the same ground as are involved in this case between these parties. It is clear that such evidence is incompetent.

Secondly: Did the court properly reject the evidence offered by the defendants showing that sidewalks similar to that in question in this case are to be found in Boston and other cities? This evidence could have no legitimate tendency to establish the fact that the sidewalk was constructed at this place in such manner as to be reasonably safe and convenient. It is alleged in the writ that it was rough and uneven and incumbered with ice, and that a steep descent existed from the sidewalk to the passageway across it, of about eight inches at the middle of the sidewalk—the descent becoming gradually greater towards the right and left by reason of a slope each way from the middle line of the sidewalk towards its side lines; and we understand the testimony offered that sidewalks like this are common in Boston and other cities to have particular reference to the construction of the sidewalk with this step and slope. That sidewalks are so constructed in other localities can have no tendency to prove that it was proper under the circumstances here. We do not understand that it is now claimed by the defendants that the evidence was competent for that purpose; but it is contended that it was competent upon the question whether the plaintiff exercised proper care and prudence in passing upon the sidewalk they constructed. As we understand the position taken by the defendants' counsel, the jury may have found upon the evidence in the case that the plaintiff's fall was occasioned by this step in the sidewalk, he walking upon it in a dark night as though it were level, and that the evidence should have been admitted for the purpose of showing that as sidewalks in Boston and other cities are not unfrequently constructed in this way, the plaintiff was not in the exercise of the proper degree of prudence and care if he passed along upon it under the supposition that this was not thus constructed. The case of *Raymond* v. *Lowell*, 6 Cush. 531 [53 Am. Dec. 57], is cited in the argument for the defendants as an authority that such evidence is competent for that purpose. From the opinion delivered in that case by Fletcher, J., it would seem that evidence of that character was admitted at the trial; and it is said by the learned judge that it was admissible as bearing on the question of ordinary care. From the statement of the case, as reported, it

Digitized by Google

would seem that the evidence was rejected when offered by the defendants. Whether rejected or admitted, the case cannot be considered an authority in favor of the position here taken by the defendants; because, if rejected, the ruling of the court in rejecting it was not made the ground for setting aside the verdict; and if admitted, the point whether properly admitted or not was not raised by the case, the verdict being against the party introducing it.

We think the doctrine cannot be sustained upon any sound principle that the degree of care and prudence which a traveler who sustains injury by reason of an alleged defect in the highway is to exercise in passing upon it is in any way to be made to depend upon the fact that in other localities highways are occasionally or frequently constructed in any given manner. If the sidewalk in this case, at the time of the accident, was in a suitable and proper condition, with the step and slope as they existed, for that place, and for the usual travel passing upon it, then the plaintiff and all others passing thereon were bound to know that it was so constructed, and to govern themselves accordingly. No other or different rule can be applied in reference to the care and prudence which the traveler is to exercise in passing along a sidewalk so constructed, because it is or is not common in other localities to construct sidewalks in a similar or in a different manner. The evidence, we think, was properly rejected. More important questions arise upon the instructions given to the jury in reference to the degree of care and prudence which travelers are to exercise in passing upon a highway, and in reference to injuries resulting from defects produced by the action of the elements.

The rule as laid down by the judge who tried the cause, upon the first of these points, in his instructions to the jury, was, that if the highway was defective, and the plaintiff knew of the defect, yet if it were not of a character from which an injury must so manifestly result as to render it unreasonable to attempt to pass, the plaintiff was entitled to recover, otherwise not.

The rule of law is well settled, that in order to entitle the traveler to recover for an injury received by reason of an alleged defect in the highway, it must appear that he was exercising ordinary care and prudence at the time of the injury. In Jones on Bailments, 6, it is said: "Ordinary care is that which every person of common prudence, and capable of governing a family, takes of his own concerns." Story on Bailments, 6, says: "Ordinary care and prudence is that degree of diligence [care]

Digitized by Google

which men in general exert in regard to their own concerns; that common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them." These definitions are designed to express the same idea. They illustrate and explain, with sufficient precision for all practical purposes, the degree of care and prudence required of the traveler in passing upon a highway. If an obstruction or defect exist which is open to his observation, he is to remit none of the ordinrry care and prudence which men of business and heads of families usually exhibit in their own concerns. He is to try no experiments and to run no hazards which men of common care and prudence, as thus explained, would not incur at their own risk.

It is obvious that the question whether the plaintiff was exercising such care and prudence at the time of the injury must have been one of the principal inquiries of fact involved in this case, and the effect of the charge to the jury upon this point cannot be misunderstood.

They were told, in effect, that in order to charge the plaintiff with want of proper care the condition of the street must be such that an injury must manifestly result from an attempt to pass upon it; so manifestly as to render it unreasonable to make the attempt. An analysis of the rule thus laid down in the instructions cannot fail to show that widely different principles are there presented to the jury for their application to the facts from those involved in the well-established rule of law. That rule is, that the traveler is acting without the proper degree of prudence if he should attempt to pass at the risk of the town, when men of ordinary care and prudence would not pass under ordinary circumstances at their own risk. Instructions in these or equivalent terms would have turned the attention of the jury to the proper inquiry, whether the defect was such, and under the circumstances of the case would have appeared to men of the prudent and cautious character described by men of "ordinary care and prudence" to be such, as to render it likely that injury would result; so likely that they would not have attempted to pass at their own risk. The rule prescribed in the charge is, that the defect must be such that injury must manifestly result; so manifestly as to render it unreasonable to attempt to pass. Under the rule which the law prescribes, the jury would have, for the standard by which to measure the degree of prudence and care exhibited, the estimate which would be placed upon it by men of ordinary care and prudence in their own concerns.

Digitized by Google

The rule as given to the jury ignores the judgment of such men in their own affairs, and sets up as the standard the manifest result of an injury; manifest either to the mind of the traveler himself at the time, or to the minds of the jurors upon a review of the circumstances; so manifest as to make it unreasonable to attempt to pass—unreasonable in his view or theirs. It is the aim of the law in the rule which it establishes to define the degree of care and prudence required with as much of precision as the nature of the case will admit; and this it does by reference to that degree which men of ordinary care and prudence exhibit when acting at their own risk. The instructions omit all reference to such degree, and substitute the estimate which the jury may form of the conduct of the traveler, as prudent or otherwise, or which he may have formed of his own conduct in this respect. Under the instructions, each juror was at liberty to decide, according to his own view of the circumstances, whether it was manifest that injury would result, and whether, therefore, the conduct of the plaintiff was unreasonable, without bringing it to the test of the law; viz., whether men of ordinary prudence would have so conducted under the circumstances. What the law regards as sufficient to exonerate the town is such a degree of risk, such a probability or possibility of injury, that men of common care and prudence would not, under ordinary circumstances, try the experiment at their own risk. No more definite and precise rule can well be given, and this rule furnishes a standard, which, although to some extent matter of estimate, and consequently not of necessity precisely the same thing in the minds of any two jurors, nevertheless approximates to uniformity in the minds of all. How would men of common care and prudence have acted under the circumstances proved? is the question which the rule of law proposes to the jury. Their answer must be based to a very great extent upon their observation and experience of the conduct of men of different characters in this respect under the various circumstances of life; and in the results of this observation and experience, the jurors in the main would agree, whatever might be the differences of character among them. The question which the instructions propose would be quite likely to be answered by each juror according to his peculiar cast of mind. If timid and cautious, he might well think it manifest that injury would result, and the conduct of the plaintiff would in his view be unreasonable; while the more adventurous would see no manifestation of danger, and think his conduct quite reasonable. There was no common

Digitized by Google

standard suggested in the instructions to which the answer of the jury could be referred.

But if there were, it was erroneous. The phrase "must manifestly result" implies a near approach to certainty, and the word "unreasonable" admits of a wide range in degree from the highest to the lowest. Unqualified as the instructions appear in the case, the jury may have understood that, in order to exonerate the town on the ground of want of proper care on the part of the plaintiff, they must find that injury would be so nearly certain to follow from his attempt to pass that his conduct was in the highest degree unreasonable. This is not required in order to exonerate the town; and for want of a proper qualification in this respect, the instructions were erroneous.

Another important question arises upon the instructions that the defendants were bound at all times to have their highways in a reasonably safe condition for the customary travel, and that it would form no answer to the claim of the traveler for damages who should suffer an injury resulting from a defect in the highway without any fault on his part, even though the defect was produced by the elements, and the defendants had no notice of it or opportunity to repair it.

If the first branch of these instructions had been accompanied with a proper explanation of the phrase "reasonably safe," and a proper qualification of the expression "at all times," so as to limit it to all times when the circumstances were such as to admit of their highways being in the reasonably safe condition required, that branch of the instructions would have been entirely unexceptionable. It may perhaps be understood that such explanation and qualification were given. So understood, it presents substantially the ground for the liability of the town as that laid down in the statute relative to the assessment of fines against towns upon indictment for neglect to keep their highways in repair: R. S., c. 53, sec. 1. This section declares that fines shall be imposed upon towns if they shall neglect to keep any highway therein in good repair, suitable for the travel passing thereon. Whether a highway is or not in that suitable state of repair is a question for the jury under the particular circumstances of each case; among which are the nature of the route, the character of the ground, the kind and amount of travel, and the ability and means of the town to improve it in the particular involved in the inquiry.

Towns are not required to make their highways perfect, or to correspond with any given standard. In each case the highway

Digitized by Google

is to be pronounced sufficient or insufficient to answer the requirements of law, and to exonerate the town from liability, according as it is or not made reasonably safe and convenient for the travel passing upon it, under the particular circumstances which exist in connection with that particular case. Whenever it can be said by the jury that the highway in question, under all the circumstances of the case, is reasonably safe and convenient for that travel, it is free from defect.

The highway which leads through woodlands, and is designed and used only for drawing wood upon sleds in winter, is not required to be put in condition for travel in carriages when there is no snow. The highway designed for and used by foot-passengers only is not required to be made safe or convenient for any kind of carriage or animal. Obstacles of any character which forbid the passing of carriages on the winter path, if they do not obstruct the use of sleds, or other vehicles adapted to such path, insufficiencies which do not interfere with the use of the way by those ordinarily passing upon it, want of repairs indispensable for certain kinds of travel, but not customary upon that highway, are not obstacles, insufficiencies, or want of repairs, in the contemplation of the statute. In cities, certain portions of the highways are reserved for sidewalks, and their use by carriages and animals is usually forbidden. Obstacles, such as posts, set up at proper places for the very purpose of obstructing their use by carriages, are not obstructions within the meaning of the statute, because they are nevertheless suitable for the travel passing upon them. In such sidewalks it is not unusual to find steps, and they are almost invariably found in passing from the sidewalk to the part of the highway used by carriages, which is ordinarily upon a lower level. Such steps do not necessarily constitute obstructions or insufficiencies in the ways where they are found. They may be so if, under the circumstances, they are not suitable for the travel there. There are many situations where level sidewalks are unattainable. They are required to be made as suitable for the travel upon them as the nature of the case admits, considering the location, the nature of the ground, the extent and amount of travel, and the means which the town may command for the repair of all the highways with which they are burdened, and the comparative claims for repairs and improvements of all such highways. In some cases, the hill may be dug down; in others, the expense may forbid this, or it may for other causes be entirely impracticable. In some, the walk may be made to rise with a more or

Digitized by Google

less rapid ascent; but this, when it passes a certain limit, becomes dangerous, and steps are necessary; and the question whether they are obstructions is to be determined by considering whether the way with them is as safe and convenient for the travel upon it as is reasonable under the circumstances.

It may, and often must, happen that the manner of constructing or repairing one street or sidewalk must be controlled by the necessity of providing for connecting streets or private ways, or the preservation of the rights of adjoining owners. A due regard to these considerations may render it necessary to make steps of unequal elevation, and to construct sidewalks crossing other streets or passage-ways, public or private, uneven, inclined, or in other respects less convenient and suitable, and even less safe than may be desirable, and than otherwise might easily be done. In such cases, the unequal step or the dangerous slope is not, of course, to be pronounced an obstruction or defect. They may be, on the whole, the most suitable for the travel and the most safe and convenient of which the case, under all the circumstances, admits.

These principles are recognized in the charge to the jury that the defendants were bound to keep the sidewalk in a reasonably safe condition for the travel upon it. It is to be supposed that the court stated to the jury more fully than appears in the case what were the circumstances to be regarded in determining whether it was in that reasonably safe condition, and that the rule and the circumstances by which the jury were to be guided in its application were not left with so bald a statement as the case exhibits. If so left, it is obvious that the jury may have found that the sidewalk was insufficient, without having their attention turned to the proper inquiries upon which the question depended.

Upon the other branch of the instructions, namely, that it would form no answer to the claim of the traveler for damages who should suffer an injury resulting from a defect in the highway without any fault on his part, even though the defect was produced by the elements, and the defendants had no notice of it or opportunity to repair it, we think the position here taken to be too unreasonable and too severe upon towns to be sustained.

The liability of towns in these cases proceeds upon the ground that they are chargeable with negligence, or the failure to discharge a duty imposed upon them: *Wood* v. *Waterville*, 4 Mass. 423. It is true that actual negligence is not required to be proved. The question in that form, whether the town have

Digitized by Google

been guilty of negligence, is not the inquiry, because the very existence of the defect, obstruction, or insufficiency implies negligence. But the same thing which under one condition constitutes an obstruction, insufficiency, or want of repairs, under different circumstances may amount to neither. Assuming that the defect exists, the negligence follows. But the question always arises, What constitutes a defect under the circumstances of the case? and we think it must be held to have been the meaning of the legislature in the enactment which subjects towns to liability for injuries resulting from obstructions, insufficiencies, or want of repairs in the highways, that nothing is an obstruction which the town were not bound to have removed at the time of the injury, under the circumstances of that particular case; nothing an insufficiency which they were not reasonably—that is, having reference to those circumstances—bound then to have improved; nothing a want of repairs which, in the same view, they were not bound to have amended.

This view of course involves the inquiry, as vitally important in considering the liability of a town in a given case, whether an obstruction or defect produced by the action of the elements was of such character and of such continuance at the time of the accident that the town were reasonably bound, under all the circumstances, then to have removed or remedied it.

This action is one of a large class, founded upon the negligence of the defendants, by which an injury has been occasioned to the plaintiff. They all rest, at common law, upon certain common principles, one of which is that the party must have neglected some duty which he owes to the injured party, either personally or to the community. If there is no duty, there is no negligence. In the very idea of negligence is embraced a duty which the party ought to have performed. If the town, under all the circumstances, were not bound to remedy the defect or remove the obstruction, they are chargeable with no negligence or failure of duty. Snow, for example, is an obstruction in the highways, often of the most serious character. By the express terms of the statute towns are made liable for damages resulting from this cause, as for any other defect. Yet, as the snow falls in such quantity that it is impracticable to remove it, it has never been understood that there was any general duty to remove it, though in special cases it may be otherwise; as in the case of great thoroughfares in large cities. The idea has never been entertained that towns were liable for damages occasioned by snow to wheel carriages. On the contrary, the trav-

Digitized by Google

eler must conform his mode of conveyance to the state of the roads; and it is only when the roads are neglected to be put in condition for sleds and sleighs in the season of sleighing that towns are held liable. There are seasons, too, when the snow is dissolving in spring, when the roads become nearly or quite impassable, either for sleighs or wheel carriages. It would be absurd to hold that towns are bound at such times to keep their roads in a safe and suitable condition for the travel ordinarily passing upon them. It has never been so held, and could not be, without doing violence to the common sense of the community.

So, too, towns have never been required to make all parts of their highways safe or passable. But if the statute is to be construed in its broad, unqualified, and literal sense, then it is immaterial in what part of the space which has been laid out for a highway the injury happens. The whole highway must be in a secure condition for the travel, for nothing in the statute limits its application to one part rather than another. But it never has been supposed that the town is bound to put in passable and safe condition any greater width than the public travel requires.

Roads in particular localities and under certain contingencies are liable to become suddenly obstructed, torn away, or otherwise rendered unsafe or impassable without any fault on the part of the town. In such cases, it is understood to be settled that the town is not responsible if they cause such notice to be given as will put the traveler on his guard, and thus prevent the occurrence of damage. In cities the most frequented thoroughfares must be occasionally obstructed by materials for building, by trenches for gas and water pipes, and the like, and their whole duty is understood to be performed if, under such circumstances, they cause proper fences to be erected, and lights exhibited, to show and guard against the danger. Their duty is to keep their highways in good repair, suitable for the travel passing upon them; but the precautions on their part which exonerate them from responsibility under such circumstances are adopted in place of what otherwise would be required for the proper condition of the highway, upon a reasonable construction of the statute—holding that towns are not required to do things physically impossible, nor things which are impracticable to be done with the means of the town, or without the allowance of sufficient time for the purpose.

Actual notice is not required to be given to the traveler of

Digitized by Google

every specific obstruction. It is enough if he has knowledge that there is a probability of danger; even less: if he has such notice or knowledge of such facts as ought to put him on inquiry. In broad daylight it is not necessary to fence about an excavation, or to put up notices of any other obstruction, if the whole is open to the view of every passer. If the highway across the interval is overflowed by the freshet, it is notice to all having eye-sight that it is in an unsafe condition to be traveled; and as the difficulty is one that human power can neither obviate nor remove, the town are not responsible, nor are they required to take any specific precautions to prevent danger.

Now, these must be considered exceptional cases, arising from a reasonable construction of the statute limiting the remedy of the traveler against the town, contrary to its broad and literal interpretation; and if such excepted cases may be ingrafted upon it by a construction in these respects at variance with its literal terms, there is nothing to forbid that like exceptions may be made in all cases where a reasonable view requires it to be done; and that, consequently, where an obstruction, insufficiency, or want of repairs exists, of such extent and character as to constitute a defect in reference to the travel passing over the highway; a defect when viewed merely in reference to the *status* of the road and its purposes and uses, it may, nevertheless, be no defect within the meaning of the law, when viewed in reference to the manner in which it originated, the length of time it has existed, and the opportunity which the authorities of the town have had to remedy it.

Cases may be supposed—extreme cases, to be sure—but nevertheless peculiarly appropriate, to illustrate the view here presented. A whirlwind or tornado may hurl the trunk or limb of a tree, or the timbers of a building, upon the highway, directly in the path of the traveler, under circumstances to render it impossible for him to arrest his horse before horse and carriage are dashed against it. The wheel of a loaded wagon may break down, and the horse that is following close behind it, though driven prudently and carefully, may nevertheless unavoidably stumble over the obstruction upon the instant of its happening. The rain falling may instantly become ice, and in a few minutes every part of every street, in all the towns and cities for a circuit of miles, become coated with ice, and the traveler who is passing along the highway when the process commences, and while it is going on, may necessarily be compelled to travel on at the risk of broken limbs, even for the purpose

Digitized by Google

of getting out of his danger. Such instances present the case of an obstruction on the highway, when viewed in reference to its purposes and uses, and the travel it was designed to accommodate, and which usually passes upon it. Thus viewed, such obstructions are within the literal meaning of the statute. Upon that literal construction, the town is to be held liable for damages resulting from them. But we think it cannot have been intended by the enactment thus to make the town insurers against damage arising from causes which no human foresight can anticipate, no human power can avert, and no human means, without time and opportunity, can remedy. If there be any case in which the literal interpretation of the terms employed in the statute is to be modified by a reasonable construction, such would seem to be cases of this character.

We must therefore dissent from the doctrine advanced in the latter branch of the instructions. The jury should have been instructed that if the injury resulted from the condition of the sidewalk, produced by the recent sudden action of the elements, the defendants were not chargeable, unless under the circumstances they ought to have repaired the defect before the accident happened, and had reasonable opportunity to do so; and that, if they could have had no such notice and reasonable opportunity as would have enabled them to repair it, the defect was not one embraced within the legal construction of the statute. So produced, and existing without such lapse of time as to give the authorities of the city a reasonable opportunity to know of it, and remove it before the accident, it had not become the kind of obstruction, insufficiency, or want of repairs contemplated by the statute. This construction gives to the traveler every security and guaranty of vigilance and due care on the part of the town, and the full indemnity for a neglect of duty in this respect which the nature of the case demands. The other construction subjects the town to penalties for misfortunes falling upon the traveler, not merely without fault or neglect on their part, but against which the most unremitting vigilance and the most lavish expenditure are unavailing.

Other questions are presented by the case, which have been ably discussed in the argument. These may not arise upon the new trial; and as the decision in this case must necessarily be that of a minority of the court, we have purposely refrained from expressing an opinion upon them. It is proper to say, however, that by thus refraining we do not intend to be under-

Digitized by Google

stood as acquiescing in the rulings which have given rise to those questions.

Verdict set aside and a new trial granted.

PERLEY, C. J., and EASTMAN and FOWLER, JJ., being citizens of Concord, did not sit in this case.

LIABILITY OF CITIES AND TOWNS FOR INJURIES FROM NON-REPAIR OF STREETS AND HIGHWAYS, or from obstructions therein: *Raymond* v. *City of Lowell*, 53 Am. Dec. 57, and note thereto 67; *Rochester W. L. Co.* v. *Rochester*, Id. 316, and note to same 320; *City of Tallahassee* v. *Fortune*, 52 Id. 358; note to *City of Buffalo* v. *Holloway*, 57 Id. 553; *Hutson* v. *Mayor etc. of New York*, 59 Id. 526, and note 528, discussing the question at some length; *Erie* v. *Schwingle*, 60 Id. 87; *Browning* v. *City of Springfield*, 63 Id. 345, and extensive note thereto 350–357, discussing the liability of cities and property owners for neglect to repair streets; *Rowell* v. *City of Lowell*, 66 Id. 464, and collected cases in note thereto 466.

EVIDENCE OF CONDITION OF OTHER ROADS IS INADMISSIBLE for defendant in an action against a town for an injury from a defective highway: *Dutton* v. *Weare*, 43 Am. Dec. 590; note to *Raymond* v. *City of Lowell*, 53 Id. 67.

PARTY INJURED BY DEFECT IN HIGHWAY MUST PROVE DUE CARE AND PRUDENCE or he cannot recover in an action against a town for such injury, as culpable negligence or want of ordinary care is a defense to such action: *Reed* v. *Northfield*, 23 Am. Dec. 662; *French* v. *Brunswick*, 38 Id. 250; *City of Tallahassee* v. *Fortune*, 52 Id. 358; *Raymond* v. *City of Lowell*, 53 Id. 57, and notes 67; *Erie* v. *Schwingle*, 60 Id. 87; *Savage* v. *Bangor*, 63 Id. 658; note to *Rowell* v. *City of Lowell*, 66 Id. 467.

NOTICE, WHAT CONSTITUTES: *Booth* v. *Barnum*, 23 Am. Dec. 339; *Lodge* v. *Simonton*, Id. 36; *Hood* v. *Fahnestock*, 44 Id. 147; *Wilson* v. *McCullough*, 62 Id. 347.

KNOWLEDGE OF DEFECT IN HIGHWAY BY PARTY INJURED THEREBY IS NOT CONCLUSIVE EVIDENCE of negligence contributing to the injury. This fact, though he was an inhabitant of the town, is, in an action against the town, material only to the point whether he used due diligence in avoiding the injury: *Reed* v. *Northfield*, 23 Am. Dec. 662. But contributory negligence in attempting to pass such defect bars his right of recovery for the injury: *Mount Vernon* v. *Dusouchett*, 54 Id. 467, and note 469, discussing the subject at length.

NOTICE OF DEFECT IN HIGHWAY IS NECESSARY TO CHARGE TOWN for injuries resulting therefrom; but actual notice is unnecessary. It may be inferred from circumstances: *Savage* v. *Bangor*, 63 Am. Dec. 658. As to sufficiency thereof, see *French* v. *Brunswick*, 38 Id. 250.

THE PRINCIPAL CASE WAS APPROVED in *Johnson* v. *Haverhill*, 35 N. H. 84. In *Clark* v. *Barrington*, 41 Id. 52, it was said that in constructing roads towns were bound for ordinary care and skill, and in case of an injury by stones or otherwise, they were, as the law then stood, only bound for reasonable vigilance in discovering the defect and making the repairs. And the principal case was therein cited to the point that in case of an injury to a road properly constructed, by water or other cause operating beneath the surface, and not discovered by the town, and the town being in no fault for not discovering it, the court would long hesitate before holding the town liable. In

Digitized by Google

Howe v. *Plainfield*, Id. 137, it was said that the liability of a town for damages occasioned by a defect in a highway did not depend upon the question whether its officers or agents had actual notice of the existence of the defect, provided it were of such a character, and of such continuance, at the time of the accident, that the town was reasonably bound, under the circumstances, to have remedied it, and the principal case was cited in its support. The principal case was referred to in *Winship* v. *Enfield*, 42 Id. 202, 203, 204, as being inapplicable to the point in controversy in the latter case. The *dicta* of the principal case, relative to the state of suitable repair in which the statute requires roads to be kept, and the circumstances to be considered by the jury in settling that question, and which says that among such circumstances "are the nature of the route, the character of the ground, the kind and amount of travel, and the ability and means of the town to improve it in the particular involved in the inquiry," seemed to justify the plaintiff's position in *Winship* v. *Enfield*, *supra;* but the court did not feel themselves estopped thereby from fully considering such questions when they were legitimately raised and brought before them for determination. The principal case was the subject of much comment in *Palmer* v. *Portsmouth*, 43 Id. 268, 269, where it is said that the foundation of that decision is that the liability of a town is imposed by the statute for the neglect of a duty which it ought to have performed. This makes plain the principle that where there has been some neglect of duty on the part of the town no distinction is made between defects occasioned by natural causes and the fault of man. Nothing is perceived in this decision which overrules the foundation of the principal one. The leading decision was cited in *Chamberlain* v. *Enfield*, Id. 362, to the point that whether a road is incumbered or not is a question for the jury, and that instructing them regarding that matter is proper. The court said, in *Darling* v. *Westmoreland*, 52 Id. 415, that they had carefully examined the principal case; but their conclusion was not in accord with it concerning the admissibility of evidence tending to raise a collateral issue. In *Darling* v. *Westmoreland*, *supra*, the action was for an injury caused by a horse backing off a bridge before he crossed it, in consequence of becoming frightened at a pile of lumber near by; and it was held that evidence was admissible to show that other horses were or were not frightened by it in passing over the bridge. The principal case was cited in *Cofran* v. *Sanbornton*, 56 Id. 13, to the effect that where men of ordinary care and prudence would not attempt to do a dangerous act at their own risk, such as passing with a team over a snow-drift in a highway, the plaintiff cannot try the experiment at the risk of the town, and will not be entitled to recover for an injury arising from such an attempt.

GRAVES v. SHATTUCK.

[35 NEW HAMPSHIRE, 257.]

DETERMINATION OF NUISANCE ON PUBLIC HIGHWAY.—The jury must determine from all the circumstances of each particular case whether any object permanently placed, temporarily left, or slowly moving in a public highway is or is not a nuisance.

DETERMINATION OF NUISANCE ON PUBLIC HIGHWAY must, at common law, depend on the jury's finding of the fact whether or not the given object, under all the circumstances attending its occupation of the highway, unnecessarily obstructed the free passage of the public over and upon it.

Digitized by Google

USES OF PUBLIC HIGHWAY—WHAT USES OF HIGHWAY WILL NOT CONSTITUTE NUISANCE.—Highways may lawfully be used for other purposes than the accommodation of the traveling public, provided such use be not inconsistent with the reasonably free passage of travelers over them. They are designed and constructed for general convenience, and may be used as they have ordinarily been accustomed to be used, without nuisance. Time, necessity, and locality are important factors in determining the character of any particular use of a highway. It is no nuisance to use highways for moving buildings in a reasonable and judicious manner, where such highways have been commonly used for that purpose.

WHETHER USE OF HIGHWAY IN MOVING BUILDINGS IS REASONABLE AND JUDICIOUS is a question for the jury under all the circumstances of the case. Proper streets should be selected, the moving expedited, and no unnecessary obstruction should be caused.

PARTY WHO ASSUMES THAT SOMETHING IS NUISANCE, AND UNDERTAKES TO ABATE IT AS SUCH, does so under the peril of being deemed a trespasser if he fail to establish the existence of the nuisance; or having established it, employs unnecessary force and unwarrantable means for its removal. Thus it is with a building which is being moved through a public highway.

ANY PERSON MAY ABATE COMMON NUISANCE; but he does so at the risk of being deemed a trespasser, unless the existence of the nuisance is established.

DEFENSE OF PRIVATE PROPERTY MENACED BY MOVING BUILDING.—If an individual's private property is imperiled or endangered by a building that is being moved, he has the right to use whatever force is necessary to protect and defend that property from injury. But a mere prospect of future injury will not justify the destruction of the building, unless it be a common nuisance. And where there is time and opportunity for the interposition of an adequate legal remedy which may be effectual, the law will not justify the summary employment of force.

"LAW OF ROAD" DOES NOT APPLY TO BUILDINGS THAT ARE BEING MOVED THROUGH PUBLIC HIGHWAY. It is limited to the regulation of the conduct and rights of travelers with vehicles at the time and place of meeting, and while passing each other.

PROTECTION AND DEFENSE OF TREES ON STREET—RIGHTS OF ADJACENT LAND-OWNERS ON STREET.—Towns are not bound to grade the entire width of their common highways; and in cities and villages foot-passengers may properly be accommodated and protected by sidewalks, curb-stones, posts, and railings, to the exclusion of carriages from a part of the way. Such curb-stones, posts, and railings, properly constructed, are in no sense nuisances. Adjacent land-owners may lawfully use the space between the carriage-path and such sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private property specially protected by statute; and if they are injured or unreasonably endangered by a building being moved through the highway, their owners are warranted in employing sufficient force to protect them from actual or impending destruction.

CASE and trover. There were four counts; three of them being in trover for the conversion of certain buildings: and the

Digitized by Google

fourth count, in case for defendants' injury to plaintiff in concerting together to obstruct plaintiff and his agents in moving a building through the public highways of the town of Nashua; and that by force, by obstructions placed in the highways, and by threats of violence, the defendants prevented plaintiff from removing said building, subjecting him to great expense, etc. Defendants severally pleaded the general issue, with a brief statement. Two of them gave notice that they would show in defense that they were at the time of the alleged injury surveyors of highways, and did the acts complained of under warrants from justices of the peace, under chapter 63 of the compiled statutes of 1853 relating to incumbrances in highways; also that said buildings were a public nuisance on said highways or streets, and that they entered them and did the acts alleged for the purpose of abating such nuisance, and doing no unnecessary damage. Three of the other defendants gave notice that they would show in defense that the plaintiff had threatened and attempted to move said building through Cross street, to the obstruction of the travel, the destruction of defendants' trees in said street, and to the injury of their other property; also, that all the acts were done and were necessary to prevent plaintiff from moving his building through said street, thereby causing the damage alleged. The other defendant gave notice that he would defend on the ground that he was the son of one of said owners, and acted as his servant to prevent the injury to his property and the obstruction of said street. It appeared on trial that the plaintiff purchased of the Lowell and Nashua Railroad Company the building known as "the Pearson block," and agreed to remove it from their land, and that he employed one Bunker to remove it in three parts, through Cross street, on to the plaintiff's lot beyond. The main part was seventy-four feet long by about twenty-two wide, and the two wings each about twenty-two by thirty-six feet; one of them two stories, the other three stories high. The two defendants who justified as surveyors, etc., were selectmen of Nashua, and had been chosen surveyors of highways, but did not take their oath of office until a part of the obstruction by them had occurred. And the evidence showed that they were not owners of property upon Cross street. But it appeared that the three defendants who justified as owners each owned a house and lot on Cross street, and that this street was about forty feet wide, including a sidewalk on each side, with shade trees growing between the traveled carriage-path and the sidewalks opposite each of said lots,

Digitized by Google

through a part of the street. Plaintiff offered evidence tending to show that Cross street was sufficiently wide to allow the building to be passed through without injury to any of the trees growing there; that although the line of the trees, had they been continuous on both sides, might have made the passage too narrow, yet that the trees were not opposite each other, and that there was room enough by changing the building from side to side of the street, at certain points, to avoid any injury whatever to any tree. Defendants offered evidence tending to show that it was impossible to move the building through Cross street without destroying or injuring their trees, and that Bunker, who had charge of moving said building, had declared that trees in the streets were nuisances, and that he had a right to remove them, and would do it if they were in the way of his moving said buildings; and that he had in fact injured trees, by moving the said buildings, before they were obstructed at Cross street; and that a tree standing at the corner of Cross street had been broken and injured by said building before said obstruction. The evidence tended to show that Cross street, and other streets through which the building had passed before arriving at Cross street, were for a time wholly obstructed by the building, so that carriages could not pass through the streets, although it was conflicting as to the extent of the obstruction. It was beyond controversy, however, that the building in Cross street would occupy much more than half the whole width of said street. The instructions relative to the determination of nuisance, and upon what it depends, the use of highways, the right to abate nuisances, the justification by the defendants as owners acting in defense of their property, the duty of towns to protect travelers, etc., the right of owners to protect their trees, the law of the road, the duty of one injured by a nuisance to first apply to the courts, the use of force to abate a nuisance, and other points, were reaffirmed by the appellate court. The jury were also instructed that the fact that such building occupied more than half the traveled part of the road would not justify the the owners or others in opposing it, and that though it occupied much more than half the traveled path the owner or person moving it would not be a trespasser on the lands of adjacent owners. Also that though a building might encroach so much as to narrow the road, and be legally removed by a surveyor, yet if it endangered no private property, and was not a nuisance, no private citizen would have the right to oppose its progress. There was a verdict upon each count, and also a general verdict against all the defendants, who appealed

Digitized by Google

A. W. Sawyer, A. F. Stevens, and D. Clark, for the defendants.

Hughes and Wilcox, and Morrison, for the plaintiff.

By Court, FOWLER, J. As the defendants have not furnished in brief or argument any specification or suggestion in what particulars or for what reasons the instructions of the court below were regarded as erroneous, we have carefully examined and considered them, but have been unable to discover anything therein of which the defendants have just cause to complain.

That the jury must determine from all the circumstances of each particular case whether any object permanently placed, temporarily left, or slowly moving in a public highway was or was not a common nuisance, is too well settled by authority, and too clear upon well-established principles, to admit of doubt; and it is equally well settled and equally clear that at common law this determination must depend upon their finding of the fact whether the given object, under all the circumstances accompanying its occupation of the highway, did or did not unnecessarily obstruct the free passage of the public over and upon such highway: *Hopkins* v. *Crombie*, 4 N. H. 525, and authorities there cited.

The first and principal design of highways is the accommodation of the public travel, and cities and towns are required by statute to construct and maintain them in suitable condition for that purpose; but they may lawfully be used for other purposes, provided such use be not inconsistent and incompatible with the reasonably free passage over them of whoever has occasion to travel upon them. They are designed and constructed for the general convenience of mankind, to be used for all those purposes to which from the earliest period of their construction they have been accustomed to be appropriated, and it cannot be a nuisance for any one to use them as they have been ordinarily used. Very much depends upon locality, the width of the highway, and the time it may be obstructed by the alleged nuisance. What would be a reasonably free passage for the public—what would be a reasonably safe and convenient road for the accommodation of the public travel in a remote, sparsely populated, rural district, might and generally would not be so in a compact city, or a large and populous village. So, too, in a village or city, what would be no obstruction in a broad street, little frequented, might be very objectionable, if not an absolute nuisance, in a narrow business thoroughfare.

Digitized by Google

If public highways in Nashua and similar localities had been commonly used for the purpose of moving buildings, the plaintiff was guilty of no nuisance in moving his building through them, provided he selected suitable streets, used proper expedition, and was in the reasonable use of such streets, under all the circumstances shown in evidence, causing no unnecessary obstruction therein; and this whole question was properly submitted to the jury, and their verdict settles it conclusively in favor of the plaintiff.

In *Attorney-General* v. *Sheffield Gas Consumer's Co.*, 19 Eng. L. & Eq. 639, which was an information and bill asking for an injunction to prevent the defendants, who were a joint-stock company, without any special act of incorporation or authority, to lay their pipes in the public highways or streets, from laying gas-pipes in the streets or highways of the borough of Sheffield, and from breaking up or disturbing for that purpose the road or pavement of said streets or highways, or doing any other act whereby the passage of her majesty's subjects along said streets should be obstructed or rendered less safe or convenient, on the ground that such breaking up of the streets and highways would be a public injury amounting to a public nuisance, the injunction was refused, and the bill and information dismissed. In the course of the opinion of the court announcing this result, the lord chancellor remarked:

"I must say that when the cause was argued in August last, and I myself said we did not want any court of law to tell us that the tearing up of the pavement was a nuisance, I did not advert to the particular circumstance or act contemplated by these defendants, but merely to the general proposition; and I cannot now say that it appears to me absolutely impossible to be held that the taking up of the pavement for such a purpose as this is a nuisance. I do not say how the matter may be, but it may be held to be analogous to this sort of thing: If I were to station a cart in the street opposite my door, obstructing the public highway, I might be guilty of a nuisance for aught I know, and I might be liable to be indicted; but it would be a sufficient answer to say that the cart was there only a reasonable time, and for a lawful purpose. If it is used in the way in which such things are ordinarily used, it cannot be a nuisance so to use it. The public highway is for the convenience of mankind, and so to use it cannot be a nuisance. One of the uses is that a person traveling with a cart or carriage may draw up at a particular door, and get down, according to his lawful occupation.

Digitized by Google

So, again, if I have a cart come to my house with five or six tons of coals, of course it will be some time obstructing the public highway; but it is difficult to maintain that in an ordinary street that would be a nuisance. All these cases of nuisance or no nuisance, arising from particular acts, must, from the nature of things, be governed by particular circumstances. . . . . You must be guided by particular circumstances; you must look at the particular place or object the parties have in view. I take it that all these questions are of this nature: Are you using the subject-matter of injury in a reasonable way? and are those the uses for which it was contemplated? It may be that tearing up the pavement is not, even for the purpose of laying down gas-pipes, anything that was ever in contemplation, and that it cannot be done without the authority of the legislature, or some other competent authority."

In *Commonwealth* v. *Passmore*, 1 Serg. & R. 219, where the defendant was indicted for a nuisance in placing goods on the footway and carriage-way of one of the public streets of Philadelphia, and suffering them to remain there for the purpose of being sold at auction, Chief Justice Tilghman said: "It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough that it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stone, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time; but he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it." A similar doctrine is recognized in *Rex* v. *Russell*, 6 East, 427, and in *People* v. *Cunningham*, 1 Denio, 524 [43 Am. Dec. 709].

In *Rex* v. *Jones*, 3 Camp. 230, where the defendant was indicted for obstructing a highway by depositing long pieces of timber in the street and keeping them there until they were sawed up, because his yard was not large enough to receive them entire, Lord Ellenborough remarked: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but

Digitized by Google

this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience necessarily occasioned in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance."

Indeed, the doctrine of all the cases on this subject that we have examined seems to be in accordance with the instructions of the court below, that the law justifies obstructions of a partial and temporary character, from the necessity of the case, and for the convenience of mankind, when those obstructions occur in the customary or contemplated use of the highway, and that the question of their necessity and reasonableness, and of the customary or contemplated use, is one for the consideration and determination of the jury, under all the circumstances of each particular case.

Nor have the defendants any reason to object to the instructions of the court in regard to the justification by the defendants, whether, as citizens or as owners, in defense of their property imperiled, or supposed to be endangered by the plaintiff's building. In assuming that building to be a nuisance, as it was situated in the highway, and undertaking to abate it as such by force, the defendants took the risk of being deemed trespassers, if they should fail to establish the existence of the nuisance, or having established it, should be found to have employed unreasonable and unnecessary force and unwarrantable means for its removal; and on both these points the verdict of the jury, under the instructions given, is conclusive against them.

Any person may abate a common nuisance: Vin. Abr., tit. Nuisance, T, pl. 3, and W, pl. 4; Bac. Abr., tit. Nuisance, C; Com. Dig., tit. Case for Nuisance, D, 4; 3 Bla. Com. 5, 7; *James* v. *Hayward*, Cro. Car. 184; *Houghton* v. *Butler*, 4 T. R. 364. But he does so under the peril of being deemed a trespasser, unless the existence of the nuisance is established: *Wetmore* v. *Tracy*, 14 Wend. 250 [28 Am. Dec. 525].

If the defendants' shade trees, their own private property, were imperiled by the plaintiff's building, they had a right to use whatever force was necessary to defend and protect that property from injury. If they proceeded beyond that, they became trespassers, and were liable for any excess of force employed by them. But the mere fact that the building was in the street, and approaching the private property of the defendants in a way that might be likely to endanger it, would not justify them in destroying the building. They could not law-

Digitized by Google

fully interfere with it, unless it were a common nuisance, or actually endangering their property at the time. Where there is time and opportunity for the interposition of a legal remedy, by process which is adequate, and may be effectual to prevent the probable injury to property, the law will not justify the summary employment of force. The danger must be imminent to authorize private individuals to take the execution of the law into their own hands.

Brooks v. *Hart*, 14 N. H. 307, conclusively settles the correctness of the instructions as to the non-application of the law of the road to the case of a moving building. By that decision the law referred to is expressly limited to the regulation of the conduct and rights of travelers with vehicles at the time and place of meeting and while passing each other. The doctrine of that decision was reaffirmed in *Norris* v. *Litchfield*, 35 N. H. 271 [*post*, p. 546].

The powers and duties of towns, and their liabilities in relation to the construction and repair of highways, and the rights of adjoining land-owners, are so well understood, and have so recently been considered and discussed in the cases of *Hubbard* v. *City of Concord*, 35 N. H. 52 [*ante*, p. 520], and *Johnson* v. *Haverhill*, Id. 74, and in *Baker* v. *Shepard*, 24 Id. 208, and *Blake* v. *Rich*, 34 N. H. 382, decided in Coös, July term, 1856, that it is hardly necessary or useful again to consider them. It is sufficient to say that the instructions on these points seem to have been in strict accordance with the well-settled law of this state: *Copp* v. *Neal*, 7 Id. 276, and authorities there cited.

It seems entirely clear that the interest of the public in a highway consists solely in the easement or right of passage, with the right to construct and repair, while the general *prima facie* presumption of law is that the freehold of the road, *usque ad medium filum viæ*, is in the proprietors of the land on either side thereof; that towns are not bound to grade the entire width of their common highways; that in cities and villages they may reasonably accommodate and protect foot-passengers by sidewalks, curbstones, posts, and railings, and so exclude carriages from a part of the way, leaving them a reasonably safe and convenient passage; that such curbstones, posts, and railings, properly constructed, are in no sense nuisances; that where sidewalks are thus reasonably and properly set apart, the owners of the soil may lawfully use the dividing space between the carriage-path and sidewalks for the growth of trees, for ornament or use, and trees thus situated are in no sense nuisances, but spe-

Digitized by Google

cially protected from injury by statute: Comp. Stats., c. 560, sec. 19; that such trees are presumptively the private property of the adjacent land-owner, and whoever injures them is presumptively a trespasser against such owner; that trees thus situated and owned may lawfully be forcibly protected by their owners against an impending injury; and that if the plaintiff's building were of such a size or moved in such a manner as to injure or unreasonably endanger trees thus growing, their owners would be justified in employing against it sufficient force to protect the trees from actual or threatened injury.

The remarks of the court below as to the wanton and ruthless destruction of useful or ornamental shade trees, by forcing through a street a building occupying its whole width, thereby destroying in a single day the combined efforts of man and nature for half a century, were strong and emphatic, but not more so than the aggravated nature of the supposed desolation would seem to demand and justify. At all events, the defendants cannot, and the plaintiff does not, complain of them.

It is, however, entirely unnecessary to reaffirm, in detail, the instructions of the court below. We see in none of them anything objectionable as matter of law, or in any way prejudicial to the legal rights of the defendants, against whom a verdict was returned upon every count of the declaration, as well as generally. There must therefore be judgment upon the verdict.

PERLEY, C. J., and SAWYER, J., having been of counsel, did not sit in this case.

WHETHER OBSTRUCTIONS IN HIGHWAY ARE NUISANCES OR NOT is a question of fact: *Winter* v. *Peterson*, 61 Am. Dec. 678; but see note to *Young* v. *State Bank*, 58 Id. 632, where it is said that whether a thing is a nuisance or not, and hence liable to forfeiture, is a judicial question, and to be finally determined by the courts alone.

IN OBSTRUCTION OF HIGHWAY, QUESTION OF NUISANCE OR NO NUISANCE DEPENDS, at common law, upon the fact whether the passage of such highway is rendered less commodious: *State* v. *Mobile*, 30 Am. Dec. 564.

NUISANCE IN HIGHWAY, WHAT CONSTITUTES AND WHAT DOES NOT: See collected cases in note to *People* v. *Cunningham*, 43 Am. Dec. 718.

PUBLIC NUISANCE MAY BE ABATED BY ANY ONE, WHETHER HE HAS BEEN INJURED BY IT OR NOT; but a private nuisance can be abated only by one who is injured by it. The right to abate a nuisance, however, is confined to the removal of that which constitutes the nuisance: *Gates* v. *Briscoe*, 26 Am. Dec. 440; see note thereto, 443–445, on right of private person to abate a nuisance without suit. But a nuisance, whether public or private, may be abated at common law by the party aggrieved, if done without breach of the peace: *Stiles* v. *Laird*, 63 Id. 110, and collected cases in note 113, on abatement of nuisances.

Digitized by Google

TITLE IN HIGHWAY resides in the owner of adjoining land: See note to *Conner* v. *New Albany*, 12 Am. Dec. 207; *Pomeroy* v. *Mills*, 23 Id. 207, and note 209; *Nicholson* v. *N. Y. & N. H. R. R.*, 56 Id. 390, and collected cases in note 396; *Winter* v. *Peterson*, 61 Id. 678.

USE OF PUBLIC IN HIGHWAYS: See cases cited in the preceding subdivision, "Title in Highways," etc., and *Jackson* v. *Hathaway*, 8 Am. Dec. 263; *People* v. *Cunningham*, 43 Id. 709; *Troy* v. *Cheshire R. R. Co.*, 55 Id. 177.

OWNER OF FEE IN HIGHWAY CAN MAINTAIN TRESPASS for the obstruction or exclusive appropriation thereof: *Cortelyou* v. *Van Brundt*, 3 Am. Dec. 439; *Conner* v. *New Albany*, 12 Id. 207; *Lewis* v. *Jones*, 44 Id. 138.

TREES GROWING IN HIGHWAY BELONG TO OWNER OF FEE: *Winter* v. *Peterson*, 61 Am. Dec. 678.

THE PRINCIPAL CASE WAS CITED in *Kelley* v. *Kennard*, 60 N. H. 4, where it was said that as the public convenience may require a sidewalk as well as a carriage-track in a highway, so it may require two carriage-tracks; and the law does not require such tracks to be on the same level, nor forbid one to be built over the other. An unimportant mention of the leading decision was also made in *Winship* v. *Enfield*, 42 Id. 203.

NORRIS *v.* LITCHFIELD.

[35 NEW HAMPSHIRE, 271.]

ONE'S ACTION FOR DAMAGES SUSTAINED FROM NEGLIGENCE OF ANOTHER CANNOT BE DEFEATED by showing that the former party is a wrong-doer, a trespasser, or a violator of the law, unless it appears that his own negligence or his fault has directly contributed to his damage.

TRESPASS IS NOT LESS WRONG THAT IT IS DONE BY ACCIDENT, or without design, or even against the will of the actor.

TRESPASS OR WRONG DONE BY ACCIDENT, WITHOUT DESIGN, OR AGAINST ACTOR'S WILL, IS NOT FAULT, in the sense of that word as used in connection with actions for negligence. It is a misfortune, and not a fault.

NEGLIGENCE IS MIXED QUESTION OF LAW AND FACT, to be settled by the jury under instructions of the court.

TOWNS ARE NOT LIABLE WHERE THERE HAS BEEN FAULT OR NEGLIGENCE, in any degree, on the part of him who has sustained the damage; and the fact that such person is a wrong-doer, a trespasser, or a violator of the law is wholly immaterial.

TOWNS ARE LIABLE IN DAMAGES FOR INJURIES SUSTAINED FROM DEFECTIVE ROADS, or wrongful acts of third persons, if accidents, not preventable by ordinary care and prudence, unite with these causes to produce the injury.

CASE for damages to plaintiff's horse, carriage, and harness, occasioned by the insufficiency of a bridge on a public highway, in said town of Litchfield, for want of sufficient width and suitable railing. The horse and chaise were owned by plaintiff, a stable-keeper, and who had let them to one Bixby. It ap-

Digitized by Google

peared from the evidence that Bixby was traveling on the highway mentioned, with the horse and chaise, during a very dark night; that when near the bridge in question he heard a lumber-wagon coming from the opposite direction; and that he called out to the person approaching to stop, and turned out, as he supposed, as far as was safe and prudent. A man named Moor was in charge of the wagon. He was walking behind it, attending to his freight, and did not notice Bixby's carriage or hear him call out. The highway may be supposed to have run north and south, and the plank bridge, eighteen feet long, extended across it from east to west. The highway at the end of the bridge was about eighteen or nineteen feet in width. Moor's horse in going over turned to the right, so as to strike the fence on the west side before he got upon the bridge, and went across the bridge before Moor was able to take hold of or stop him. The vehicles collided before Moor's horse reached the bridge by some fifteen or eighteen feet, and the chaise with Bixby was either drawn back by Moor's horse and wagon, or backed by Bixby in endeavoring to extricate his carriage from the wagon, and precipitated backwards from the bridge on the east side, from a height of about nine feet, which caused the instant death of the horse and injury of the chaise. The highway was about eighteen or nineteen feet wide where the collision probably occurred, and the wheel-tracks of the traveled part of the road were within three or four feet of the fence struck by Moor's wagon. There was no railing on the east side of the highway, where the road was raised by an embankment; and no railing or other barrier, except a small log upon the east side of the bridge. The instructions given are in the opinion. Verdict for plaintiff.

W. C. Clarke, for the defendants.

A. F. Stevens and A. W. Sawyer, for the plaintiff.

By Court, BELL, J. The question arising upon the instructions asked, as well as those given to the jury, is whether a traveler can recover against a town for damages sustained from a defect of a highway, if at the time of the accident he is trespassing on the rights of others, or violating a law of the state.

It is not questioned that towns are liable where the damage sustained arises in part from defects of the road, and in part from such accidents as could not be prevented by ordinary care and prudence: *Palmer* v. *Andover*, 2 Cush. 600; *Hunt* v. *Town of Pownal*, 9 Vt. 418; or in part from the

Digitized by Google

wrongful acts of others; *Littleton* v. *Richardson*, 32 N. H. 59. And the court so charged the jury, "that where some accident occurs which ordinary care and prudence could not prevent, and a defect exists in the highway by means of which the damage occurs, and without which it would not have occurred, the town is liable." But the court added: "That if the plaintiff's carriage was in the middle of the traveled part of the road, his agent using ordinary care and skill and prudence, considering the circumstances, and came in collision with another carriage, this would be an accident for which the agent of the plaintiff would not be in fault, so far as this case is concerned; and if such accident led to this damage by a defect in the highway, the town would be liable."

In actions of this kind, it is settled that if the damage sustained has been in any degree directly caused by his own fault or negligence, the plaintiff cannot recover against the town. It was so held in *Farnum* v. *Concord*, 2 N. H. 392, the leading case on the subject in this state, as well as by many decisions in neighboring states: *Reed* v. *Northfield*, 13 Pick. 94 [23 Am. Dec. 662]; *Smith* v. *Smith*, 2 Id. 621 [13 Am. Dec. 464]; *Thompson* v. *Bridgewater*, 7 Id. 188; *Howard* v. *North Bridgewater*, 16 Id. 189; *Adams* v. *Carlisle*, 21 Id. 146; *May* v. *Princeton*, 11 Met. 442; *Shepardson* v. *Colerain*, 13 Id. 55; *Palmer* v. *Andover*, 2 Cush. 600; *Bigelow* v. *Rutland*, 4 Id. 247; *Hull* v. *Richmond*, 2 Woodb. & M. 337; *Moore* v. *Abbot*, 32 Me. 46; *Merrill* v. *Hampden*, 26 Id. 234; *French* v. *Brunswick*, 21 Id. 29 [38 Am. Dec. 250]; *Jacobs* v. *Bangor*, 16 Id. 187; *Hunt* v. *Pownal*, 9 Vt. 411; *Kelsey* v. *Glover*, 15 Id. 708; *Allen* v. *Hancock*, 16 Id. 230.

What constitutes negligence is a mixed question of law and fact, to be settled by the jury under the instructions of the court: *Rice* v. *Montpelier*, 19 Vt. 470; *Murch* v. *Concord R. R. Co.*, 29 N. H. 43 [61 Am. Dec. 631]; *Beers* v. *Housatonuc R. R. Co.*, 19 Conn. 566; and it was properly submitted to them.

But the idea of the defendant's counsel was, that if the plaintiff was himself a wrong-doer he could maintain no action whatever, however prudent and careful he may have been. There are decisions which give countenance to this idea, and which hold that where a party who has suffered a loss by the negligence of another was himself at the time a trespasser, or acting in violation of law, he cannot recover: *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349 [53 Am. Dec. 384]; *Hartfield* v. *Roper*, 21 Wend. 615 [34 Am. Dec. 273]; *Brown* v. *Maxwell*, 6 Hill, 592 [41 Am. Dec. 771], and cases there cited.

Digitized by Google

But we are unable to agree to the doctrine thus broadly laid down. As a general principle, it seems to us wholly immaterial whether, in the abstract, the plaintiff was a wrong-doer or a trespasser, or was acting in violation of law. For his wrong or trespass he is answerable in damages, and he may be punishable for his violation of law; but his rights as to other persons and as to other transactions are not affected by that circumstance. A traveler may be riding with a horse or carriage which he had no right to take or use; he may be traveling on a turnpike without payment of toll; he may be riding on a day when riding is forbidden, or with a speed forbidden by law, or upon what is called the wrong side of the road; or his team may be standing in the street of a town without his attending by them and keeping them under his command, as the law requires;—and in none of these cases is his right of action for any injury he may sustain from the negligent conduct of another in any way affected by these circumstances. He is none the less entitled to recover, unless it appears that his negligence or his fault has directly contributed to his damage. He may be a trespasser, and his trespass may have in no degree contributed to the damage he has sustained. Though a trespasser or wrong-doer as to others, he may have been guilty of neither fault nor negligence as to the party from whom he has sustained damage. Though engaged in an act which is a violation of law in itself, he may have exercised all proper care for the safety of himself and his property, and to avoid any injury to another. A trespass is not the less a wrong that it is done by accident or without design, or even against the will of the actor; but in such case it is not a fault in the sense of that word as used in connection with actions for negligence.

So a party may do an act which is a violation of law, and which may perhaps subject him to liability to those who may sustain damage by his conduct; yet it may not be an offense which would subject him to punishment, because the act may have been involuntary; done without negligence and against his most earnest efforts. In such a case the act is a misfortune: it is not a fault.

It is not enough, then, to show that a party is a wrong-doer, or a trespasser, or violator of the law, to defeat his action for damage sustained from the negligence of another.

It must be shown that such act is a fault, which has directly contributed to the loss or damage of which the party complains. It is not a question, as it has been made in some

Digitized by Google

cases, whether the party is a trespasser, or has done some wrongful act, but whether he is guilty of a fault or of negligence in reference to the matter in question, which has directly contributed to the injury.

The proper question, whether the fact that the plaintiff was on the left of the center of the road was the fault of the plaintiff, or was a mere accident, was submitted to the jury.

For this opinion we think the opinion of Maule, J., in *Barnes* v. *Ward*, 9 Man. Gr. & S. 420, is a sufficient authority. He says, with regard to the objection that the deceased was a trespasser on the defendant's land at the time the injury was sustained, it by no means follows from this circumstance that the action cannot be sustained. A trespasser is liable to an action for the injury which he does, but he does not forfeit his right of an action for an injury sustained. Thus in the case of *Bird* v. *Holbrook*, 4 Bing. 628, S. C., 1 Moo. & P. 607, the plaintiff was a trespasser, and indeed a voluntary one, but he was held entitled to an action for an injury sustained in consequence of a wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land. This decision was approved in *Lynch* v. *Nurdin*, 1 Ad. & El., N. S., 37; S. C., 4 Per. & Dav. 677; and in *Jordin* v. *Crump*, 8 Mee. & W. 782.

So in *Birge* v. *Gardner*, 19 Conn. 507, it is said it seems that the fact of the plaintiff's being a trespasser in the act which produced the injury complained of will not necessarily preclude him from a recovery against a party guilty of negligence: 10 Dig. 9–11.

And in *Kerwhacker* v. *Cleveland etc. R. R. Co.*, 3 Ohio St. 172 [62 Am. Dec. 246], it is held that the mere fact that one person is in the wrong does not of itself discharge another from the observance of due and proper care towards him, or the duty of so exercising his own rights as not to injure him unnecessarily.

Upon these views, we are of opinion that the instructions to the jury were suitable and proper, and that there should be judgment on the verdict.

MERE FACT THAT ONE PERSON IS IN WRONG DOES NOT IN ITSELF DISCHARGE ANOTHER from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily: *Kerwhacker* v. *Cleveland etc. R. R. Co.*, 62 Am. Dec. 246; *Johnson* v. *Patterson*, 35 Id. 96, and note 104; note to *Freer* v. *Cameron*, 55 Id. 674, showing that though plaintiff was a trespasser at the time of his injury, it is no defense if he was guilty of no negligence contributing to his injury that the fact of his

Digitized by Google

being a trespasser does not deprive him of the protection of the law; and that if due care is not used by defendant to avoid injuring him, he may recover.

CONTRIBUTORY NEGLIGENCE BARS RECOVERY: See extended note to *Munger* v. *Tonawanda R. R. Co.*, 53 Am. Dec. 387, discussing the subject; exhaustive note to *Freer* v. *Cameron*, 55 Id. 666–678, discussing the general principles of the law of contributory negligence: *Kerwhacker* v. *Cleveland etc. R. R. Co.*, 62 Id. 246, and references in note thereto 270; *Lucas* v. *New Bedford etc. R. R. Co.*, 66 Id. 406, and cases in note 409.

NEGLIGENCE IS WHAT SORT OF QUESTION.—In *Herring* v. *Wilmington etc. R. R. Co.*, 51 Am. Dec. 395, it is held that what amounts to negligence is a question of law. In *Trow* v. *Vermont Central R. R. Co.*, 58 Id. 191, that negligence is a mixed question of law and fact upon which it is the duty of the court to specifically instruct the jury; in *Zemp* v. *Wilmington etc. R. R. Co.*, 64 Id. 763, that it is a mixed question of law and fact; that the judge is to instruct as to what is negligence, and the jury, in most cases, are to ascertain whether the facts sustain the definition; and in *Galena etc. R. R. Co.* v. *Yarwood*, 65 Id. 682, and *Beatty* v. *Gilmore*, 55 Id. 514, that it is a question of fact, and not of law, and that the jury must determine it, not the court.

LIABILITY OF TOWNS FOR INJURIES CAUSED BY DEFECTIVE OR DANGEROUS HIGHWAYS, where there has been negligence in any degree on the part of him who has sustained the damages: See *Hubbard* v. *City of Concord*, *ante*, p. 520, and cases cited in note 535.

CITY OR TOWN IS NOT LIABLE TO PERSON INJURED by combined effect of defect in highway and negligence of third person; but it is liable to person injured by defect in highway, if the contributing cause is a pure accident, and one which common prudence and sagacity could not have foreseen and provided against: *Rowell* v. *City of Lowell*, 60 Am. Dec. 464.

LADD *v.* WIGGIN.

[35 NEW HAMPSHIRE, 421.]

RETURN OF LEVY OF EXECUTION UPON REAL ESTATE IS CONCLUSIVE EVIDENCE that the debtor's title to the property levied upon, and that of all persons claiming under him by title subsequent to the attachment of the property passed to the judgment creditor. Such return cannot be contradicted by any one.

EVIDENCE TO CONTRADICT LEVY OF EXECUTION, AS EFFECTUAL BETWEEN PARTIES to pass the title of the debtor in the property levied upon, will not be received.

FRAUDULENT CONVEYANCE.—CONVEYANCE OF REAL ESTATE, ABSOLUTE IN ITS TERMS, but made for the purpose of securing a debt, with an understanding between the parties that the land is to be reconveyed upon payment of the debt and interest, is fraudulent and void, not only against existing creditors of the grantor, but against those who became his creditors after its execution.

MORTGAGE CAN BE DISCHARGED ONLY BY PAYMENT IN FACT OF DEBT IT SECURES, or a release by the mortgagee, where equity requires its continued existence.

Digitized by Google

SECURITY OF HIGHER NATURE EXTINGUISHES INFERIOR SECURITIES, as a general rule, but a higher security taken expressly as a second collateral security for the same debt, and upon the same property, will not extinguish the inferior security.

SUBSEQUENT SECURITY FOR DEBT OF EQUAL DEGREE WITH FORMER SECURITY for the same debt will not, by operation of law, extinguish the former security. Such securities are distinct and independent, although both are liens upon property. To make the second security an extinguishment or discharge of the first, there must be an express release, or at least an implied release from a covenant not to sue.

ORIGINAL MORTGAGE NOT EXTINGUISHED OR DISCHARGED BY SUBSEQUENT FRAUDULENT CONVEYANCE—AVOIDED CONTRACT RESTORES EACH PARTY TO HIS PREVIOUSLY EXISTING RIGHTS—RIGHTS OF PURCHASER UNDER HIS FRAUDULENT CONTRACT.—If a note secured by a valid pre-existing mortgage is given up to the mortgagor upon the execution by him to the mortgagee of a fraudulent conveyance of the premises, the amount of the note being included in the debt intended to be secured by the fraudulent conveyance, the original mortgage is not thereby extinguished or discharged. If such fraudulent conveyance is avoided by the creditors of the mortgagor, the mortgagee is remitted to his previously existing legal rights under the mortgage. The purchaser is permitted to hold nothing by his fraudulent contract, and the creditors take all their debtor fraudulently conveyed, and nothing more.

USURY IS PERSONAL DEFENSE; AND WHEN SET UP AGAINST SUBSEQUENT PURCHASER, only the amount of illegal interest is to be deducted from the conditional judgment for the amount due on a mortgage.

WHAT ESTATE OF DECEDENT VESTS IN HIS ADMINISTRATOR, AND HOW DIVERTED.—Upon the decease of an intestate and the granting of administration, his personal estate, and all contingent as well as absolute interests therein, vest in his administrator, including his bonds, contracts, and choses in action, as well as his goods and chattels, and can be diverted only by operation of law, or some act of the administrator.

ADMINISTRATOR MAY ASSIGN CHOSE IN ACTION by a proper instrument for that purpose without license.

MORTGAGE MAY BE ASSIGNED IN SAME WAY AS DEBT ITSELF, because it is a mere incident of the debt.

WRIT of entry to recover possession of a tract of land. *Non tenure* was pleaded as to thirteen hundred and fifty-nine fifteen hundredths undivided parts of the premises demanded; and *nul disseisin* was pleaded as to the remaining one hundred and forty-one fifteen hundredths, on which issue was taken. Nothing was said as to the *non tenure*. The evidence showed that on October 1, 1852, Newell Tilton, being seised of the demanded premises in fee, executed a mortgage thereof to one Daniel G. Ladd, to secure the payment of a promissory note of that date, for three hundred and fifty dollars, given by Tilton to Ladd. The consideration of the note was a loan of three hundred and thirty-nine dollars and fifty cents, then made by Ladd to

Digitized by Google

Tilton, under an agreement to pay nine per cent interest therefor, and the note was made for more than the amount loaned by ten dollars and fifty cents, in order to secure three per cent beyond the legal rate of interest for one year. On November 1, 1853, Tilton was not only indebted to Ladd in the sum of two hundred and fifty dollars, due upon other promissory notes, in addition to the amount due upon the mortgage note, but also to defendant and to other persons. Under these embarrassed circumstances, he on that date executed to Ladd an absolute deed of the demanded premises, and received from Tilton the mortgage and mortgage note, and other notes held by Ladd against Tilton. Ladd also advanced to him at that time a further sum of about four hundred and twenty dollars. Defendant contended that this deed was fraudulent as to Tilton's creditors, and evidence was introduced tending to show that it was given as security for the debts due from Tilton to Ladd and the money so advanced, and that it was agreed between them, at the execution of the deed, that Ladd should reconvey to Tilton, or to any other person for his benefit, whenever the amount of the notes so given up and the money so advanced should be repaid to Ladd, with interest thereon at the rate of nine per cent per annum. Defendant was one of Tilton's creditors, and immediately after the deed was executed he caused the demanded premises to be attached, recovered judgment, and caused execution to be levied upon the one hundred and forty-one fifteen hundredths undivided parts of said premises as the estate of Tilton. Ladd died intestate on August 24, 1855, leaving the demandant, his only child, and Lydia R. Ladd, his widow, who was appointed administratrix upon his estate. Prior to the commencement of this suit, the administratrix executed, acknowledged, and delivered to demandant an assignment of the mortgage mentioned. Plaintiff offered evidence tending to show that during the whole course of the levy under execution the demanded premises were in the possession of a third person, occupying the same as tenant of the demandant; that no actual possession of the tract levied upon was given by the officer making the levy to the defendant; and that the defendant subsequently obtained possession of the premises by collusion with the tenant. This evidence was ruled out. The jury were instructed, in substance, that if they should find that the deed of November 1, 1853, was given in the manner above claimed by defendant, this would render it void in law as to defendant, he being a creditor of Tilton when the deed was executed; that if they should find the deed to be thus

Digitized by Google

void, and they should also find that the mortgage and mortgage note of three hundred and fifty dollars were given up to Tilton in consideration of his deed of November 1st, Ladd, if living, would nevertheless have a legal claim to the premises under the mortgage, and that by virtue of the assignment mentioned, the title, under the mortgage, passed to plaintiff, and would entitle her to maintain this action, and to recover a conditional judgment thereon for the amount of the mortgage note, the sum of ten dollars and fifty cents, included in the principal on account of illegal interest, being first deducted therefrom. They were also instructed to return a general verdict for the plaintiff, if they found that the deed of November 1st was not fraudulent as to creditors; otherwise, to return a verdict that the plaintiff was entitled to a conditional judgment for such sum as they might find to be due upon the mortgage note, after making said deduction. The jury found plaintiff entitled to a conditional judgment for four hundred and twenty-six dollars and seventy-six cents. Plaintiff made a motion to set aside the verdict for error in rejecting the evidence offered; defendant made a similar motion on account of the instructions excepted to.

Stevens, for the plaintiff.

Spear, for the defendant.

By Court, FOWLER, J. The levy of the defendant's execution vested in him an actual seisin of the land levied upon, as against Newell Tilton and all persons claiming under him by title subsequent to the defendant's attachment. All the title of Tilton in the premises levied upon, as between the parties, passed to the defendant by the levy. Upon this point the officer's return was conclusive, and not to be contradicted by any one: *Brown* v. *Davis*, 9 N. H. 78; *Parker* v. *Guillow*, 10 Id. 103; *Angier* v. *Ash*, 26 Id. 105, and authorities; *Swift* v. *Cobb*, 10 Vt. 282; *Gore* v. *Brazier*, 3 Mass. 523 [3 Am. Dec. 182]; *Blood* v. *Wood*, 1 Met. 528, 534; *Gorham* v. *Blazo*, 2 Me. 232; *Langdon* v. *Potter*, 3 Mass. 215; *Proctor* v. *Newhall*, 17 Id. 81; *Bott* v. *Burnell*, 9 Id. 98.

As against Newell Tilton and his privies, the levy gave the defendant a vested and perfect title, dependent on the officer's return; and no evidence could be raised to impeach or destroy the validity of the return for the purpose of establishing that title. The only purpose for which the execution and return were offered in evidence by the defendant was to sustain his title to one hundred and forty-one fifteen hundredths of the premises

Digitized by Google

demanded by the plaintiff in his writ. He alleged that by the levy he had acquired Tilton's interest in that share of the premises, and as his creditor, was entitled to hold the same against the fraudulent conveyance thereof to the father of the plaintiff.

Under the circumstances of the case, the only legitimate purpose for which the evidence offered by the plaintiff and rejected by the court could have been proposed was to defeat the defendant's title against Newell Tilton through the levy, and thus show that he was in no situation to contest the plaintiff's claim to the premises in controversy. In other words, its object was to show that the defendant's levy was invalid as against Newell Tilton. But on that point the return was conclusive against all the world, and could not be contradicted. The evidence was therefore properly rejected: *Dickinson* v. *Lovell*, 35 N. H. 9; *Eastabrook* v. *Hapgood*, 10 Mass. 313; *Bolt* v. *Burnell*, 9 Id. 98; *Winchell* v. *Stiles*, 15 Id. 232; *Bean* v. *Parker*, 17 Id. 591.

The conveyance of November 1, 1853, absolute in its terms, but made for the purpose of recovering a debt, with an understanding between the parties that the land was to be reconveyed upon payment of the debt and nine per cent interest as found by the jury, was void; that is, voidable not only against existing creditors, but against those who might have become such after its execution: *Smith* v. *Lovell*, 6 N. H. 67; *Paul* v. *Crocker*, 8 Id. 288; *Tifft* v. *Walker*, 10 Id. 150; *Smith* v. *Smith*, 11 Id. 460.

The jury have also found that the three-hundred-and-fifty-dollar mortgage and note were delivered up by Ladd to Tilton in consideration of the execution of the deed of November 1, 1853. Did such surrender for such consideration operate to extinguish the mortgage debt and release the mortgage as between the parties, or as against the creditors of Tilton?

It is well settled that nothing but payment in fact of the debt, or a release by the mortgagee, will discharge a mortgage: *Crosby* v. *Chase*, 17 Me. 369; *Elliot* v. *Sleeper*, 2 N. H. 525; *Willard* v. *Harvey*, 5 Id. 252; *Pool* v. *Hathaway*, 22 Me. 85; *Davis* v. *Maynard*, 9 Mass. 242; *Scituate* v. *Hanover*, 16 Pick. 225; *Dana* v. *Binney*, 7 Vt. 493.

And it is equally well settled that the taking of a second collateral security for the same debt upon the same property, even of a higher nature, does not extinguish or discharge the first: *Gregory* v. *Thomas*, 20 Wend. 17; *Burdett* v. *Clay*, 8 B. Mon. 287; *Day* v. *Leal*, 14 Johns. 404.

Adjudications for several centuries of cases of every variety of form established the proposition that a subsequent security for

Digitized by Google

a debt of equal degree with a former for the same debt will not, by operation of law, extinguish it: *Manhood* v. *Crick*, Cro. Eliz. 716; *Norwood* v. *Grype*, Id. 727; *Maynard* v. *Crick*, Cro. Car. 86; *Erie's Case*, Lit. 58; *Higgins's Case*, 6 Co. 45; *Rhoades* v. *Barnes*, 1 Burr. 9; *Phelps* v. *Johnson*, 8 Johns. 54, 58; *Preston* v. *Perton*, Cro. Eliz. 817; *Mumford* v. *Stocker*, 1 Cow. 178; *Andrews* v. *Smith*, 9 Wend. 53.

When the securities are of equal degree, they shall be intended and held to be distinct and independent, although both are liens upon property. A debt is not honestly extinguished until it is paid in cash or its equivalent, and to multiply artificial mergers will not further the cause of fair dealing: *Higgins's Case*, 6 Co. 45; *Andrews* v. *Smith*, 9 Wend. 53.

To make the second security an extinguishment or discharge of the first, there must be an express release, or at least, an implied release from a covenant not to sue: *Phelps* v. *Jackson*, 8 Johns. 58.

It is true that where the estate of the mortgagor and mortgagee become united in the same person, *prima facie* the mortgage debt is extinguished: *Greenough* v. *Rolfe*, 4 N. H. 363, and authorities. And the delivery of the note by the mortgagee to the morgagor is *prima facie* evidence that the mortgage was discharged: *Smith* v. *Smith*, 15 Id. 55; *Johnson* v. *Nations*, 26 Miss. 147. And where the mortgagee purchases the mortgaged premises and receives a deed in fee-simple, paying a part of the consideration by the delivery of the note which the mortgage was given to secure, the mortgage is thereby *prima facie* paid and extinguished: *Jennings's Lessee* v. *Wood*, 20 Ohio, 261.

But all these inferences and conclusions of law and of fact are open to explanation, and may be rebutted and controlled by evidence. And we think they must be considered to have been explained, rebutted, and controlled by the evidence in the present case. The instructions of the court to the jury must be regarded as having been, in substance, that if they found that the three-hundred-and-fifty-dollar note and mortgage were given up otherwise than in consideration of a new deed, absolute upon its face, but accompanied by a secret trust, rendering it, as between the parties, a conditional sale or equitable mortgage, they must find a verdict for the defendant. And under the constructions, a verdict for the plaintiff for a conditional judgment for the amount of the mortgage debt, less the illegal interest included therein, must be considered as establishing the fact that the mortgage debt was not extinguished or the

Digitized by Google

mortgage released by the transactions of November 1, 1853, but that the debt was simply included in and resecured by the fraudulent deed of that date; that the note, constituting the original evidence of its existence, was given up with the express understanding that it was not paid and extinguished, but united with the four hundred and twenty dollars then advanced, and the two hundred and fifty dollars due upon other notes, and remained secured by the new lien on the same land. The new security having failed, the mortgagee was at liberty to fall back upon the original mortgage for the security of his debt. As between the parties, after the verdict rendered under the instructions, the whole final transaction in relation to the original debt and mortgage may be regarded as having existed only in contract; and that contract having been pronounced void as to creditors, and been avoided by them, the debt and mortgage continue in full force and validity. The agreement between the parties may be taken to have been, that if Tilton redeemed the property from the deed of November 1, 1853, which was to be done only by the payment, among other debts, of the original three-hundred-and-fifty-dollar mortgage, the first mortgage was to be released, otherwise not. This agreement proving ineffectual as fraudulent and void, the mortgagee was in no worse situation than if it had never been made, but was at once remitted to his previous rights.

The general rule of law, as between parties, is that where a contract is avoided for any cause, each is restored to his previously existing rights; they are placed back in their original position. Thus a person who has been defrauded in a contract returns what he has received, and rescinds the contract, and may then maintain an action to recover what he parted with, if it be not restored to him on demand. The infant, by avoiding his deed, rescinds the whole contract. So where a party avoids a usurious contract, the opposite party is restored to his previous legal rights, and may recover any legal claim previously existing, although it may have been mingled in the usurious contract, and to have been canceled: *Cook* v. *Gilman*, 34 N. H. 556; *Bigelow* v. *Kinney*, 3 Vt. 353 [21 Am. Dec. 589]; *Edgell* v. *Stanford*, 6 Id. 551.

In the case before us, the statute makes the absolute conveyance void; that is to say, voidable at the election of the grantor's creditors. When those creditors avoid this absolute conveyance, the law remits and restores the other party to his previously existing legal rights. This gives the statute its proper and legit-

Digitized by Google

imate effect, permits the purchaser to hold nothing by his fraudulent contract, and the creditors to take all their debtor fraudulently conveyed, and nothing more. To give it any other construction would be to create penalties beyond those contemplated by its enactment, and compel the fraudulent purchaser to surrender, not only all he may have fraudulently purchased, but his previously acquired *bona fide* securities on the property.

The presumption of payment was rebutted by the finding of the jury. The note was given up on the taking of the fraudulent conveyance, and the debt included in that conveyance which the creditors have now avoided. The very avoiding of the fraudulent conveyance revived and renewed the former valid lien, restored the parties to their original position: *Marshall* v. *Wood*, 5 Vt. 250; *Irish* v. *Clayes*, 10 Id. 81 [30 Am. Dec. 446]; *Hoyt* v. *Demon*, 5 Day, 479; *Towle* v. *Hoit*, 14 N. H. 61; *Haven* v. *Low*, 2 Id. 13 [9 Am. Dec. 25].

No objection has been urged to the instructions of the court below as to the effect or amount of deduction for the illegal interest included in the mortgage note, and we are not aware that any could properly be taken to them. The defense of usury is personal, and as against a subsequent purchaser, only the amount of illegal interest is to be deducted from the conditional judgment for the amount due on a mortgage: *Reading* v. *Weston*, 7 Conn. 413; *De Wolf* v. *Johnson*, 10 Wheat. 367, 393; *Post* v. *Bank of Utica*, 7 Hill, 391.

The mortgage debt, less the illegal interest included in the note, then subsisting at the death of Daniel G. Ladd, was a chose in action, which, on well-established principles, his administratrix could assign and transfer by a proper instrument for that purpose, without license. The mortgage was a mere incident of the debt, assignable in the same way: *Glass* v. *Ellison*, 9 N. H. 69; *Southerin* v. *Mendum*, 5 Id. 420; *Ellison* v. *Daniels*, 11 Id. 274.

Upon the decease of an intestate, and the granting of administration, his personal estate, and all contingent as well as absolute interests therein, vest in his administrator, including his bonds, contracts, and choses in action, as well as his goods and chattels, and can be diverted only by operation of law or some act of the administrator: Com. Dig., tit. Administrator, B, 10–13; *Dawes* v. *Boylston*, 9 Mass. 252 [6 Am. Dec. 72]; *Clapp* v. *Stoughton*, 10 Pick. 468; *Jewett* v. *Smith*, 12 Mass. 309; *Goodwin* v. *Jones*, 3 Id. 514 [3 Am. Dec. 173]; *Hayes* v. *Jackson*, 6

Digitized by Google

Id. 149; *Johns* v. *Johns*, 1 McCord, 132; *Seabrook* v. *Williams*, 3 Id. 371.

As the rulings and instructions upon the trial were correct, there must be judgment on the verdict.

RETURN OF OFFICER LEVYING EXECUTION ON REAL ESTATE IS CONCLUSIVE UPON PARTIES, and all persons claiming under them: *Stevens* v. *Brown*, 23 Am. Dec. 215, and collected cases in note thereto 217, on conclusiveness of officer's return. Sheriff's return to a *scire facias* cannot be controverted: *Bly* v. *Richards*, 13 Id. 672. See note to *Mitchell* v. *Lipe*, 29 Id. 121, on officer's return of execution as evidence.

CONVEYANCE ABSOLUTE IN TERMS, BUT ATTENDED WITH SECRET TRUST that the grantor shall have the land again on repayment of the money he received, is void as against the creditors of the grantor: *Winkley* v. *Hill*, 31 Am. Dec. 215. So, if the understanding is that the creditor shall hold any balance realized after the discharge of his debt, subject to the order of his debtor: *McCulloch* v. *Hutchinson*, 32 Id. 776. Such deeds are void against *bona fide* creditors, because they do not state the real nature of the transaction: *North* v. *Belden*, 35 Id. 83. An absolute deed given to secure a debt amounts in equity to merely a mortgage: *Bigelow* v. *Topliff*, 60 Id. 264, and cases cited in note 271. A deed made to secure an honest debt will be fraudulent and void if it is also made to cover up the property from creditors, and will not be allowed to stand as security for the amount due: *Garland* v. *Rives*, 15 Id. 756; *Miller* v. *Tollison*, 14 Id. 712. As to secret trust in absolute conveyance, see also *Birely's Ex'rs* v. *Staley*, 25 Id. 303.

MORTGAGE DEBT IS EXTINGUISHED BY PAYMENT: *Breckenridge's Heirs* v. *Ormsby*, 19 Am. Dec. 71; *Bowman* v. *Manter*, 66 Id. 743. So is it extinguished by a release: See references in note to case last cited, p. 745, treating of both release and payment.

MERGER OF SECURITIES.—As a general rule, the taking of a higher security extinguishes a debt arising from mere matter of account, and merges the latter into the former: *Van Vliet* v. *Jones*, 43 Am. Dec. 633, and note 635. See also *Steamboat Charlotte* v. *Hammond*, Id. 536, as to effect of taking note for a pre-existing debt; and note to *Speed's Ex'rs* v. *Hann*, 15 Id. 81, as to merger of contracts.

USURY IS STRICTLY PERSONAL DEFENSE: *Stevens* v. *Muir*, 65 Am. Dec. 764, and reference in note 767.

PERSONAL PROPERTY VESTS IN WHOM ON DEATH OF OWNER: See note to *Hubbard* v. *Ricart*, 23 Am. Dec. 201; *Wonson* v. *Sayward*, Id. 691; *Potts* v. *Smith*, 24 Id. 359; *Bufford* v. *Holliman*, 60 Id. 223; *Ansley* v. *Baker*, 65 Id. 136, and notes 140.

ADMINISTRATOR MAY SELL CHOSES IN ACTION OF HIS INTESTATE: *Beecher* v. *Buckingham*, 44 Am. Dec. 580, and note 585.

CITATIONS OF THE PRINCIPAL CASE.—In *Divoll* v. *Atwood*, 41 N. H. 450, it was objected that usury could not be pleaded in a suit on a mortgage. But after reviewing the statutory law on the subject, the court considered it a mere revision of the former law, and not designed to affect the rights of the defendants in suits upon mortgages, any more than upon bonds or other contracts; and that a suit "for the recovery of a debt or damages, upon any instrument hereafter made," must be understood to include a mortgage as well as the note which is secured by it. The principal case was cited to show that

Digitized by Google

no such distinction existed. It was also cited in *coolidge* v. *Melvin*, 42 Id. 521, 533, to the point that a conveyance of land, absolute on its face, with an understanding that it should be reconveyed on payment of the sum for which it was conveyed, with interest, is void both as to antecedent and subsequent creditors. The case of *Leach* v. *Tilton*, 40 Id. 474, involved questions concerning some of the notes mentioned in the principal case, and the latter was there cited to the point that the note for three hundred and fifty dollars was a subsisting and valid contract, notwithstanding it was given up to Tilton.

JOHNSON *v.* ATLANTIC & ST. LAWRENCE R. R. CO.

[35 NEW HAMPSHIRE, 569.]

RAILROAD CORPORATION HAS RIGHT TO CONSTRUCT ITS ROAD IN ANY SUITABLE AND PROPER MANNER for its own convenience and the public accommodation, and the right to vary and change that construction within the established limits of its road from time to time forever.

MEASURE OF DAMAGES ALLOWED TO LAND-OWNER FOR INJURIES TO HIS LAND BY CONSTRUCTION OF RAILROAD over it includes all damages, direct and consequential, present and prospective, certain and contingent, which may fairly result to the land-owner by the loss of his property and rights, and the injuries thereto.

LAND-OWNER CAN MAINTAIN NO ACTION AGAINST RAILROAD COMPANY for any loss or injury which results from building its road in a suitable and proper manner.

RAILROAD CORPORATION IS LIABLE FOR ALL DAMAGES RESULTING FROM IMPROPER and unsuitable construction of its road over the lands of another.

JURY OR COMMISSIONERS WILL BE PRESUMED TO HAVE DONE THEIR DUTY IN APPRAISING DAMAGES done by a railroad company in constructing its road over another's land.

RAILROAD CORPORATION HAS RIGHT TO CONSTRUCT ITS ROAD IN SUITABLE AND PROPER MANNER, whatever may be the injury to the residue of the lands of the same owner; but the mere purchase of the fee-simple does not authorize it to flow water upon lands above its road and on a stream, although its rights in this respect are more extensive than it would have as an owner against the parties whose lands have been taken for the road.

IN ALL ORDINARY CASES, RAILROAD COMPANY IN BUILDING ITS ROAD HAS NO RIGHT TO OBSTRUCT NATURAL WATERCOURSE, and must construct a culvert or drain, with a proper grade, to carry off the water.

IN CASES OF NECESSITY, RAILROAD COMPANY IN BUILDING ITS ROAD IN SUITABLE AND PROPER MANNER MAY WHOLLY OBSTRUCT NATURAL WATERCOURSE, and submerge lands of the owner other than those taken for the track, without being answerable for any damage resulting from that cause; for it will be regarded as having acquired the right to flow such lands.

UNDER COMPLAINT SUBSTANTIALLY ALLEGING THAT PLAINTIFF WAS DEPRIVED OF USE OF HIS MEADOW by reason of the defendant causing water to overflow it, thereby rendering it spongy and impassable, it is competent for plaintiff to show that his muck-bed in the meadow, valuable for manure, was made inaccessible by the flowage, and that he was

Digitized by Google

injured in consequence thereof; for if the single question is whether the railroad company so constructed its road as to injure the owner's meadow-land by flowage, the latter may show in what manner, and every manner, in which the flowing impaired the profits of the land.

TRESPASS on the case. Johnson alleged in his declaration against said railroad company that the defendants had so negligently constructed their road across his land, in failing to provide sufficient watercourses for the water, etc., obstructing the flow thereof, and causing the water to overflow his meadow, that his grass was destroyed, his meadow made spongy and impassable, and that he had been deprived of the use and profit of the meadow. Plaintiff's evidence tended to prove that the culvert under the railroad, through which alone the water running into the meadow from springs and from the hills could escape, was not made in the low part of the meadow, where the water naturally ran, but on the higher land; that the bottom of the culvert was not as low as the surface of the meadow, so that the water would be two or three feet upon the low part of the meadow before it would be as high as the bottom of the culvert; that the culvert was dug about two feet below the natural surface of the land where it was cut; and that no ditches were dug from the culvert to the meadow, or to the low ground below the culvert. Plaintiff also introduced evidence tending to show that there was in his meadow a large body of muck, valuable for manure, which was to a considerable extent covered and filled by the water thrown upon the meadow by the acts of defendant, and which prevented him from digging any part of the same. It was objected that no part of the declaration was applicable to an injury of this kind, and that the evidence was therefore inadmissible, but it was received. The jury were instructed that if they found that there was no difficulty in building a suitable culvert to draw the water off said meadow, and that the water was flowed back upon the meadow by the embankment, either in consequence of the bottom of the culvert not being sunk low enough to drain the meadow, or in consequence of the culvert not being connected by ditches, cut low enough to carry the water of the meadow through the culvert to the natural or other channels of the water below, the plaintiff was entitled to recover. Defendants excepted. Verdict for plaintiffs.

Burns and Fletcher, for the defendants.

G. C. Williams, for the plaintiff.

Digitized by Google

By Court, BELL, J. In the case of *Dearborn* v. *Boston etc. R. R. Co.*, 24 N. H. 185, the court considered the principles upon which the damages to be paid by railroad corporations, upon the laying out of their roads, were to be estimated, and the rights acquired by them by reason of the assessment and payment of such damages. The court there say: "The corporation acquire the right to construct the road in any suitable and proper manner, for their own convenience and the public accommodation, and the right to vary and change that construction, within the established limits of their road, from time to time forever. Accordingly, the jury should take into consideration and appraise all damages, direct and consequential, present and prospective, certain and contingent, which may be judged by them fairly to result to the land-owner by the loss of his property and rights, and the injuries done thereto:" *Sabin* v. *Vermont Central R. R. Co.*, 25 Vt. 368.

For any loss or injury which results from building the road in a suitable and proper manner, the land-owner can maintain no action against the company. The damages awarded must be regarded as a full compensation for all the injury which the land-owner may sustain, then or at any future time, from any cause which the commissioners were bound or had a right to consider. It must be taken that they have done their duty in considering all such causes of damage as were legitimate subjects for their consideration: *Aldrich* v. *Cheshire R. R. Co.*, 21 N. H, 359 [53 Am. Dec. 272]; *Furniss* v. *Hudson River R. R. Co.*, 5 Sandf. 551; *Lancashire etc. Railway Co.* v. *Evans*, 19 Eng. L. & Eq. 300. But no authority is given to the railroad to make their road in an unsuitable and improper manner, and the corporation must remain liable for all such damages as result from an improper and unsuitable construction: *Sabin* v. *Vermont Central R. R. Co.*, *supra*; *Dodge* v. *County Commissioner*, 3 Met. 380; *Whitcomb* v. *Vermont Central R. R. Co.*, 25 Vt. 68.

Upon these principles, the question here is, whether the culvert was so built, at such a place, and of such dimensions, and so connected with the natural or existing channels of the water, as that the railroad could be said to be built in a suitable and proper manner. It is not, however, a matter of course that every case is to be referred to the jury under such general instructions. The law has in some cases prescribed the rule in a more definite way. In the case of rights connected with running water, many principles have become settled, and parties are bound by them in cases to which they apply.

Digitized by Google

By the mere purchase of the fee-simple of the land a railroad would not acquire a right to flow the water upon the lands above them upon the stream. But the railroad acquire in this respect more extensive rights than they would have as owners, as against the parties whose lands have been taken for their road. They acquire the right to construct their road in a suitable and proper manner, whatever may be the injury to the residue of the lands of the same owner: *Mason* v. *Kennebec etc. R. R. Co.*, 31 Me. 217; *Dodge* v. *County Commissioners, supra; Sabin* v. *Vermont Central R. R. Co., supra.*

Though in all ordinary cases they acquire no right to obstruct a natural watercourse, and must construct a culvert or drain with a proper grade to carry off the water: *Proprietors etc.* v. *Nashua & Lowell R. R. Co.*, 10 Cush. 385; *Rowe* v. *Addison*, 34 N. H. 306; yet if it should be found to be necessary, for the suitable and proper construction of the railroad, to obstruct the water wholly, and to submerge the other lands of the owner of the land taken for the track, they must be taken to have acquired the right to flow it, and would not be answerable for any damage that might result from that cause. But the case thus supposed is a case of necessity, and not of caprice or economy merely: *Whitcomb* v. *Vermont Central R. R. Co., supra; Hooker* v. *New Haven etc. R. R. Co.*, 14 Conn. 146 [36 Am. Dec. 477]; *Mason* v. *Kennebec etc. R. R. Co., supra.*

This case was not one which was supposed to give rise to any question of necessity. There was nothing tending to show that the road could not be suitably and properly built, without flowing the meadow in the slightest degree. The case shows no pretense nor suggestion of that kind, nor even a pretense that the expense of a proper culvert and suitable ditches was in any degree disproportionate to the value of the meadow. If a meadow was very small or very poor, and an embankment was very high, and consequently wide, the expense of a culvert might exceed the entire value of the meadow, and in such a case it might perhaps be contended that it would be a suitable and proper mode of building the road to make no water-way, and that it was consequently the duty of the commissioners to allow for the whole damage resulting from building the road in this way: *Whitcomb* v. *Vermont Central R. R. Co., supra;* but there was no suggestion of any such state of facts, nor of any facts, which would render it proper for the commissioners to allow damages for any flowage of the meadow. There was no evidence having that bearing.

Digitized by Google

It was not, therefore, a case where it was necessary to submit to the jury in terms whether the railroad was constructed in a suitable and proper manner. The question was greatly narrowed by the fact that there could be no pretense that the railroad had any right to flow the meadow. If they had not, the single question would be whether they had so constructed their road as to injure the meadow by flowage, and upon this point we think the charge correct.

A question arose whether the plaintiff should be allowed to show that his meadow contained a large body of muck valuable for manure, which was filled and covered with water so that it could not be dug for use. The court held that as it was alleged in his declaration that his meadow is become spongy, rotten, impassable, and of no value, and he has thereby been deprived of the use and profit of it, the evidence was competent. The complaint was substantially that he was deprived of the use of his meadow, and it was competent for him to show in what manner, and every manner, in which the flowing impaired the profits of his land.

It is not suggested that any error occurred in laying down the rule of damages, and the jury might as properly allow damages to the plaintiff for being deprived of the use of his muck-beds as for being deprived of the crop of grass usually growing on the meadow. It does not appear that any claim was set up relating to the muck, except the injury arising from its being inaccessible.

The rulings being sustained, there must be judgment on the verdict.

RAILROAD COMPANY'S LIABILITY FOR DAMAGE ARISING FROM CONSTRUCTION OF ROAD: See collected cases in note to *Jones* v. *Western Vermont R. R. Co.*, 65 Am. Dec. 210.

THE PRINCIPAL CASE WAS REVIEWED in *Johnson* v. *Atlantic & St. L. R. R.*, 43 N. H. 410, where it was held that interest on the verdict from the time it was rendered until judgment is entered up should be added to the judgment, and is the correct practice.

Digitized by Google

CASES

IN THE

SUPREME COURT AND COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

TINSMAN *v.* BELVIDERE DELAWARE R. R. CO.

[2 DUTCHER, 148.]

ACTION CANNOT BE MAINTAINED FOR INJURIES resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution, within the scope of their authority.

PRIVATE CORPORATION AUTHORIZED BY STATUTE to construct public highways, or other works of public improvement, for private emolument, and to take private property in so doing, upon making compensation therefor, is not vested with the immunities that pertain to the sovereign, and is not exempt from liability to damages for injuries done to individuals in the exercise of the power granted.

STATUTES IN DEROGATION OF COMMON-LAW RIGHTS are to be strictly construed, and it will not be inferred that the legislature intended to alter common-law principles further than is clearly expressed or the case absolutely requires.

PRIVATE CORPORATION CAN BE HELD LIABLE IN TORT for an act expressly authorized by statute when it transcends the authority conferred on it by the legislature.

PUBLIC CORPORATIONS ARE SUCH AS ARE CREATED for political purposes, and invested with subordinate legislative powers, to be exercised for the public good. These powers are subject to legislative control, and their charter may be altered or repealed at the pleasure of the legislature. But a corporation is not public merely because its object is of a public character.

GRANT TO AND ACCEPTANCE BY PRIVATE CORPORATION of a private charter is a compact which the legislature cannot violate.

PUBLIC CORPORATIONS ARE EQUALLY LIABLE with private corporations or individuals for injuries inflicted, where the powers conferred are not strictly for the public benefit, and if the grant is a special franchise, made as well for private advantage as for public good.

Digitized by Google

DEMURRER ADMITS ONLY FACTS WELL PLEADED; WHETHER INJURY IS REMOTE AND CONSEQUENTIAL is a conclusion of law upon the facts stated in the declaration.

INJURY IS DIRECT AND IMMEDIATE CONSEQUENCE of the acts of a private corporation, when such corporation constructs an embankment in the mouth of a creek, thereby preventing the water from flowing in its accustomed channel, and depriving the injured party of its use for milling purposes, although the property injured is an incorporeal right in the land of another; and it is no defense to an action for damages for such injury that the water flowing in the mouth of the creek is a public navigable river, under servitude to the public interests and subject to legislative control.

THE opinion states the facts.

Richey and Randolph, for the plaintiff.

J. P. Stockton and Field, for the defendants.

By Court, GREEN, C. J. This action is brought to recover damages for injuries done to the reversionary interest of the plaintiff in certain real estate, by the construction of a railroad by the defendants. The first plea, which is the subject of demurrer, states the following facts by way of defense to the action:

The defendants were incorporated by an act of the legislature of this state, and by the said act were authorized and invested with all the necessary rights and powers to lay out and construct a railroad from Belvidere to Trenton. The road so authorized was declared to be a public highway. It was located and constructed in compliance with the requirements of the law. In locating and constructing the road, with its necessary appendages, of which the embankment specified in the plaintiff's declaration was one, the defendants did no unnecessary damage to the rights or property of the plaintiff. The road, with its necessary appendages, was constructed in the most prudent and skillful manner, in pursuance of the provisions of the law for a public highway, without any design to injure the rights of the plaintiff. The defendants did not take possession of or occupy any land of the plaintiff, nor did they construct the said road or embankment upon or over any land of which he was seised. But of necessity, and in order to carry out the requirements of the act, the said embankment was erected on land acquired by the defendants by virtue and under authority of the act. The damages complained of are remote and consequential, and done by authority of the statute.

The second plea demurred to contains substantially the same statements, with the additional averments that the Delaware

Digitized by Google

river is a public highway, and that the water flowing in the creek's mouth is the navigable water of the river Delaware, under servitude to the public interest, the regulation of which is vested in the sovereign power.

The demurrer admits the facts thus stated. For the purpose of this argument, they must be taken to be true. This legal principle is the more distinctly adverted to, because when this cause was before the court on a former occasion, upon demurrer to the declaration, it was understood that the road was located and the embankment constructed upon the land of the plaintiff, of which he was seised, and of which his tenants were in possession.

Such appears to be the plain import of the declaration; and the opinion of the court was to some extent based upon that understanding of the fact: *Tinsman* v. *Belvidere etc. R. R. Co.*, 25 N. J. L. 255 [64 Am. Dec. 415]. The plea, however, avers the fact to be otherwise. The truth now appears to be, as stated by counsel upon the argument, in entire consistency with the averments of the plea, that the plaintiff's mill is situated upon the creek, at some distance from the river and from the creek's mouth; that the plaintiff does not own the land at the creek's mouth, either the bed of the creek or the banks, but that he holds, either by purchase from the owner or by reservation when he parted with the title to the land, the right of floating lumber in the creek's mouth, and of securing, storing, and rafting it there for the use of his saw-mill. The plaintiff's right, therefore, the injury to which constitutes the ground of complaint in this action, is an interest in the land of another, an incorporeal hereditament appurtenant to his mill. It is neither an injury to the plaintiff's own land, nor to his right of landing lumber upon the shore of a public navigable river, which forms the subject of complaint, and which the defendants' pleas are designed to justify. With this statement of the facts, intended to guard against misapprehension, and to show the applicability of the opinion proposed to be expressed, we proceed to examine the legal positions upon which the defense is based.

The first general proposition upon which the defendants rely is, that whenever a corporation or individuals act in the due execution of powers conferred upon them by the legislature for the erection of works of public improvement, no action of tort can be maintained against them for any consequential damages arising from the execution of such work while acting judiciously in the exercise of the powers granted.

Digitized by Google

The principle is perfectly well settled that no action can be maintained for injuries resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution, and within the scope of their authority: *Governor etc.* v. *Meredith*, 4 T. R. 794; *Sutton* v. *Clark*, 6 Taunt. 29; *Boulton* v. *Crowther*, 2 Barn. & Cress. 703; *Radcliff's Ex'rs* v. *Mayor etc. of Brooklyn*, 4 N. Y. 197 [53 Am. Dec. 357].

The principle has been applied to acts done by commissioners for paving streets by trustees under a road act, and to persons executing similar public trusts for the public benefit. And it is insisted that, inasmuch as the railroad is declared by the charter a public highway, as it is constructed for the public benefit by authority of public law, the company are entitled to the benefit of the exemption.

This question was very elaborately discussed by counsel and decided by this court in the case of *Ten Eyck* v. *Delaware and Raritan Canal Company*, 18 N. J. L. 201 [37 Am. Dec. 233]. It was held that the Delaware and Raritan Canal Company were not a public corporation, and that their charter does not justify them in injuring the property of individuals by obstructions of the natural flow of streams of water, although such injuries may be remote or consequential. We do not understand it to be denied by counsel that if that case is law it rules the present. The charters of the two companies are, so far as they affect this question, substantially, if not identically, the same. The pleas present the same grounds of defense, except in some particulars that will be hereafter noticed, and the questions were directly decided. The same points were raised and decided in the case (not reported) of *Vandevere* v. *Delaware and Raritan Canal Company*, upon similar issues. The latter case was removed to the court of appeals, and was affirmed at February term, 1843, by a divided court. Those decisions have not been called in question, and have been regarded as the law in this state. We do not see that the present defense can be sustained without overthrowing them. The case might rest, therefore, upon the doctrine of *stare decisis*. As it is insisted, however, that those decisions are in conflict, both with sound principle and authority, the grounds upon which they rest may with propriety be re-examined.

The position that a corporation authorized to construct public highways, or other works of public improvement, are vested with the immunities that pertain to the sovereign, and are ex-

Digitized by Google

empt from liability to damages for injuries done to individuals in the exercise of that power, cannot be sustained upon grounds of reason or justice. That the individual is entitled, in justice and equity, to remuneration, has never been denied. It is a principle of natural as well as constitutional law that private property can be taken for public use, by virtue of the eminent domain, only upon just compensation. And in regard to that class of injuries not falling within the pale of the constitutional provision, at least where the injury is direct, it is admitted that the party injured, upon the principles of natural justice, is entitled to reparation. But it is insisted that the injury is not the subject of an action at law; that the remedy must be by appeal to the justice of the sovereign; and that, as between the corporation and the state, the state by whose authority and on whose behalf the injury was done, and not the corporation, who were the mere agents in the transaction, should respond for the injury. There is a class of incidental injuries, it is true, resulting from the execution of public works, which must be borne by the individual for the public good, and for which he is entitled to no redress; but the injury of which the plaintiff in this case complains will not be found within that category.

Assuming, then, the claim of the plaintiff for indemnity for the injury sustained to be founded in natural justice, to whom is he to look for redress? It must be, of necessity, either to the corporation by whom the work was done that occasioned the injury, or to the legislature who authorized it. Now, no party injured under similar circumstances ever has, and it may be safely affirmed that no one, with the least prospect of success, ever will apply to the legislature for redress. The answer that would be given is obvious. This work was not done by the state, nor by the agents of the state, nor is the profit resulting from it to inure to the treasury of the state. It was done by a private corporation, acting in their own behalf, for their own benefit, and for the interest of the individual stockholders. True, they were invested with such portion of the sovereign power as enabled them to construct the road. They were authorized, in virtue of the right of eminent domain, to take private property, so far as was essential to the completion of a work of public improvement, and thus far we provide strictly for remuneration. Nor was this done at the instance or by the command of the state. The right to construct the work was solicited as a boon; it was paid for as a privilege. It was entered upon as a private enterprise for private emolument.

Digitized by Google

The work was begun, carried on, and completed by the parties interested, for their individual interest, not as the agents of the state, or primarily for the public benefit. True, the public were incidentally benefited, and so they would have been by the erection of wharves, or storehouses, or manufactories, or any other important private enterprise. If it should be suggested by the applicants for relief that highways are improvements which the sovereign power are bound to provide, the answer would be: True, and we did make provision for their construction; but individuals undertook, at their own instance, for their own benefit, and upon their own responsibility, to execute the work. We are neither responsible for the cost of executing it, for the manner of executing it, nor for injuries resulting from its execution. We are, in equity and justice, no more responsible for injuries inflicted upon individuals in the execution of the work than for the materials employed in its construction, or for injuries resulting by defective construction, or careless management. And well-settled legal principle, no less than natural justice, would sustain the legislature in such a reply to the application.

Speaking of the principle already adverted to, that a public agent, in the execution of a public trust for the public benefit, while acting judiciously within the scope of his authority, is not liable for damages, Chief Justice Gibbs said the case is perfectly unlike that of an individual who, for his own benefit, makes an improvement on his own land. The resemblance fails in the most important point of comparison—the work is not done for a public purpose, but for private emolument: *Sutton* v. *Clarke*, 6 Taunt. 29.

In *Boulton* v. *Crowther*, 2 Barn. & Cress. 703, Littledale, J., states the rule thus: "Where an act of parliament vests a power in trustees or commissioners, to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of the power, the legislature must be taken to have intended that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit."

In *Burroughs* v. *Housatonic R. R. Co.*, 15 Conn. 124 [38 Am. Dec. 64], S. C., 2 Am. R'y Cas. 35, Chief Justice Williams, speaking of a railroad, says: "If this improvement was for a public object merely, and the defendants stood in the same light as commissioners acting *bona fide* in the execution of a public trust,

Digitized by Google

then they could not be responsible, according to the cases of *Sutton* v. *Clarke*, *supra*, and *Boulton* v. *Crowther*, *supra*. But as the defendants are to derive a personal benefit from these improvements, we do not place the case on that ground."

The same principle will be found in *Bailey* v. *Mayor of New York*, 3 Hill (N. Y.), 531 [38 Am. Dec. 669]. But aside from the merits of the question, it is insisted that this action cannot be sustained upon legal principles, inasmuch as it is founded upon a tort; and an act which is authorized by law cannot be a legal wrong. The principle on which the position is founded is certainly true. The action is founded upon a wrong. If, says Buller, J., the thing complained of were lawful at the time, no action can be sustained against the party doing the act: *Governor etc.* v. *Meredith*, 4 T. R. 797. Legal liability, the imputation of the civilians, is founded upon *culpa*, or legal fault: Sedgwick on Damages, 2d ed., 113. And how, it is asked, can that be unlawful which the legislature has expressly authorized? How can that be a legal fault which is done strictly within the scope and letter of the law? Every nuisance is unlawful, and it is a legal solecism to speak of a lawful act being a nuisance.

In *Radcliffe* v. *Mayor of Brooklyn*, 4 N. Y. 200 [53 Am. Dec. 357], Mr. Justice Bronson stated the principle, as a ground of justification for injuries, in the broadest possible terms. He said: "An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow." As applied to the case then under consideration, the principle was a clear ground of justification, for that was a case of consequential damages, resulting from grading a public street under authority of a municipal corporation. And it is certainly true that such act, if done under lawful authority and in a proper manner, never can subject the party to an action. But as applied to acts done by individuals, not for the public but for private benefit, the principle is stated too broadly. An act in itself perfectly lawful becomes unlawful from its effects upon the rights of others. The doing an act in itself lawful does not in all cases exempt the actor from liability for the injurious consequences of that act to others. A man must so exercise a lawful authority, and so enjoy his own rights, as not to encroach upon the rights of others. It is perfectly lawful to erect a dam upon one's own land, yet the builder is answerable if by it he throws the water back upon the land of his neighbor. It is lawful to erect a building upon one's own ground, yet the builder is answerable if it occasion a nuisance

Digitized by Google

to the adjoining proprietor. The consequences of the act render it so far unlawful, no matter with what care the work is done. The act of the legislature gave the defendants no more absolute right to build the road in question than the common law gives every man to build upon his own ground. The act becomes unlawful in the one case precisely upon the same principle and to the same extent as in the other. If it be said that it is not the building of the dam or the house that constitutes the nuisance, but it is the throwing back the water upon another's land or stopping his lights that makes the act illegal—that the complaint is not that he used his own rights, but that he encroached on the rights of others—the same is equally true of the injury here complained of. The plaintiff does not complain that the defendants built their embankment merely, but he complains that in so doing they injured his property.

But it seems to be supposed that there is some virtue in the fact that the legislature have, in express terms, authorized the very act complained of. It is not pretended that in terms they authorized the injury of which the plaintiff complains to be inflicted, but they authorized the work to be done from which injury has resulted. Now, if the act had authorized the work to be done, and had at the same time declared that the act should not be construed to exempt the defendants from liability for injuries occasioned in the doing of the work, their legal liability could not be questioned. The act would be lawful, but the defendants would be liable nevertheless for the consequences of the act. The statute in such case would not create the liability of the defendants for damages for injuries inflicted; it would simply leave their liability as it stood at common law, unaffected by the statute. And that consideration presents this question in its true aspect. Did the legislature intend, by passing the act in question, to exempt these defendants from responsibility for injuries inflicted in executing the work? Admit that the legislature might lawfully have granted such exemption, admit that the injury inflicted is not within the protection of that clause of the constitution which prohibits the taking of private property for public use without just compensation: was it the intention or within the contemplation of the legislature to exempt the defendants from liability for injuries inflicted in the execution of the work? It would have been easy for the legislature to declare, in express terms, that in the construction of the work the corporation should be regarded as the agents of the state, and that they should not be liable for damages result-

Digitized by Google

ing from the execution of the work. Can any one imagine that the legislature would have granted a charter containing such a clause? And yet this court are asked to do, by judicial construction and by the application of technical rules, what it is obvious the legislature never would have done, and never designed to do; viz., to deprive the party of his common-law remedy for injuries sustained. The legislature have manifested no such intention. None such can be implied: 1. Because statutes in derogation of common-law rights are to be strictly construed, and we are not to infer that the legislature intended to alter the common-law principles further than is clearly expressed, or than the case absolutely required: *Sinnickson* v. *Johnsons*, 17 N. J. L. 144; *Arthur* v. *Bokenham*, 11 Mod. 149; Dwarris on Stats. 695; 2. Because it would be contrary to natural justice and equity to permit private individuals to construct a work for their own benefit, and not hold them responsible for all damages done to private property by them in the execution of that work; 3. Because it is against the spirit if not within the letter of the constitution, which prohibits private property to be taken for public use without just compensation.

In an opinion of Mr. Justice Littledale, already cited, he places the exemption of public agents executing public trusts from liability for damages on the ground that, where the act gives no compensation, the legislature must be taken to have intended that no compensation should be received for loss resulting to individuals for acts done in pursuance of the law for the public benefit. A different rule of interpretation would apply where the act is done by private individuals, or by a corporation for their private benefit.

And in *King* v. *Pease*, 4 Barn. & Adol. 30, the court put the exemption of a railroad company from liability to indictment for nuisance upon the ground of the absence of any implied condition or qualification to the authority given in the act.

Looking, then, either to the words of the act itself or to the intent of the legislature as a guide in the interpretation of the powers and privileges conferred, we find nothing to warrant the position that the defendants are exempted from liability to damages for injuries done by them in the execution of the powers conferred by the statute. They are vested with the sovereign power to take private property for public use, but they are not clothed with the sovereign's immunity for damages by reason of their acts.

Upon the question whether a party can be held liable in tort

Digitized by Google

for an act expressly authorized by the legislature, the case of *Sinnickson* v. *Johnson*, 17 N. J. L. 129 [34 Am. Dec. 184], is an authority. In that case it was held that a statute of this state, which authorized John Denn, for his own accommodation, to change the course of Salem creek, a navigable stream, and provided no remedy for damages to meadow-land, occasioned by the execution of the work, was no defense to an action for such damages. That case, in many of its features, was analogous to the present. The injury complained of was the impeding of the flow of the tides and currents in Salem creek, so as to obstruct the sluice-gates and water-works of the plaintiff's meadow adjacent to said creek, and prevent the water from running off and draining from the said meadow, as it was accustomed to do. The defendant pleaded that the work which occasioned the injury was authorized by statute; that its object was to shorten the navigation of Salem creek, a navigable stream; and that the work was done in pursuance of the requirements of the statute, and so as to accomplish the purposes contemplated by the act. It was held, by the unanimous judgment of the court, that the plea constituted no defense to the action. The same view was taken of the question in the court of chancery by Vroom, chancellor. "If," said the chancellor, "in the erection of this dam, or stopping of the water, injury is done to private property, the defendants are answerable in damages to the party injured. It cannot be supposed that the legislature, in authorizing the construction, mainly, if not entirely, for private accommodation and benefit, intended to exempt the grantor or his assigns from all legal liabilities. Such a proposition could meet with no favor at the hands of any court, and, least of all, from a court of conscience:" *Sinnickson* v. *Johnson*, 17 N. J. L. 138 [34 Am. Dec. 184].

In *Crittenden* v. *Wilson*, 5 Cow. 165 [15 Am. Dec. 462], the supreme court of New York held that an act authorizing one to build a dam upon his own land, upon a creek or river which is a public highway, merely protects him from an indictment for a nuisance If, say the court, there had been no express provision in the act for the payment of damages, the defendant would still have been liable to pay them. The effect of the grant is merely to authorize the defendant to erect a dam, as he might have done if the stream had been his own, without a grant. In such a case, he would have been responsible in damages for all the injury occasioned by it to others. In the cases last cited, the act was passed for a merely private purpose, but they are direct

Digitized by Google

and express authority upon the point now under consideration.

It cannot be denied that a different view of the law has been adopted in several cases by high judicial authority, and is sustained by much force of reasoning. A late eminent elementary writer states the general rule to be that where the grantees of a public franchise or the public agents of government have not exceeded the power conferred on them, and when they are not chargeable with want of due care, no claim can be maintained for any damage resulting from their acts; otherwise the absurdity would follow that operations undertaken and conducted by virtue of the supreme authority are unauthorized in the view of the law, and lay a foundation for damages. The proper light in which to regard the matter is to consider the grantee of the franchise, or the public agent, so long as he does not transcend the authority conferred on him, as representing the government, and the government as acting under its right of eminent domain, subject, of course, to its liability to make compensation, and to that liability only: Sedgwick on Damages, 110, 111. The same view of the law will be found to be sustained by several of the authorities cited in the note, and also by the cases collected in 1 Shelford on Railways, Am. ed., 432, note 1; *Mason* v. *Kennebec and Portland R. R. Co.*, 1 Am. R'y Cas. 166, note 1.

These authorities place the grantees of public franchises upon the same platform with the public agents of government. They maintain that corporations holding grants of public franchises are not only vested with the sovereign right of eminent domain, but possess also the sovereign immunity against liability for damages. If this be the law, then wherever authority is granted by the legislature to a private corporation or to an individual to construct a railroad, a canal, a turnpike, a bridge, a raceway for manufacturing purposes, or any other work which the spirit of speculation may prompt and the legislature may conceive will prove conclusive to the public good, private property may not only be taken against the will and consent of the owner upon making compensation, but however ruinous in its consequences the work may be to individuals, no redress can be had for damages resulting from their acts. Such, as we have seen, has not been the rule of law adopted in this state, and such we believe never to have been within the contemplation of the legislature in passing these acts. The whole reason assigned for adopting this rule, in itself manifestly unjust and inequitable, is that otherwise the absurdity will follow that an act authorized by

Digitized by Google

law lays a foundation for damages. But where is the absurdity in supposing that the legislature intended, by virtue of their sovereign power, to confer upon the corporation authority to take the land necessary to construct the road, to do precisely what they might have done if they had owned the land necessary for that purpose, leaving their common-law liability precisely where it would have stood if the work had been constructed upon the lands of the corporation, without the aid of the statute?

So far as the rule applies to public agents of government and to a certain class of remote and consequential damages, the validity of the rule is not questioned. And thus far the authorities are clear and in accordance. The character of consequential injuries for which no damages can be recovered are designated by Nevius, J., in *Ten Eyck* v. *Delaware and Raritan Canal Co.*, 18 N. J. L. 201 [37 Am. Dec. 233], to be such as withdrawing business of transportation from its former channels, affecting the good-will and custom of established stands for the purchase and sale of merchandise and produce, and changing the course and kind of business. But exemption from responsibility for injuries of this character rests upon general principles of law. It rests upon no grant of sovereign immunity, but extends to individuals as well as to agents of government. So a railroad company are not liable for a nuisance or the destruction of private property resulting from the use of locomotives, while used with due caution, not only because the use of the locomotive is authorized by law, but because the legislature will be presumed to have anticipated and authorized the hazards which result from their use, and because an individual under similar circumstances would not be liable for similar incidental injuries in the exercise of his rights: *Bord etc. Turnpike Co.* v. *Camden and Amboy R. R. Co.*, 17 N. J. L. 314.

It is urged against the authority of the case of *Ten Eyck* v. *Delaware and Raritan Canal Co.*, *supra*, that some of the grounds assigned in support of the opinion are untenable, and have been repudiated in subsequent authorities. This may be conceded, and yet the soundness of the decision not necessarily impeached.

It is insisted that it was erroneously assumed in that case that the defendants were a private corporation. It is conceded that the purpose for which the defendants were incorporated was to construct a public highway, a work essentially of a public character, and one which it was the peculiar province of the sovereign power itself to furnish, and in this sense it may be said

Digitized by Google

truly that the defendants were incorporated for a public purpose. But they are not a public corporation, in the legal sense of that term.

Public corporations are such as are created for political purposes. They are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good. Their powers are subject to the control of the legislature, and the charter of such incorporations may be altered or repealed at the pleasure of the legislature. But a corporation is not public merely because its object is of a public character. "A bank created by the government for its own uses, and where the stock is exclusively owned by the government, is a public corporation. But a bank whose stock is owned by private persons is a private corporation, though its object and operation partakes of a public nature, and though the government may have become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike, and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private equally as if vested in a single person: 2 Kent's Com. 305; Angell & Ames on Corp., sec. 14, 30–36; *Bonaparte* v. *Camden and Amboy R. R. Co.*, 1 Baldw. 222. This is clearly the American doctrine, though a different classification appears to be adopted in England: Grant on Corp. 9.

Over public corporations the legislature have an unlimited control to create, modify, or destroy them at pleasure. But the grant and acceptance of a private charter is regarded as a compact which the legislature cannot violate: 2 Kent's Com. 305; Angell & Ames on Corp., sec. 31. It may well be doubted whether these defendants would be willing to claim the privileges of public corporators, if at the same time they are made subject to all the conditions of the character they claim.

But admitting that the defendants are strictly a public corporation, if the powers conferred authorizing the execution of the work in question were not, strictly speaking, conferred for the public benefit, if the grant was a special franchise, made as well for the private advantage of the corporators as for the public good, they are equally liable for injuries inflicted as if they were a private corporation: *Bailey* v. *Mayor of New York*, 3 Hill (N. Y.), 531 [38 Am. Dec. 669].

Again: it is said that the view adopted in *Ten Eyck* v. *Delaware and Raritan Canal Co.*, 17 N. J. L. 201 [37 Am. Dec. 233], that the state could not compel the company to construct the

Digitized by Google

canal, but that the company might abandon the work at their pleasure, is erroneous. The position is not at all material to the conclusion at which the court in that case arrived, nor has it been relied upon in the present case as the ground of decision.

The English authorities certainly show that a railroad company may be compelled to construct their road as authorized by the charter. And regarding the charter as a contract between the government and the corporators, it seems a dictate of sound principle that the company, having accepted the charter, should be compelled, in fulfillment of their part of the contract, to carry the work into effect.

But it is further insisted that the injury of which the plaintiff complains is remote and consequential, and therefore of a character for which the defendants cannot be held responsible; that no action would lie for the injury, even if occasioned by an individual, and without authority of law. Whether the injury is remote and consequential is a conclusion of law upon the facts stated in the declaration. The demurrer admits only the facts that are well pleaded. This objection was raised and overruled in the case of *Ten Eyck* v. *Delaware and Raritan Canal Co.*, *supra*, and if in any case it might be urged effectually, it would seem to apply in that case. There the injury complained of was the building of a wall by the defendants in and along the Raritan river, by which the channel of the river was contracted and rendered less capable of discharging large bodies of water, by reason whereof the plaintiff's land, lying on the opposite side of the river, in times of freshets was subjected to inundation, and the soil thereby washed away. The injury complained of is clearly consequential, and there are certainly authorities which, in this aspect, appear to conflict with the authority of that case. But whatever force the objection is entitled to under the circumstances of that case, it can have no applicability to the case before the court. The complaint here is not of a remote or consequential injury resulting from the construction of the road of the defendants, but of a direct and immediate injury occasioned by the defendants' acts. The plaintiff does not complain, as in the case of Ten Eyck, that by reason of the act of the defendants he is injured by the operation of freshets, or, as in the case of *Sinnickson* v. *Johnson*, 17 N. J. L. 129 [34 Am. Dec. 184], that by the act of the defendant the tides are prevented from flowing freely, whereby the sluice-gates are obstructed, and consequently the water prevented from flowing freely from the plaintiff's lands. But the com-

Digitized by Google

plaint is that the defendants have constructed an embankment in an eddy and creek's mouth, in which the plaintiff has a right of storing, landing, and rafting lumber for the use of his said mill, so that the water is prevented from flowing in its accustomed channel, and the plaintiff deprived of the full enjoyment of his privilege. The property injured is incorporeal, a mere right in the land of another, but the injury to that right is the direct and immediate consequence of the acts of the defendants. In no proper sense can the damages sustained by the plaintiff be denominated as remote or consequential.

The only remaining ground of defense is presented by the second plea of the defendants; viz., that the water flowing in the creek's mouth is the navigable water of the river Delaware, a public navigable river under servitude to the public interests, the regulation of which is vested in the sovereign power.

This objection appears to be fully met and decided by the cases of *Sinnickson* v. *Johnson*, *supra*, and *Crittenden* v. *Wilson*, 5 Cow. 165 [15 Am. Dec. 462]. In the former case, moreover, the act was passed for the purpose of improving the navigation of the stream, and direct authority to do the act complained of was given. Here the improvement of the navigation of the river was not within the contemplation of the legislature, and no authority for that purpose was given. The plea might be available as a defense to an indictment, or an action for a nuisance in obstructing the navigation of the river, but it is not perceived that it constitutes any answer to the plaintiff's cause of action.

The demurrer to both pleas is well taken. The matters set forth, alone or collectively, constitute no defense to the action.

The plaintiff is entitled to judgment.

WHERE, IN EXECUTION OF PUBLIC WORK authorized by the legislature, the limits prescribed by law are prudently observed, no action will lie for consequential injury to the property of another: Note to *Hooker* v. *N. H. & N. Co.*, 36 Am. Dec. 487; and that no action can be maintained against a town for work done under authority of statute, and in the performance of a public trust, see *Hickox* v. *City of Cleveland*, 32 Id. 730.

LIABILITY OF CORPORATIONS TO MAKE COMPENSATION for injuries inflicted upon private individuals when exercising the right of eminent domain granted to them by the legislature: See *Beekman* v. *Saratoga etc. R. R. Co.*, 22 Am. Dec. 679; note to *Bloodgood* v. *M. & H. R. R. Co.*, 31 Id. 372; *Lexington and Ohio R. R. Co.* v. *Applegate*, 33 Id. 497; *Nicholson* v. *N. Y. & N. H. R. R. Co.*, 56 Id. 390; *Monongahela Navigation Co.* v. *Coon*, 47 Id. 474, and note 477.

LIABILITY OF CORPORATIONS FOR THEIR TORTS: See *Thayer* v. *Boston*, 31 Am. Dec. 157; *State* v. *Great Works etc. Co.*, 37 Id. 38; *Goodspeed* v. *East Haddam Bank*, 58 Id. 439, and notes to these cases.

Digitized by Google

PUBLIC CORPORATION IS ONE CREATED for political purposes and with political powers, to be exercised for the public good in the administration of civil government, and is subject to the control of the legislature: *Regents etc. of Maryland* v. *Williams*, 31 Am. Dec. 72; *Yarmouth* v. *North Yarmouth*, 56 Id. 666, and note 671; and that a corporation established for a public end is not necessarily a public corporation, see *Regents etc.* v. *Williams*, *supra*.

LEGISLATURE CANNOT ALTER CHARTER of private corporation: *Brown* v. *Hummel*, 47 Am. Dec. 431, and citations in note 441; see also, on this subject, *Pingry* v. *Washburn*, 15 Id. 676; *Crease* v. *Babcock*, 34 Id. 61; *Yarmouth* v. *North Yarmouth*, 56 Id. 666; *Thorpe* v. *Rutland etc. R. R. Co.*, 62 Id. 625, and notes to these cases.

DEMURRER ADMITS ONLY FACTS WELL PLEADED: *Kellogg* v. *Larkin*, 56 Am. Dec. 164, and note 181.

MILL-OWNER MAY RECOVER DAMAGES for obstruction of a stream through the erection below of a bridge by a railroad corporation, whereby the water is prevented from passing off from his mill as freely as before: *Blood* v. *Nashua etc. R. R. Corporation*, 61 Am. Dec. 444, and note 447.

STATUTE AUTHORIZING ONE TO BUILD a dam in a river which is a public highway is no justification for a private injury caused by the overflow of the lands of an individual proprietor: *Trenton Water Power Co.* v. *Raff*, 36 N. J. L. 342; *Alexander* v. *City of Milwaukee*, 16 Wis. 255; both citing the principal case.

PARTIES CANNOT BE HELD LIABLE for work done in the execution of a public trust and for the public benefit, when acting within the scope of their authority and with due skill: *Quinn* v. *City of Patterson*, 27 N. J. L. 36; *Trenton Water Power Co.* v. *Raff*, 36 Id. 340; but if the injury be direct, and the work done for the benefit of an individual or a corporation, with private capital and for private emolument, then the parties are not vested with the immunities which pertain to the sovereign, and are liable in damages for injuries done to private individuals, even though the public are incidentally benefited by the improvement: Id. 340; *McAndrews* v. *Collerd*, 42 Id. 191; *Alexander* v. *City of Milwaukee*, 16 Wis. 255, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *New Brunswick* v. *Williamson*, 44 N. J. L. 168, to the point that the power of the legislature over incorporations, created for purposes of local government, is supreme, and no contract arises with such corporation from the delegation of authority to them.

INSLEE *v.* FLAGG.

[2 DUTCHER, 368.]

UNDER NEW JERSEY STATUTE ARBITRATOR MUST BE SWORN before he acts, in all cases, whether the submission to arbitration is made by rule of court or not.

IF ARBITRATOR IS NOT SWORN BEFORE HE ACTS, his award is void, and a judgment thereon will be reversed.

OATH OF ARBITRATOR IS PREREQUISITE TO JURISDICTION, and cannot be waived.

OMISSION OF ARBITRATOR TO BE SWORN before he acts may be pleaded in avoidance of his award.

Digitized by Google

THE opinion states the facts.

A. V. Schenck, for the plaintiff.

H. V. Speer, for the defendant.

By Court, GREEN, C. J. To an action of *assumpsit* brought by Inslee in the court below, the defendant pleaded an award. The plaintiff replied that the arbitrator to whom the submission was made did not, before proceeding to the business submitted to him, take the oath or affirmation prescribed by the statute. To this replication there was a general demurrer, and judgment thereon for the defendant.

The only question presented for consideration is, whether the failure of the arbitrator to take the oath avoids the award.

The act for regulating references and determining controversies by arbitration, Nix. Dig. 26, sec. 6, directs that in cases of arbitration every arbitrator shall, before he proceeds to the business submitted to him, take an oath or affirmation of the like nature with that prescribed to be taken by referees, and to be administered in like manner. The fourth section of the act prescribes the oath to be taken by referees, and by whom it shall be administered. It is insisted that the sixth section of the act applies only to cases where the arbitration is to be made a rule of court. But certainly the act itself contains no such limitation. It comprehends every arbitrator and all cases of arbitration. Nor is there anything in the general structure and scope of the act, or in the reason of the thing, to narrow the natural import of the language of the sixth section. The two first sections of the act, including the preamble, are a substantial copy of the statute 9 & 10 Wm. III., c. 15, and apply only to arbitrations where no cause is pending, and where the submission is agreed to be made a rule of court: *Lucas* v. *Wilson*, 2 Burr. 701. The third, fourth, and fifth sections of the act regulate references where there is a cause pending in court. It might be inferred, from what is reported to have been said by the chief justice (Kinsey), in *Ford* v. *Potts*, 6 N. J. L. 393, that the whole of the statute, as found in Paterson, 141, is a transcript of the English statute, and applies only to cases where no suit is depending. But the remark is applicable only to the two first sections of the statute. The residue of the act was drawn by Governor Paterson, and affords a more efficacious remedy upon reports of referees than existed at common law. The sixth section prescribes an oath as the qualification of every arbitrator. No reason can be given why an arbitrator should be sworn when the arbitration is to be

Digitized by Google

made a rule of court, and not sworn in all other cases. The whole object of making it a rule of court is to enforce it by a more summary process than could otherwise be resorted to. The legislature doubtless designed to give to every party who submitted his controversy to arbitration the protection which the law affords to every party litigant; viz., the oath of the tribunal by which his rights are to be adjudicated. This construction of the sixth section appears to have been entertained by the court in *Ford* v. *Potts*, *supra*. If the sixth section of the act is restrained in its application to arbitrations where the submission is to be made a rule of court, no reason is perceived why the seventh section should not be subject to the same limitation. Yet no such construction can be adopted without contravening the language and defeating the obvious design of the act.

It is further objected that if the arbitration is within the provision of the sixth section of the act, the failure of the arbitrator to be sworn is a mere irregularity, and does not avoid the award.

This view was expressed in *Ford* v. *Potts*, 6 N. J. L. 393, but it was not necessary to the decision of that case, and it is contrary to the uniform course of decisions in this court. It has been repeatedly held in this court, that if it did not appear that the referee was sworn, a judgment entered upon the report would be reversed: *Bowen* v. *Laning*, 2 Id. 139; *Reeves* v. *Goff*, Id. 143; *Parker* v. *Crammer*, Id. 271; *Little* v. *Silverthorne*, Id. 680; *Crammer* v. *Mathis*, Id. 550.

The question was directly presented in *Combs* v. *Little*, 4 N. J. Eq. 310. The answer in that case set up an award in favor of the defendant for a large amount to be paid by the complainant. It admitted that the arbitrators were not sworn; but insisted that the award was not thereby rendered void, but that it was binding upon the parties in equity. But the chancellor (Pennington) held that as the arbitrators were not sworn, the whole proceeding was void.

The sound construction of the statute is that the arbitrator cannot act, that in fact he is clothed with none of the powers of an arbitrator, and can make no award until he is sworn.

It is further insisted that the necessity of the arbitrator being sworn may be waived; and if the party suffer the arbitrator to proceed without being sworn, it operates as a waiver. This doctrine has the sanction of judicial authority in a sister state, as well as the support of the *obiter* opinion of a learned judge of this court: *Ford* v. *Potts*, 6 N. J. L. 393; *Browning* v. *Wheeler*,

Digitized by Google

24 Wend. 258 [35 Am. Dec. 617]; *Howard* v. *Sexton*, 1 Denio, 440; S. C., 4 N. Y. 157.

These cases proceed upon the ground that the oath of the arbitrator is not a prerequisite to jurisdiction; that its omission is a mere irregularity, which the party may waive like any other irregularity, by proceeding with the cause without objection. But this view of the statute is in direct conflict with the whole course of adjudication in this state. No judgment could ever have been reversed on the ground that the arbitrator was not sworn, if such omission was a mere irregularity, and the party's proceeding before the arbitrator a waiver of that irregularity. The construction is in fact a virtual repeal of the statute which requires, in express terms, that every arbitrator shall be sworn before he proceeds to act. This construction adopts the principle that he need not be sworn unless the party demands it. This provision is expressly embodied in the Pennsylvania act of March 21, 1806, by which it is enacted that referees chosen in pursuance of the act shall be sworn as prescribed in the act, unless the same shall be dispensed with by the consent of the parties. The construction now contended for will operate to ingraft, by judicial construction, this provision upon our act, without the semblance of legislative authority, and in direct conflict with the terms of the act. And how, it may be asked, does it appear that the party knew that the arbitrator was not sworn? That was the duty of the arbitrator; and may not the party presume that the arbitrator would not violate his duty? that he would not assume to act as arbitrator in violation of the statute, without being sworn? and how can his proceeding before the arbitrator be a waiver of the objection, if the party had no knowledge of its existence?

Lastly, it is objected that the oath of the arbitrator being matter *dehors* the award, its omission cannot be pleaded in avoidance. It is undoubtedly true that a party cannot, in an action at law, plead or give in evidence, in avoidance of the award, collusion or misconduct, or mistake of the arbitrators, or other extrinsic matter, against which relief can be had only in equity: *Sherron* v. *Wood*, 10 N. J. L. 18. But the principle cannot extend to a matter which not merely impeaches the regularity, but questions the very existence of the award.

The judgment must be reversed.

POTTS, J., delivered a concurring opinion.

ELMER, J., concurred; VREDENBURGH, J., dissented.

Digitized by Google

ARBITRATOR NOT BEING SWORN, the whole proceeding is void: *Combs* v. *Little*, 40 Am. Dec. 207; *contra*, note to *Elmendorf* v. *Harris*, 35 Id. 592; and as to when the manner required by law must be followed in matters of arbitration and award, see *Conger* v. *Dean*, 66 Id. 93, and note 96.

NO VALID AWARD CAN BE MADE by arbitrators, if they, or any one of them, fail to take the oath prescribed by statute: *Hepburn* v. *Jones*, 4 Col. 98, citing the principal case.

CARRON *v.* MARTIN.

[2 DUTCHER, 594.]

ACT OF CITY COUNCIL IN LAYING OUT and opening street is *quasi* judicial in its nature, and the tribunal exercising such act is subject to the control of the supreme court.

ACT JUDICIAL IN ITS NATURE is void when attempted to be exercised by a court or other tribunal having no jurisdiction.

WHERE POWER OF CITY COUNCIL TO ALTER OR WIDEN STREETS is confined by the city charter to cases where application is made in writing by three fourths of all owners of land along such streets, this is a case of a tribunal having a limited and special power to proceed only in the manner prescribed in the act.

CITY COUNCIL BEING TRIBUNAL OF LIMITED JURISDICTION, every fact necessary to give jurisdiction must affirmatively appear, to give their proceedings validity.

SUPREME COURT OF NEW JERSEY MAY REVIEW PROCEEDINGS of municipal corporations, and other inferior tribunals, who do acts, judicial or *quasi* judicial in their nature, affecting the rights and property of individuals. This they may do as well when the proceedings are void for want of power in the tribunal to act, as when void in consequence of some material irregularity.

PUBLIC POLICY REQUIRES THAT PROCEEDINGS OF MUNICIPAL CORPORATIONS should be kept strictly within the limits assigned to them by the statute authorizing them, and if they appear not to come within those limits, they are liable to reversal by *certiorari* and are void and insufficient to support a title professing to be founded on them.

THE facts are sufficiently stated in the opinion.

W. Pennington and J. P. Bradley, for the plaintiff.

C. Parker and F. T. Frelinghuysen, for the defendant.

By Court, ELMER, J. The important question in this case is, whether the proceedings of the common council of the city of Newark, in opening the street for which the assessment was made, are void for want of a proper application of the land-owners for that purpose, so that the sale of land made to raise the sum assessed thereon is also void, and confers no title on the purchaser. The thirtieth section of the charter enacts that it

Digitized by Google

shall be lawful for the common council to lay out and open streets, roads, highways, and alleys, and to cause any street, road, etc., already laid out to be vacated, opened, altered, or widened; provided, no street shall be altered or widened as aforesaid except on the application in writing by three fourths of all the owners of lands lying on said road. It is found by the special verdict that the street laid out and opened was a street, road, or highway then already laid out, opened, and used in said city, and became such street, road, or highway before the passage of the charter, the same having been laid out and defined by a survey made in 1753, a copy whereof is annexed. This survey is certainly vague, and is probably so uncertain that it would not be possible accurately to locate the road described after the lapse of a century; but if, as the jury find, it was accurately opened and used as laid out originally, it comes within the description of a street already laid out when the charter was granted.

It also appears by the special verdict that the owners of lands and real estate necessary to be taken for the street laid out and opened, and called Quarry street, agreed to take a certain compensation for their lands, which was authorized to be paid, and it may be presumed was paid; and hence it was insisted by the counsel for the defendant in error that it sufficiently appears that not merely three fourths, but all the owners of land lying on said road, did apply for and consent to the altering or widening of said road. But if it be admitted that an acceptance of compensation by the owners can be regarded as equivalent to a petition in writing, it does not appear that the owners of land necessary to be taken for the street comprised three fourths of all the owners of land lying on said street. Many of the owners of lands lying on said street may have owned no land necessary to be taken in laying it out and opening it. And besides, the council did not profess to proceed under the power given to them to alter and widen an existing street, but under the power to lay out and open a new street.

Assuming, then, as we must, that the council, either in ignorance of the fact that a street had been there before laid out and opened, or, regardless of that fact, did proceed to lay out and open a new street where one existed before the granting of the charter, the question is whether their proceedings, although for this reason irregular and liable to be set aside upon a direct proceeding by way of *certiorari*, are so far available as to be good in a collateral proceeding like the present. The argument relied on to sustain them was that they were of a judi-

Digitized by Google

cial nature, and therefore, however illegal, remain in force until set aside by a direct judgment. This depends upon the further question, whether the want of an application to widen the street made the subsequent proceedings *coram non judice* and void; in other words, was a written application necessary to give the council jurisdiction in the case?—for if they had no jurisdiction, it is admitted that the whole proceedings were void.

Much of the discussion in this court turned upon the question whether the act of the council, in laying and opening this street, was judicial in its character. That a proceeding of this kind does not necessarily belong to the judicial department of the government, as defined by the constitution of this state, must be admitted, otherwise it could not be exercised by any other persons than those who belong to it, as provided for in that instrument. It is probably best designated as *quasi* judicial, or judicial in its nature; that is, judicial in such a sense that the tribunal intrusted with its exercise is subject to the control of the supreme court, as commissioners to settle the boundary line between counties were held to be in the case of *State* v. *Coleman*, 13 N. J. L. 98. But the determination of this question does not settle the difficulty, for an act in the largest sense judicial is totally void when attempted to be exercised by a court or other tribunal having no jurisdiction in the case.

There is a marked and well-settled distinction on this subject between the acts of courts having a general jurisdiction and those of tribunals having only a limited jurisdiction and empowered to act in a special case. In the case of *Turner* v. *Beale*, 2 Salk. 523, it was held that a plea setting up a discharge of a poor prisoner by the quarter sessions must set forth that he petitioned for a discharge, without which the court had no jurisdiction; and this case has been repeatedly recognized as law: *Den* v. *Hammell*, 18 N. J. L. 73; *Price* v. *Bray*, 21 Id. 13; *Ladbroke* v. *James*, Willis, 199; *Service* v. *Heermance*, 1 Johns. 91; *Stephens* v. *Ely*, 6 Hill, 609. In the case of *Den* v. *Hammell*, *supra*, the question was whether it was necessary in ejectment to show that an order of the orphans' court to sell land was founded on an account of the personal estate under oath, before the administrator's deed could be given in evidence. Judge Ford, who delivered the opinion of the court, held that the orphans' court did not come within the description of a tribunal having a limited and special authority, but had a jurisdiction for the general administration of justice within certain great departments, and therefore the same presumption that its

Digitized by Google

proceedings were regularly applied as in the case of proceedings by the supreme court. But he admitted, we think correctly, that tribunals with special powers for adjudicating in particular cases, under the various names of commissioners, surveyors, appraisers, committees, directors, overseers, and the like, little or in no wise relating to the general administration of justice, whose modes of proceeding are prescribed in the statutes by which they are created, are of a different class; and unless their proceedings on the face of them show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction or exceeded it. If the record of a road duly recorded by the order of a court of common pleas would be valid in any collateral proceeding, although it did not appear that a petition had been presented, signed by the requisite number of freeholders, as counsel insisted, and which it is not intended to affirm or deny, it would be because this proceeding by the court of common pleas is to be regarded in the same light as an order of the orphans' court for the sale of land.

It was urged for the defendant in error in this case that the common council had a general power to lay out all streets and to widen streets already laid out; and being a permanent body, and required by the thirty-second section of the charter to ratify the assessment upon those benefited, subject to an appeal to the supreme court, these proceedings ought to have the same effect as those of the court of common pleas in road cases, or of the orphans' court when ordering land to be sold. But it must be remarked that it is only the assessment of the commissioners, as ratified by the council, from which there is an appeal, in order that the amount to be assessed may be ascertained by a jury, and that the appeal has no effect upon the order of the council to open a street. The thirtieth section, in express terms, confines the power of the council to alter or widen a street to the case when an application shall be made in writing by three fourths of all the owners of lands lying on said road. This, we think, is clearly the case of a tribunal having a limited and special power to proceed in the manner prescribed in the act, and only in that manner.

The surrogates in the state of New York hold courts and act judicially; but being courts of inferior and special jurisdiction, it is held that when an order to sell lands is produced as evidence in an action of ejectment, it must appear that a petition was presented, accompanied by a proper account, so as to show

Digitized by Google

that the surrogate had jurisdiction: *Jackson* v. *Robinson*, 4 Wend. 436; *Jackson* v. *Crawfords*, 12 Id. 533. In case of *Sharp* v. *Speir*, 4 Hill, 76, which was an ejectment to recover land sold for payment of an assessment for making a pump in the village of Brooklyn, under an act which authorized the trustees, on the application in writing of the persons owning property, to divide the village into pump and well districts, and a petition was shown, but no evidence was produced that the signatures were genuine, or that they were owners of property, it was held that the trustees acted at their peril; that they could not make the occasion by resolving that it existed; and that corporations and their officers, where they interfere with the rights of individuals, and especially when they attempt to divest and transfer the title to real estate, must show that the very case has arisen in which they were authorized to proceed.

The opinion delivered in that case suggests that there is little, if anything, of a judicial nature in the proceedings of corporations to take lands, either by way of assessments or for public use; it is the mere execution of a power. In the cases of *People* v. *Mayor etc. of New York*, 2 Hill (N. Y.), 9, and *In Matter of Mount Morris Square*, Id. 14, the same court seem to hold that such proceedings are not so far judicial as to be reviewed upon *certiorari*. Whether they are or are not is not material to the question before this court. Admitting them to be in some sense judicial, they are not proceedings of a court of general jurisdiction, to which the principle, *Omnia præsumuntur rite esse acta*, can be applied, and therefore every fact necessary to give jurisdiction must affirmatively appear to give them validity. In the case of *Doughty* v. *Hope*, 3 Denio, 594, it was held by the court of appeals that the ratification by the common council of the city of New York did not render valid a void assessment; that to make a title, there must be a regular assessment duly ratified; and it being proved that one of the assessors authorized to act was not consulted, and did not act, that the whole proceeding was void.

There can be no doubt that, according to the long-established practice in New Jersey, the supreme court has a right to review the proceedings of corporations and all other inferior tribunals who do acts affecting the rights and property of individuals, which are judicial or *quasi* judicial in their nature; and may do this as well when those proceedings are wholly void for want of any power or jurisdiction in the tribunal to act as when they are illegal in consequence of some material irregularity. The

Digitized by Google

judgment of a justice of the peace in a case of replevin, should be erroneously proceed in such a case, would undoubtedly be wholly void, but it might also be set aside by means of a *certiorari*. In our judgment, public policy requires that the proceedings of our numerous municipal corporations should be kept strictly within the limits assigned to them by the statutes authorizing them, and if they appear not to come within those limits, they should not only be liable to reversal by *certiorari*, but also be held void and insufficient to support a title professing to be founded on them.

We are therefore of opinion that the judgment must be reversed.

For affirmance, none.

For reversal, Judges ELMER, HAINES, RYERSON, ARROWSMITH, CORNELISON, RISLEY, VALENTINE, and WOOD.

POWER IS JUDICIAL WHICH IS VESTED in the mayor and aldermen of the city of Boston, as to laying out and widening streets, "whenever, in their opinion, the safety and convenience of the inhabitants of said town shall require it;" and *certiorari* lies to remove their proceedings is such case: *Parks* v. *Boston*, 19 Am. Dec. 322; and see *City of Louisville* v. *Hyatt*, 36 Id. 594, where it is held that a municipal council are the final judges of the utility of street improvements which they are authorized to make, and the remedy of a lot-owner is, if any, by action, and not by resisting the order for the improvement.

JUDGMENT OF COURT HAVING NO JURISDICTION IS VOID: *Rodgers* v. *Evans*, 52 Am. Dec. 390; *Horan* v. *Wahrenburger*, 58 Id. 145, and notes to these cases.

JURISDICTION OF COURTS OF INFERIOR and limited powers must be shown; it will not be presumed: *Piper* v. *Pearson*, 61 Am. Dec. 438; *Morrow* v. *Weed*, 66 Id. 122, and citations in notes to these cases; see also *Cooper* v. *Sunderland*, Id. 52; *Gunn* v. *Howell*, 62 Id. 785.

MUNICIPAL CORPORATION CAN ONLY EXERCISE powers expressly granted, and such others as may be necessary to carry the powers expressly granted into execution: *Collins* v. *Hatch*, 51 Am. Dec. 465.

DILLON ON MUNICIPAL CORPORATIONS, 3D ED., discusses the principles involved in and cites the principal case, at pages 116, 443, 797, 799, 896, 924, and 926.

MUNICIPAL CORPORATIONS CAN EXERCISE only such powers, and should be kept strictly within such limits, as are assigned to them by the statutes under which they act: *State* v. *City of Perth Amboy*, 29 N. J. L. 260; *State* v. *Town of Union*, 32 Id. 345; *State* v. *Inhabitants of Trenton*, 36 Id. 501; *Paret* v. *Bayonne*, 39 Id. 564; *Macy* v. *City of Indianapolis*, 17 Ind. 270, note; especially when they attempt to divest title to real estate: *Fleischauer* v. *West Hoboken*, 40 N. J. L. 110; *Dinsmore* v. *Westcott*, 25 N. J. Eq. 475. The power to pass by-laws and ordinances interfering with the rights of individuals or the public comes within the above rule: *Breninger* v. *Belvidere*, 44 N. J. L. 352; as does the power to make street improvements: *State* v. *City of Passaic*, 41 Id. 93, all citing the principal case.

Digitized by Google

JURISDICTIONAL FACTS OF SPECIAL, limited, and inferior tribunals should be shown upon the face of their record: *Nixon* v. *Ruple*, 30 N. J. L. 60; *State* v. *Mayor etc. of Orange*, 32 Id. 54; and their proceedings are reviewable by the supreme court of the state on *certiorari*: *State* v. *Brown*, 31 Id. 357; *Morris Canal and Banking Co.* v. *Jersey City*, 12 N. J. Eq. 257. The above rules apply to municipal corporations whose acts are judicial or *quasi* judicial in their nature: *State* v. *Jersey City*, 34 N. J. L. 398; and whose proceedings are not only liable to reversal on *certiorari*, but may be held void to support a title professing to be founded on them: *State* v. *City of Perth Amboy*, 29 Id. 260. All of the above cases cite the principal case.

Digitized by Google

CASES

IN THE

COURT OF CHANCERY

OF

NEW JERSEY.

ROBINSON *v.* DAVIS.

[3 STOCKTON'S CHANCERY, 302.]

DECREE CANNOT BE USED by any of the parties to it for the purpose of defrauding creditors not parties to the suit in which it was entered; and upon proof of fraud on the part of the judgment debtor, his creditors are entitled to an injunction preventing the decree from being used for the benefit of the fraudulent debtor, and in keeping from his creditors the proceeds of property which belong to them.

WHERE COMPLAINANTS HAVE TAKEN NECESSARY STEPS to expedite their cause and procure the answer of all the defendants, an injunction will not be dissolved until the defendant upon whom the *gravamen* of the charge is made has answered; and if all of the defendants are implicated in the charge, not until all have answered.

COMPLAINANT PROPERLY MAKES EVERY ONE a party who is a participator in the fraud, for the purpose of discovery; and as a general rule, he is entitled to hold his injunction until he obtains discovery.

THE opinion states the facts.

T. H. Dudley and W. L. Dayton, for the motion.

P. L. Voorhees and A. Browning, contra.

By Court, WILLIAMSON, Chancellor. Sarah M. Hall exhibited her bill of complaint in this court for the foreclosure and sale of mortgaged premises, upon a mortgage which she held against David C. Urquhart. There were several mortgage and judgment creditors of Urquhart made defendants to the bill. A decree was obtained to sell the mortgaged property to pay the complainants' mortgage, and among other incumbrances, which were decreed to be satisfied out of the sale, was a ten-thousand-dollar mortgage, held by John B. Myers, as assignee, a judg-

Digitized by Google

ment of John I. Smythe for upwards of two thousand dollars, and a judgment of Francis Lee of about one thousand eight hundred dollars. After the bill was filed, John B. Myers assigned his mortgage to Edward M. Davis, one of the firm of E. M. Davis & Co.; John I. Smythe assigned his judgment to Jonathan P. Burton, another member of the same firm; and Francis Lee assigned his judgment to Charles W. Wharton, another member of the firm of E. M. Davis & Co. The bill alleges that the ten-thousand-dollar mortgage was paid and satisfied while it was held by Myers, and that, by an arrangement made between Urquhart and the firm of E. M. Davis & Co., it was assigned by Myers to Edward M. Davis, to be held by the firm for Urquhart's benefit, and for the purpose of enabling him to defraud his creditors. The bill also charges that the Smythe and Lee judgments were also paid off by Urquhart, and were assigned to Burton and Wharton for the same unlawful purpose. The complainants are judgment creditors of Urquhart, who have taken out execution on their judgment, and have levied upon the mortgaged premises. They ask to be relieved against the alleged fraud, and that this court will prevent the decree from being used to appropriate the moneys raised under it to the payment of this mortgage and these judgments, which are kept on foot, as they allege, for the purpose of defrauding Urquhart's creditors.

Upon filing the bill, an injunction was issued to stay all further proceedings upon the decree. Since then the injunction has been so modified as only to enjoin the sheriff from satisfying the alleged fraudulent mortgage and judgments out of the proceeds of the sale.

The individuals composing the firm of E. M. Davis & Co. have answered the bill, and upon their answer have moved to dissolve the injunction.

In the first place, it is insisted that the bill cannot be maintained; that the complainants, not being parties to the original suit, cannot interfere with the decree in that suit, which is conclusive as to the rights of the parties. As far as the bill complains of mere irregularities in the proceedings, the position is correct. But the decree cannot be used by any of the parties to it for the purpose of defrauding creditors. If the allegations of the bill are true, and if the mortgage and judgments are fraudulently kept on foot for Urquhart's benefit, the complainants, who are his creditors, have a right to ask this court to interpose and to prevent the decree from being used to place in the pocket of the fraudulent debtor the proceeds of property which belong

Digitized by Google

to his creditors. There is no obstacle to giving relief as it is sought by this bill. The complainant in the foreclosure suit is entitled to her money; and so are the other mortgagee and judgment creditors in that suit, the *bona fides* of whose liens are not questioned. All that is necessary in order to give complete relief is for the court to arrest so much of the execution of that decree as directs the sheriff to pay off and satisfy out of the proceeds the alleged fraudulent mortgage and judgments. When the question of fraud set up in this bill is determined, those proceeds will be disposed of in accordance with the decree made in this suit. If the fraud is made out, the complainants, with the other creditors of Urquhart who shall come in and entitle themselves to the benefit of this suit, will be substituted in the place of the holders of the alleged fraudulent mortgage and judgments. I think the remedy sought by the bill is the one to which the complainants are entitled, if the alleged fraud can be established.

But the defendants ask that the injunction may be dissolved on the ground that the equity of the bill is answered. The complainants interpose the objection that all the defendants who are implicated in the charge of fraud have not answered. The bill is alleged to have been devised by Urquhart, in connection with John B. Myers and with the defendants, who compose the firm of E. M. Davis & Co. The *gravamen* of the charge rests on Urquhart and Myers, as well as on the defendants who have answered. Indeed, many of the facts charged in the bill going to establish the fraud are within the knowledge of Urquhart and Myers exclusively, and are answered by the defendants only upon their information and belief. "Where the complainants have taken the necessary steps to expedite their cause, and procure the answer of all the defendants, an injunction will not be dissolved until the defendant upon whom the *gravamen* of the charge is made has answered; and if all the defendants are implicated in the charge, not until all have answered:" Eden on Injunction, 117, notes, and cases there cited. Process to appear and answer was duly served on Urquhart and Myers. Both have made default, and a decree *pro confesso* has been taken against them. The complainants have used due diligence in expediting their cause, and have taken all the requisite steps to procure the answers of Urquhart and Myers.

It was argued that Myers and Urquhart are not necessary and proper parties to the suit, and that therefore their default should not prejudice the defendants who have answered. But both of

Digitized by Google

them are certainly proper parties. The charge is, that they combined with the other defendants to commit the fraud. A complainant may properly make every one a party who is a participator in the fraud. He has a right to do this for the purpose of discovery; and the general rule is, that he is entitled to hold his injunction until he obtains that discovery. But Urquhart is not only a proper but necessary party to the suit. The object of the bill is to recover a debt which Urquhart owes the complainant. If the complainants succeed, it must be upon the ground that Urquhart is fraudulently interposing the mortgage and judgments to defeat the complainants in the recovery of their debts. Such a decree could not be made without giving Urquhart an opportunity of being heard. This case is directly within the decision of *Price* v. *Clevenger*, 3 N. J. Eq. 207. Price recovered a judgment at law against Clevenger. Wilkinson had a prior judgment by confession. The bill was filed by Price, alleging that the confessed judgment was fraudulent, and an injunction obtained to prevent the sale of the debtor's property under it. Wilkinson answered, and fully denied the fraud. Clevenger made default, and a decree *pro confesso* was taken against him. The chancellor refused to dissolve the injunction, upon the ground that the complainant was entitled to the answer of Clevenger. The injunction was retained to the hearing.

There was another ground upon which it was insisted that this injunction should be dissolved. After the decree was obtained in the suit upon the bill filed by Sarah M. Hall, Urquhart presented his petition, alleging that the ten-thousand-dollar mortgage and the judgments had been paid by him, and were used for an unlawful purpose.

I have not the petition now before me, but I have a recollection of its contents. That petition was dismissed on several grounds, one of which was, that the facts were not sustained by the proofs. I do not think that the action of the court upon that petition can have any bearing upon the present suit. The complainants were not parties to the proceedings upon the petition, and the position they occupy in this suit is very different from that occupied by any of the parties in the proceedings under that petition.

The motion is denied, but without costs.

COLLUSIVE JUDGMENT MAY BE ABATED collaterally by another judgment creditor, so far as it interferes with his rights: *Dougherty's Estate*, 42 Am. Dec. 326, and note collecting prior cases 331.

Digitized by Google

POWER OF EQUITY TO ENJOIN JUDGMENT AT LAW: *Pollock* v. *Gilbert*, 60 Am. Dec. 732, and note 737.

INJUNCTION TO RESTRAIN PROCEEDINGS AT LAW will, as a general rule, be dissolved only when all defendants fully answer the equity of the bill; but there is a qualification of the rule to the effect that if the defendants upon whom the *gravamen* of the charge rests answer the bill, the injunction will be dissolved: *Adams* v. *Hudson County Bank*, 64 Am. Dec. 469.

THE PRINCIPAL CASE IS CITED in *Miller* v. *Jamison*, 24 N. J. Eq. 44, to the point that in a bill to set aside a deed on the ground of fraud, all parties to the fraud are properly joined.

IZARD *v.* BODINE.

[3 STOCKTON'S CHANCERY, 403.]

OCCUPATION BY ONE TENANT IN COMMON of the whole estate, claiming it as his own, is an ouster of his co-tenant, who must first establish his right at law to enable him to recover the mesne profits. One tenant is bound to account to another only as his bailiff appointed by contract, express or implied.

TENANT IN COMMON ACTUALLY RECEIVING the rents, issues, and profits may be compelled to account for such profits actually received: this by statute, both in England and New Jersey.

TENANT IN COMMON OCCUPYING WHOLE ESTATE, without claim on the part of his co-tenants to be admitted into possession, is under no obligation to account.

TENANT IN COMMON IS ENTITLED TO POSSESSION in common of the whole with his co-tenant, but has no right to the exclusive possession of any particular portion; and if he exercise such right and excludes his co-tenant from participation in the possession, he must account to his co-tenant for his interest in the part from which he was ousted.

THE opinion states the facts.

W. Halsted, for the complainant.

A. Browning, for the defendant.

By Court, WILLIAMSON, Chancellor. The bill is filed for a partition and account. The parties are tenants in common, the complainant being the owner of seven eighths and the defendant of one eighth of the premises. It was decreed that the complainant was entitled to his account, and a reference was made to a master to ascertain the yearly value of the premises. There is no dispute as to what portion of the premises the defendant occupied. The only difficulty is as to the character of that occupation.

Digitized by Google

The following propositions, as laid down by the counsel of the defendant, are well established:

1. If one tenant in common occupies the whole estate, claiming it as his own, it is an ouster of his co-tenant, who must first establish his right at law, and thus recover the mesne profits; for one tenant is bound to account to another only as his bailiff appointed by contract, express or implied.

2. Where one tenant in common actually receives the rents, issues, and profits, then he may be compelled to account for such profits actually received; but this is by statute, both in England and this state, and not by the common law: 4 Anne, c. 16; N. J. act of 1794, Nix. Dig. 5, pl. 3; *Sargent* v. *Parsons*, 12 Mass. 153.

3. Where one tenant in common occupies the whole estate, without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account—for he had a right to such occupancy: Co. Lit. 200 b; *Sargent* v. *Parsons*, 12 Mass. 152, 153; *Meredith* v. *Anbries*, 7 Ired. L. 5 [45 Am. Dec. 504]; *Colburn* v. *Mason*, 25 Me. 434 [43 Am. Dec. 292].

The pleadings and proofs show that from the seventeenth of June, 1848, to the second of February, 1852, the defendant was in the exclusive possession of a portion of the premises, and that the remainder was unoccupied. I think that under the circumstances of the case the defendant should account to the complainant for the yearly value of that portion of the premises which the defendant occupied. The property was valuable as an entirety. It was a large glass-manufacturing establishment. An opportunity was afforded for an advantageous lease, and the complainant, owning seven eighths of the whole premises, was anxious that it should be leased out. To this the defendant objected, and he took and retained exclusive possession of that portion of the property which was most useful to himself. It was undoubtedly the interest of the owners that the property should have been leased. The conduct of the defendant prevented an advantageous disposition of the property. The character of the property, and the mode of its occupancy by the defendant, were of a character to exclude the complainant from any participation in the enjoyment of it. He could not enjoy the benefit of a possession as a tenant in common, occupied as the premises were, by the defendant.

There are other considerations connected with the ownership and occupancy of the property, and the conduct of the defendant in regard to it, which induce me to consider the occupancy

Digitized by Google

of the defendant as an *ouster* of the complainant, and to make it proper that the defendant should account with the complainant for the portion of the premises the defendant exclusively occupied. The yearly value was proved to be one hundred and eighty-two dollars, taking the admission and statement of the defendant's counsel. Deducting from that amount the one eighth, which was the interest of the defendant in the property, and the complainant is entitled to receive the balance for three years seven months and thirteen days. On behalf of the defendant, it was claimed that the sum of fifty dollars, that being the ascertained yearly value of the premises, including the portion which remained vacant as well as that occupied by the defendant, should be deducted, and not the one eighth merely of the part occupied. But the portion that remained vacant was left in that situation because of the occupancy by the defendant of the other portion. No benefit was derived from the vacant portion, and it was the defendant's fault that there was not. He should suffer the loss as well as the complainant. And for this reason I do not think any allowance should be made to the defendant, which he claims for taking care of that portion of the property which was unoccupied.

I am of opinion, also, that the complainant is entitled to receive the seven eighths of the yearly value of the storehouse and adjoining lot of land from the second day of February, 1852, to the ninth day of December, 1856. It is true, the master reports that the store-house and adjacent lot constitute about one eighth of the glass-works property; and it is insisted that as the defendant was the owner of one eighth of the property, although he kept his co-tenant out of possession, he is entitled to retain the whole value, because the value of the portion he occupied did not amount to more than his interest in the whole property. But as a tenant in common, while he was entitled to a possession in common of the whole with his co-tenant, he had no right to the exclusive possession of any particular portion; and if he exercised such a right, and excluded his co-tenant from a participation in the possession, he must account to his co-tenant for his interest in the part from which he was ousted of his possession.

As to the costs, each party may pay his own.

WHAT POSSESSION BY ONE CO-TENANT will amount to ouster as against the other: See *Jackson* v. *Whitbeck*, 16 Am. Dec. 454; *Thomas* v. *Garvin*, 25 Id. 708; *Baird* v. *Baird's Heirs*, 31 Id. 399; *Meredith* v. *Andres*, 45 Id. 504; *Harmon* v. *James*, Id. 296, and notes to these cases.

Digitized by Google

LIABILITY OF CO-TENANTS TO ACCOUNT: *McPherson* v. *McPherson*, 53 Am. Dec. 416; *Peck* v. *Carpenter*, 66 Id. 477, and notes to these cases; see also Freeman on Cotenancy and Partition, secs. 273–275, citing the principal case.

SEISIN OF ONE CO-TENANT IS SEISIN OF ALL: *Peck* v. *Carpenter*, 66 Am. Dec. 477, and collected cases in notes 478.

IF TENANT IN POSSESSION occupies simply as tenant in common, and not to the exclusion of his co-tenants, he is not liable to account; but if he refuses to join his co-tenants in an advantageous lease, and thus deprives them of all income from the premises, he is chargeable with reasonable rent: *Edsall* v. *Merrill*, 37 N. J. Eq. 116, citing the principal case.

CAMPBELL *v.* GARDNER.

[3 STOCKTON'S CHANCERY, 423.]

COURT OF CHANCERY WILL SET ASIDE EXECUTION SALE after delivery of deed, when some special ground is laid in the petition; such as fraud, or accident which has prevented a fair sale, and worked injustice to some party whose interests are affected thereby.

RESALE WILL BE ORDERED UPON GROUND OF MISTAKE, where it is shown that defendant, an aged woman, has been misled as to her rights, and deprived of her property without just compensation.

APPLICATION FOR RESALE WILL BE REGARDED WITH MORE INDULGENCE when the mortgagee purchases than when a stranger is the purchaser; in a case where the party applying to open the sale offers to pay the money due upon the security, and there has been mistake on the part of the owner of the equity of redemption, owing to which the property has been sacrificed.

THE opinion states the facts.

James R. Hardenbergh and James S. Nevius, for the petitioner.

Wortendyck and Zabriskie, for the respondent.

By Court, WILLIAMSON, Chancellor. This is an application, by petition, on behalf of Sarah Ann Gardner, to open a sale made by a sheriff under a decree of this court.

The complainant filed his bill to foreclose the defendant of her equity of redemption in the premises in dispute, and to satisfy a mortgage of five hundred dollars, and some interest due thereon, by a sale of the premises. The defendant, in January, 1856, had purchased the premises, subject to two mortgages. The first mortgage is for five hundred dollars, dated January 16, 1845, and is the mortgage held by the complainant, upon which he filed his bill. The second mortgage is dated June 20, 1845, and was originally for two hundred and fifty

Digitized by Google

dollars, but has been reduced by a payment of one hundred dollars of the principal. The second mortgagee was not made a party to the suit. There are no parties except the first mortgagee and Sarah Ann Gardner, who holds the equity of redemption. She purchased the property subject to the mortgages, and assumed their payment as part of the purchase money. The property was sold by the sheriff for the sum of five hundred dollars. The complainant was the purchaser, and the sheriff delivered him a deed of the property.

It is insisted, as a preliminary objection to this application, that the sheriff having delivered the deed, the matter is beyond the control of the court, and that the ground of complaint is such as is properly the foundation for relief by bill, and not a matter which is addressed to the mere discretion of the court.

The practice pursued by this court in opening biddings or setting aside sales under a decree has assimilated very much to the English practice after a report of sale, and confirmation of the same. According to the practice of the court of chancery in England, if parties apply to open biddings before the report is confirmed, it is a matter of course to open them on payment of costs, and making a deposit; but after confirmation, a special ground upon evidence is required. This court has never interfered with a sale for mere inadequacy of price, but has uniformly declined doing so. It has always required some special ground to be laid, such as fraud or accident, which has prevented a fair sale of the property and worked injustice to some party whose interest is affected by the sale. The special ground which, by the English practice, is required to open a sale after confirmation has always been required by this court to open a sale when the property has been struck off to the purchaser. In England a sale confirmed is upon the same footing as a sale here which has been confirmed, not by the court, for that is not required, but by the sheriff's completing all that is necessary to be done—a sale upon his execution, and delivery of his deed to the purchaser. The same objection, therefore, which would exist to the opening of a sale, by this court, upon motion or petition, after the sheriff had delivered his deed, would operate with equal force against that practice after a confirmation of sale, if such confirmation were necessary.

In the case of *Watson* v. *Birch*, 2 Ves. jun. 51, the sale had been confirmed. The confirmation was on the twenty-fourth of July, 1792. On the twenty-eighth of November following a motion was made by a party interested to open the biddings,

Digitized by Google

which was successful. Lord Commissioner Ashurst said, in that case, that upon the best consideration, he could not find any more confined rule than this, that as a general principle biddings are not to be opened after confirmation of the report, unless under particular circumstances; that in Gower's case it was decided thus far, that increase of price alone is not sufficient; but if fraud appears, that suspends the operation of the general rule; that fraud was only mentioned as one exception; but it was not laid down as the only possible exception; that the same general rule was laid down in *Prideaux* v. *Prideaux*, 1 Bro. C. C. 287.

The case of *Morice* v. *Bishop of Durham*, 10 Ves. 522, is one where a motion was made to open the biddings after the confirmation of the report of sale. So also the case of *White* v. *Wilson*, 14 Id. 151. In both cases the motion was denied, Lord Eldon deciding that he would not open biddings after confirmation unless for fraud in the purchaser, or fraudulent negligence in another person, as the agent, of which it would be against conscience that the purchaser should take advantage. But in these cases, although the sale had been completed as much so as the sale in the case we are considering, where the sheriff had delivered the deed, the application was not objected to on the ground that it was by motion, and not by bill. The motion would have been successful in both cases if the party making it had laid before the court sufficient ground to justify its interference. The objection was not taken that the sale having been confirmed, any interference with it was beyond the reach of the court, by motion or petition. All the court did was to put different limits to the discretion to be exercised in the case where a confirmation had taken place and in a case where it had not.

In the case of *Collier* v. *Whipple*, 13 Wend. 224, the deed had been delivered by the master to the purchaser. An application, by petition, was made for a resale, on the ground that through some misapprehension in a conversation with the master and an agent of the petitioner, the latter did not attend the sale. The chancellor ordered a resale, which order, on appeal to the court of errors, was affirmed. Mr. Justice Nelson, in delivering the opinion of the court, expressly declares that he considers the fact of the delivery of the deed of no importance. "As to the deed, it was taken subject to the jurisdiction of the chancellor over the sale." In *Requa* v. *Rea*, 2 Paige, 339, the deed had been delivered, and the application for resale was by

Digitized by Google

petition, which was successful. The chancellor remarked in that case: "Where a person becomes a purchaser under a decree, he submits himself to the jurisdiction of the court in that suit, as to all matters connected with that sale or relating to him, the character of purchaser;" and cites *Casamajor* v. *Strode*, 1 Sim. & Stu. 381.

The case of *Tripp* v. *Cook*, 26 Wend. 143, is a very strong case directly to the point. The mortgagee had purchased in the property at an inadequate price. The master delivered the deed, and the sale was confirmed by the court. The mortgagor presented his petition, stating that within a week after the service of the subpœna upon him, he had an interview with the complainant, and understood, from the conversation then had, that the suit would be no further prosecuted, and in consequence thereof, did not attend the sale. The petition was granted, and the court laid down the principle that a resale would be ordered where the mortgaged premises had been sold greatly below their value and bought in by the mortgagee, if the mortgagor, or those standing in his place, had been misled by the mortgagee, or even by a third person, in reference to the foreclosure of the mortgage, and in consequence thereof did not attend the sale.

In looking through all the cases, I do not find anything to sanction the position taken by the complainant's counsel, that because a deed has been delivered, the court cannot remedy any wrong that has been committed, on an application by petition of the party aggrieved. There was but one difficulty suggested, which was this: it was said that the title having passed to the purchaser, and become a matter record, an order for a resale would leave the deed to the purchaser upon record; that it would not divest him of his title, thus acquired, and that the deed would thus remain upon the record an embarrassment to the title. There certainly can be nothing in the objection. If the court has control of the matter, it may make such order as will remove any such difficulty as the one suggested. The mortgagee is the purchaser, and receives the satisfaction of his mortgage by the decree of this court. He must submit to such terms as equity shall impose, and as is agreeable to good conscience. If a resale should be ordered, the court may require the mortgagee to release to the purchaser all the title he may have acquired by the sheriff's deed, so that the title may stand upon the record wholly disembarrassed. I think there is no difficulty in the courts ordering a resale if justice demand it.

Digitized by Google

The ground upon which a resale is asked is mistake, by which the defendant has been deprived of her property. She alleges that no process to appear was ever served upon her, and that she was wholly ignorant of the proceedings in the suit, and of the fact that the property was to be sold, until after the sale had taken place. There can be no doubt but that the subpœna was served, and that the defendant had all the notice that is required by law. A service at her dwelling-house, with a member of the family, is all that the statute requires: Nix. Dig. 89, sec. 9; and it is not disputed that such service was made.

But the defendant alleges that although the subpœna was left with her brother, she was misled by him as to its contents; that he informed her that it was a notice merely from Mr. Campbell; that he wanted his money, and that, relying upon this information, her attention was never called to the suit. There is great conflict of testimony, and it cannot be reconciled as to the particulars of the service of the subpœna. I feel bound to take the statement made by the sheriff as true; and yet, taking it as true, I cannot think that the defendant understood it as a notice to appear to a suit in court. She alleges in her petition, and proves, that after this she actually furnished the money to pay the interest, and made arrangements to raise the money to pay off the mortgage. Her conduct is so entirely irreconcilable with the fact that she understood the contents of the subpœna that it is impossible to escape the conclusion that she was ignorant of its purport and object, except upon the assumption that she contrived a plan for an opportunity like this to avoid any proceedings that might be had against her. This supposition is not to be reconciled with her sanity; for she offers to pay off the mortgage, with all the expense that has been incurred, and has gained nothing, and could gain nothing, by simulating ignorance, which has involved her in the present difficulty.

I think, after carefully examining the evidence, I may state the case to be this: The subpœna was served according to the statute; but although the defendant had legal notice, through some mishap she was prevented having actual notice of the contents of the process. In this way her property has been sacrificed. It was worth three thousand five hundred dollars. It was sold for five hundred dollars. The case is not a strong one, but there are some considerations, to which I have not alluded, which incline me to regard the case with indulgence. The defendant

Digitized by Google

is a woman advanced in life. She was the sole defendant in the suit, and, as the evidence shows, had no one upon whom she could rely for aid and advice with any confidence. This is a matter deserving some consideration, for it may be said that it was culpable negligence in her not to attend to the notice that was served upon her; and that while the court may properly aid a party who has been innocently misled, it will extend no indulgence to one to whom culpable negligence can be attributed. This is certainly correct, and it is therefore proper to look at the character and situation of the party, in order to ascertain what degree of negligence is properly to be imputed: *Duncan* v. *Dodd*, 3 Paige, 99. In connection with this, I may say there ought to have been another party to this suit. Why the person holding the second mortgage was not made a party does not appear. The second mortgagee was a necessary party to the suit. Had he been a party, the difficulty in which the defendant has been placed would not have been so likely to occur.

There is another consideration. The purchaser is the mortgagee, and not a stranger. I think where the mortgagee is the purchaser, and the party applying to open the sale offers to pay all the money due upon the security, and there has been really a mistake upon the part of the owner of the equity of redemption, owing to which the property has been sacrificed, the court ought to regard an application for resale with more indulgence than when a stranger is the purchaser. Mr. Justice Nelson, in *Collier* v. *Whipple*, 13 Wend. 228, in noticing this circumstance, remarks: "All the plaintiff is entitled to is his debt; that end is not defeated by opening the bid, but generally attained; and the control which he has, right or wrong, over the proceedings down to the sale, inclusive, should induce courts closely to scrutinize his connection with it;" and in *Tripp* v. *Cook*, 26 Id. 156, the senator who delivered the opinion of the court of errors says: "The mortgagor, and those who stand in his place and share in his losses, have a right to be protected, so far as is consistent with the mortgagee's rights, against needless sacrifice of their property, whilst the mortgagee can claim nothing beyond the amount of his loan. Hence, as between these parties only, if from any cause whatever the mortgaged property should be sold very far below its market value to the injury of the owner or of others interested in it under him, as his sureties or otherwise, it would always be a claim of strict justice to allow the opportunity

Digitized by Google

of a second sale upon such terms as will secure the mortgagee's debt." And again, on page 158 of the same case: "Where the buyer is the holder of the mortgage, he must surely be content if his debt is paid. He has commonly an entire control over the proceedings and sale, and has no right to use it for any purpose of advantage beyond securing himself. Nor does the holder stand upon the same footing of public policy with other buyers. He seldom purchases for investment or use. He bids to secure himself, and when he buys in, he takes the property in payment of so much debt."

The defendant does not ask that the sale may be opened and the complainant be subjected to any risk or delay in realizing the money due upon the security. But as soon as she heard that her property had been sold, and that the complainant was the purchaser, she offered to redeem the property, which the complainant refused. She now offers to pay him all the money due upon the decree and the costs. It is all that the complainant is entitled to, and I think it is a case where it is right that the court should interfere.

Let an order be made that the sale be opened, on the following conditions: that within twenty days after the date of the order the defendant pay to the complainant the amount of the decree and interest, together with all expenses of the sale by the sheriff, and all other incidental expenses incurred and paid by the complainant in and about the said sale, in procuring his deed, recording, etc., and upon such payment let the complainant execute to the defendant a quitclaim deed for the mortgaged premises, and also an assignment of the decree, all of which is to be done at the defendant's expense. Upon failure of the defendant to comply with the terms of the order, let it be discharged, and the sale stand.

TO JUSTIFY INTERFERENCE BY COURT OF CHANCERY in sheriff's sales, there must be a foundation of fraud, accident, or mistake laid, by which the rights of the parties have been affected: *Seaman* v. *Riggins*, 34 Am. Dec. 200, and note 204.

THAT CHANCERY WILL RELIEVE against a judgment at law obtained by fraud, accident, surprise, or mistake, see *Bank of Tennessee* v. *Patterson*, 47 Am. Dec. 618; *Pearce* v. *Chastain*, 46 Id. 423; *Rust* v. *Ware*, 52 Id. 100; *Lockwood* v. *Mitchell*, 53 Id. 438, and notes to these cases.

JUDICIAL SALE WILL BE SET ASIDE where there is surprise or misapprehension created by the conduct of the purchaser or of the officer who conducted the sale: *Woodward* v. *Bullock*, 27 N. J. Eq. 513; *Hayes* v. *Stiger*, 29 Id. 197; but where it appears that there has been no fraud, accident, mistake,

Digitized by Google

or surprise, the sale will not be set aside: *Cline* v. *Prall*, Id. 418. This power to correct mistakes and avoid transactions made under the influence of mistake is one of the most ancient heads of equity jurisprudence, and has been frequently used in cases of sheriffs' sales: *Marlatt* v. *Warwick*, 18 Id. 123; which may be set aside after the delivery of the deed: *Mutual Life Ins. Co.* v. *Sturgis*, 33 Id. 331; *National Bank* v. *Sprague*, 21 Id. 461. The sale may be set aside by petition, where the complainant is the purchaser: *Meyer* v. *Bishop*, 27 Id. 146; *Mutual Life Ins. Co.* v. *Goddard*, 33 Id. 483; *Mutual Life Ins. Co.* v. *Sturgis*, 32 Id. 680; and where no new rights have intervened: *Cawley* v. *Leonard*, 28 Id. 470; *Steamer Sparkle*, 7 Ben. 534. Fraud is not the only ground upon which to base an application to set aside the sale: Id. 535; all citing the principal case to the above points.

Digitized by Google

CASES

IN THE

COURT OF APPEALS

OF

NEW YORK.

FAIRCHILD *v.* OGDENSBURGH ETC. R. R. CO.

[15 NEW YORK, 337.]

ORDER DRAWN BY PRESIDENT OF CORPORATION UPON ITS TREASURER, directing him absolutely to pay a sum certain to a third person, in discharge of a debt due from the corporation, is in legal effect a promissory note, and may be sued on as such, without averring or proving that the payee demanded payment from the treasurer.

ORDER DRAWN BY ONE AGENT OF CORPORATION UPON ANOTHER agent of the same corporation is not a bill of exchange; for as both agents represent the same person, it lacks the essential element of two parties.

APPEAL from a judgment of the supreme court in favor of the plaintiff in an action on drafts or orders for payment of money, the character of which is described in the opinion. The contention for the defense was merely that the instruments were, in effect, bills of exchange, and were not enforceable without proof of presentment to the drawee, and refusal of payment. The court below held that the instruments were promissory notes of the corporation in whose behalf they were made, and that demand before suit was unnecessary.

T. Jenkins, for the appellant.

J. H. Reynolds, for the respondent.

By Court, DENIO, C. J. The complaint contains a distinct averment of an indebtedness by the defendant to the plaintiffs for work and labor to an amount equal to the sum claimed. The paper which it is alleged was given for this indebtedness was not a bill of exchange. The idea of a bill, under the law merchant, supposes the existence of a party other than the drawee,

Digitized by Google

to whom the bill is addressed, and who is therein requested to pay the amount to the holder on account of the drawer. Here the party with whom the plaintiffs dealt was the corporation, which, being an artificial person, could only act by agents. The president was one agent, and the treasurer was another; and as a convenient method of keeping the accounts, the former, whose duty it was to adjust the claims for labor, made his warrant in favor of the plaintiffs, on the treasurer, who was intrusted with the duty of keeping the money, and paying it out on proper vouchers. Both the drawee of the order and the party to whom it was addressed represented the corporation, and neither incurred, or were expected to incur, any personal obligation. The default of either in performing any duty respecting the order would be the default of the corporation, and would not subject either of them to any individual liability. The giving of the order for the debt of the corporation was a method suggested by motives of convenience for transacting its business, and keeping its accounts. To require of the holder of such a draft the kind of diligence which the law exacts of the holder of commercial paper would be a perversion of its object. It is argued by the defendant's counsel that the plaintiffs having taken a draft on the defendant's treasurer for his debt, they must be understood to have assented to their forms of doing business, and should be holden to make a presentment of the draft before suing the company. It would certainly be wrong to allow the creditor in such a case to subject the company to costs when the funds are ready, and when the money would be paid upon the presentation of the paper. But the answer to the argument is that the creditor will be defeated in his action, as to damages and costs, if the company are able to show that its treasurer was furnished with funds, and would have paid the demand if he had been called on. It becomes, then, a question as to the *onus probandi*. In *Wolcott* v. *Van Santvoord*, 17 Johns. 248, it was settled, upon much consideration, that in an action against the acceptor of a bill, or the maker of a note, payable at a particular place, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed. This has been considered the unquestioned law ever since the judgment in that case, a period of nearly forty years. After such an acquiescence in a principle of such constant application, and which relates to the most practical of subjects, the effect of commercial paper, we cannot listen to the suggestion of the defendant's counsel, that the prior cases in England are the other way. If upon examination

Digitized by Google

we found them to be so, we should not depart from the rule as we find it settled and universally acted on in this state. The drafts which the plaintiffs received for their debt against this corporation are in the nature of promissory notes payable at the office of the treasurer of the company. Though in the form of bills, they contain an acknowledgment in writing of their indebtedness to the plaintiffs in the amounts mentioned in them, and an undertaking, in effect, to pay these amounts at the treasurer's office.

In *Miller* v. *Thomson*, 3 Man. & G. 576, the court of common pleas in England determined that an instrument in the form of a bill of exchange, drawn upon a joint-stock bank by the manager of one of its branches, by order of the directors, might be declared upon as a promissory note. The chief justice said there was the absence of the circumstance of there being two distinct parties, as drawer and drawee, which, he said, was essential to the constitution of a bill of exchange. That being so, he added, the only alternative is that this instrument is a promissory note, and is properly declared upon as such. We adopt the principle of this case, which is strictly applicable to the one before us. The issue, therefore, which was joined upon the question whether these orders had been presented for payment was an immaterial one, and the supreme court was right in its judgment.

SHANKLAND, J., delivered an opinion to the same effect, and all the judges concurred except COMSTOCK and BROWN, who, not having heard the argument, took no part in the decision.

Judgment affirmed.

DEMAND ON NOTE OR BILL PAYABLE AT PARTICULAR PLACE is unnecessary to charge the maker or acceptor: *Terbell* v. *Downer*, 65 Am. Dec. 212, note 214; *Ripka* v. *Pope*, 52 Id. 579, note 583, where other cases are collected. A draft drawn by an agent of a corporation upon the corporation, as a convenient method to obtain payment of an existing debt of the corporation, need not be presented for payment and demand made: *Mobley* v. *Clark*, 28 Barb. 391; *Indiana & Ill. Cent. R. R. Co.* v. *Davis*, 20 Ind. 8, both citing the principal case.

An order drawn by one agent of a municipal corporation upon another agent of the same corporation, both acting in their official capacity, is, in legal effect, a non-negotiable promissory note: *Read* v. *City of Buffalo*, 67 Barb. 527, citing the principal case; and no demand on such an instrument is necessary: Id. 528, again citing the principal case. But in *Bull* v. *Sims*, 23 N. Y. 572, it is said, citing the principal case, that such an instrument is in the nature of a negotiable promissory note, and can be treated as such.

Digitized by Google

THE PRINCIPAL CASE IS CITED in support of these propositions in the following cases: A promise to pay a certain sum of money in definite installments at specified times, with no contingency, alternative, or uncertainty, is a promissory note: *Wright* v. *Irwin*, 33 Mich. 34; an instrument drawn by the president of a railroad upon its treasurer, requesting the latter to pay A B, or order, a specified sum of money for a debt due for work performed for the company, has the legal effect of a negotiable promissory note of the company: *Spooner* v. *Rowland*, 4 Allen, 487. Where the drawer and drawee of an instrument in the form of a bill of exchange are the same person, it may be declared on as a promissory note: *Almy* v. *Winslow*, 126 Mass. 344. And in the case of *Oatman* v. *Taylor*, 29 N. Y. 665, it was held that the notes in the case were promissory notes, within the rule laid down in the principal case.

CHENEY *v.* ARNOLD.

[15 NEW YORK, 345.]

PROMISES TO MARRY IN FUTURE, although followed by cohabitation, do not constitute marriage in such sense as to render issue legitimate.

APPEAL from a judgment of the supreme court in favor of plaintiff in an action for real property. The facts appear in the opinion. The case below is reported in 18 Barb. 436.

Henry Bennett, for the appellant.

Henry R. Mygatt, for the respondent.

By Court, DENIO, C. J. The plaintiff, Phila Cheney, claims to be the daughter of Charles Harris, who is admitted to have been seised of the premises claimed in this action, and she seeks to recover as his heir. The defendant claims under a conveyance from her mother, Betsey Pike, formerly Betsey Harris; and he insists that the plaintiff is not the legitimate daughter of Charles Harris, and cannot therefore inherit from him, though it is not denied that she is his natural daughter.

Upon the question of the plaintiff's legitimacy, there was no room for controversy about the facts. It was proved by the plaintiff's own witness, Betsey Pike, that when her daughter, the plaintiff, was born, she had not been married to Charles Harris, the plaintiff's father. She swore, however, that there was a mutual engagement between them to be married to each other at some future time, and that after such engagement the plaintiff was begotten, and that their marriage was actually celebrated a few months after the plaintiff's birth. There was no cohabitation between them as husband and wife; they did not hold themselves out, and they were not recognized by their relatives or acquaintances, as married persons until the formal marriage.

Digitized by Google

The plaintiff was, however, brought up by them, and always recognized as their daughter. The plaintiff's counsel maintains that mutual promises to marry, followed by carnal intercourse, is a legal marriage, and that the judge consequently committed an error in submitting the question to the jury, whether the engagement was that they would presently take each other as husband and wife, or whether it was executory in its character; as he maintains that in either case they became husband and wife from the time the intercourse commenced. I agree that there was nothing to be left to the jury, for there was no disputed question of fact. There was no agreement between the parties to become husband and wife *in præsenti*, but there was an agreement to be married *in futuro*, and that was followed by carnal intercourse; and if that constitutes a marriage by our law, they were married, and the plaintiff is legitimate, otherwise she is not.

There is a *dictum* by Judge Cowen, in *Starr* v. *Peck*, 1 Hill (N. Y.), 274, which fully sustains the plaintiff's position, but it was unnecessary to the decision. It was a case in which the jury were left to presume a marriage in fact, by which I understand a present contract, from the conduct of the parties; and the verdict affirmed the existence of a marriage. There was no evidence of a contract present or future, and it was as easy for the jury to find the one as the other. What was said by the learned judge as to a contract *per verba de futuro* was *obiter*. Chancellor Kent also countenances the position of the plaintiff's counsel. He says: "If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary:" 2 Kent's Com., 2d ed., 86. Blackstone, too, says that in cases of cohabitation, contracts *per verba de futuro* were, before the marriage act, deemed valid marriages for many purposes, and the parties might be compelled, in the spiritual courts, to celebrate them *in facie ecclesiæ*. Notwithstanding these respectable opinions, I have not been able to assent to the proposition. With us, marriage is simply a civil contract, differing, it is true, from contracts upon other subjects in the circumstance that it is not in the power of the parties to release or dissolve it, but partaking in many other particulars of the nature of common-law contracts. It requires the existence of two parties of different sexes, competent to contract, and an actual contract between them. Like other contracts, it may be in terms and intent, executory

Digitized by Google

or executed. If executed, that is, if the parties agree *eo instanti* to take each other for husband and wife, it is *ipsum matrimonium*. If executory in its terms, it would not, by any analogy to common-law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and viewed as an agreement to marry, it confessedly does furnish the basis of an action for damages. If it were like some other common-law contracts, an action in the nature of a bill in equity might be sustained to enforce a specific performance. But the temporal courts in England never possessed a jurisdiction to enforce matrimonial contracts specifically, and we have no tribunals corresponding with the English ecclesiastical courts, which did formerly exercise such a jurisdiction: *Burtis* v. *Burtis*, Hopk. 557 [14 Am. Dec. 563]. Our courts have all the jurisdiction of the English common-law and equity courts which has not been denied them by the legislature, and such other jurisdiction as has been conferred upon them by statute. But as these English common-law courts never had any authority to decree a marriage upon the ground of an executory contract to marry, and we have no statute creating such a jurisdiction, it follows that if parties agree to marry, and one of them refuses to perform the agreement, no power exists in our courts to compel a performance. So far, then, as the analogies between agreements to marry and other executory contracts carry us, the only effect of the former is to lay the foundation for an action for damages in case of a breach. Carnal intercourse without marriage does not create any legal relation between the parties, or confer any rights upon the issue of such connection.

If by the law of England as it existed at the revolution, and as it was then administered in the temporal courts, an agreement to marry, followed by intercourse, constituted marriage, then, as we have adopted that system, and no change in that particular has been made by statute, we must hold that the plaintiff's parents were married before she was born, and that she is legitimate. It is clear that such a doctrine existed in the canon law; and that system, with some modifications, was, in a general sense, the basis of the matrimonial law of the nations of Europe, England included: *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 54. It was the law of the church, and was administered in the spiritual courts. Marriage contracts, whether by words in the present tense or *per verba de futuro*, which were followed by consummation, were not considered perfect marriages, but the spiritual

Digitized by Google

courts had a jurisdiction to compel their due celebration *in facie ecclesiæ*. In the mean time, a certain effect was given to them before celebration. The parties were for some, and perhaps most, purposes considered as husband and wife. The present question is how far the law of England regarded such irregular marriages as sufficient to predicate legitimacy of the offspring. Sir William Scott, afterwards Lord Stowell, in his masterly judgment in *Dalrymple* v. *Dalrymple*, *supra*, after stating the doctrines of the canon law, to the effect above mentioned, adds that "the common law certainly had scruples in applying the civil rights of dower and community of goods and legitimacy in the cases of these looser species of marriage." The English marriage act of 26 Geo. II., c. 33, sec. 13, passed in 1753, as is well known, required marriages to be celebrated in a parish church by banns or by license, and declared all other marriages, with certain exceptions, to be void. It never applied to the colonies, and had no force here. It abolished in express terms the jurisdiction of the spiritual courts to compel the celebration of a marriage by reason of any contract of matrimony whatever. It is extremely difficult to ascertain what the English matrimonial law was prior to this statute, and what it now is in cases to which the statute does not extend. Upon the question whether contracts by present words or by agreement looking to the future for its performance, with carnal intercourse, but without a formal celebration, amounted to a legal marriage, the cases are numerous and conflicting. Some of them, containing *dicta* which would seem to support the proposition contended for by the plaintiff's counsel, are referred to by Judge Cowen. The question has been examined with industry and care by Mr. Jacob in his *addenda* to Roper's treatise on Husband and Wife: Roper's H. & W. 445. He has collated with great discrimination all the judgments and *dicta*, together with the conclusions of the text-writers and the various statutes on the subject passed prior to the act of George II., and he comes to the confident conclusion that such contracts as we are considering "did not confer on the woman the right to dower, on the man the right to the woman's property, or on the issue the right of legitimacy, and that it did not render a subsequent marriage with a third person *ipso facto* void at law, though it formed a ground for sentence (in the spiritual courts) annulling it. "The authorities," he adds, "seem to show that according to the ecclesiastical law the contract did not give any right except to call for a performance of it by actual solemnization, not justifying cohabitation

Digitized by Google

or conferring conjugal rights; and that at the common law it had no effect, though in cases where the parties cohabited, and were reputed to be man and wife, this might afford sufficient evidence for the purpose of some actions in which strict proof was not required." Among the authorities referred to to sustain this opinion is the speech of Lord Mansfield, then solicitor-general, on introducing the marriage act into parliament. He is reported to have said: "I believe it will be allowed, if a man and woman seriously and sincerely enter into a marriage contract without the interposition of a clergyman, or any religious ceremony whatever, it will be a good marriage, both by the law of God and the law of nature; yet the law of this society, and I believe of every other Christian society, has declared it not to be a good marriage." Without further comment on the authorities upon which this writer relies, which have, however, been attentively examined, I am prepared to adopt his conclusion as to the state of the law of England prior to the marriage act.

It follows that the doctrine of the canon law, that a contract of marriage *per verba de futuro*, followed by carnal intercourse, was a valid marriage, did not become the law of this state by force of our adoption of the common law of England, for it was not a part of that common law. Should it be said that this course of reasoning would repudiate marriages *per verba de præsenti* without solemnization, I answer that the validity of such marriages is firmly established by judicial decisions in this state, which we are not at this day at liberty to question: *Fenton* v. *Reed*, 4 Johns. 52 [4 Am. Dec. 244]; *Jackson* v. *Claw*, 18 Id. 346; *Jackson* v. *Winne*, 7 Wend. 47; *Rose* v. *Clark*, 8 Paige, 574; *In the Matter of Taylor*, 9 Id. 611; *Clayton* v. *Wardell*, 4 N. Y. 230; but there is no judicial authority with us in favor of inferring a marriage from an executory agreement followed by intercourse, except the *dictum* in *Starr* v. *Peck*, 1 Hill (N. Y), 274, to which I have referred. But I think the validity of marriages by words of present contract can be shown independently of those cases. Marriage, so far as personal rights and the rights of property were concerned, has always been a civil contract, requiring only the present assent of parties competent to contract, and such ceremonial observances as the positive municipal law had prescribed. At the reformation, the ritual of the reformed church of England, established by act of parliament, prescribed the form of the marriage ceremony, which was to be celebrated, through the ministry of the priest, *in facie ecclesiæ*. There was at the same time an ecclesiastical judicature,

Digitized by Google

with jurisdiction over questions of marriage and divorce. In adopting the common law purely, the prescriptions of the prayer-book and the laws concerning the ecclesiastical judicature disappeared from the system. We inherited simply the principle which declared marriage to be a civil contract. The common law itself supplied us with all necessary rules for determining the requisites for entering into the contract, and moreover prescribed the legal relations established by and the legal consequences which followed a valid marriage. The principle that a promise, followed by intercourse, was in some sense a marriage, was a branch of the ecclesiastical system resulting from the acknowledged jurisdiction of the ecclesiastical courts to compel the performance of such marriages by spiritual censures. Having dispensed with that jurisdiction, we cannot consistently acknowledge any marriage to be valid which requires the intervention of a spiritual court to make it perfect. We must insist upon those circumstances which the law requires in an executed contract upon any other subject. Mutual promises to marry in future are executory, and whatever indiscretions the parties may commit after making such promises, they do not become husband and wife until they have actually given themselves to each other in that relation. That this has been the sense of the legal profession and of the courts is evident from the rules relating to several actions in common use. If a man seduce a woman under a promise of marriage, we allow an action for the seduction at the suit of the father, and an action for a breach of the promise at the suit of the daughter: *Foster* v. *Scoffield*, 1 Johns. 297; *Gillet* v. *Mead*, 7 Wend. 193 [22 Am. Dec. 578]; *Brownell* v. *McEwen*, 5 Denio, 367. According to the plaintiff's argument, both actions would be absurdities; for the marriage being complete by the act complained of, there would be no seduction and no breach of promise. So in the action for a breach of promise of marriage, if it appear that the plaintiff, on the faith of the defendant's promise, has been seduced by him, and has become *enceinte*, it is considered as a circumstance of great aggravation, and the damages are proportionably increased; whereas if the plaintiff's position is sound, the defendant by the very act has made all the reparation in his power, and has become the husband of the plaintiff. The legislature, moreover, has not understood the law as the plaintiff does. By an act passed in 1848, Sess. Laws, c. 111, the seducing and having illicit conversation with an unmarried female under promise of marriage is made a misdemeanor punishable by imprisonment; but the

Digitized by Google

offense may be absolved by a subsequent marriage. The legislature intended by this enactment to protect female purity, and not to deprive a wife of her lawful husband.

The foregoing considerations have satisfied me that the plaintiff's doctrine is not the law of this state. No evidence was produced respecting the matrimonial law of Rhode Island. In the absence of such evidence, we are to intend that it is the same as our law.

It follows from what has been said that the plaintiff is not the legitimate child of Charles Harris. She cannot consequently recover as his heir. When she had shown the facts respecting her legitimacy, the judge should have decided the case upon the question of law, and have directed a verdict for the defendant. She cannot complain of directions which gave her a chance for a verdict to which she was not entitled.

The judgment should be affirmed.

BOWEN, J., also delivered an opinion for affirmance, and all the judges who had heard the argument concurred.

Judgment affirmed.

CONTRACT OF MARRIAGE PER VERBA DE FUTURO, FOLLOWED BY COHABITATION.—Notwithstanding the decision in the principal case, and a few subsequent cases which recognize or follow its authority, it seems to be well settled by the great weight of American authority that a contract to marry *per verba de futuro*, followed by cohabitation, is a valid marriage by the common law as understood and administered in this country: 2 Kent's Com. 87; 2 Greenl. Ev., sec. 460; Reeve's Dom. Rel. 195; 1 Bouv. Inst., sec. 258; 1 Bish. Mar. & Div., sec. 253; *Mathewson* v. *Phœnix Iron Foundry*, 20 Fed. Rep. 281; *Estate of McCausland*, 52 Cal. 568; *Askew* v. *Dupree*, 30 Ga. 173; *Port* v. *Port*, 70 Ill. 484; *Hebblethwaite* v. *Hepworth*, 98 Id. 126; *Dumaresly* v. *Fishley*, 3 A. K. Marsh. 368; *Patton* v. *Cities of Philadelphia and New Orleans*, 1 La. Ann. 98; *Dyer* v. *Brannock*, 66 Mo. 391; S. C., 27 Am. Rep. 359; *Nathan's Case*, 2 Brewst. 149; *Richard* v. *Brehm*, 73 Pa. St. 140; S. C., 13 Am. Rep. 733; *Peck* v. *Peck*, 12 R. I. 485; S. C., 34 Am. Rep. 702. This doctrine is thus defined by Mr. Bishop: "Where parties are under an agreement of future marriage, if then they have *copula*, which is lawful in the married state alone, they are presumed, in the absence of any showing to the contrary, to have arrived at the period of actual marriage, or to have transmuted their future to present promise; because the law leans to the good rather than the evil construction of equivocal acts:" 1 Bish. Mar. & Div., sec. 253. And Scholfield, J., delivering the opinion of the court in *Port* v. *Port*, 70 Ill. 486, said: "If the contract be made *per verba de præsenti*, it is sufficient evidence of a marriage; or if it be made *per verba de futuro cum copula*, the *copula* is presumed to have been allowed on the faith of the marriage promise, and that so the parties, at the time of the *copula*, accepted of each other as man and wife." This presumption, however, is only a rule of evidence, and it is competent to show that the fact was otherwise. Mr. Bishop says: "The marriage by consent *per verba de futuro cum copula* does not differ from any other informal

Digitized by Google

marriage. It is, in effect and in its essence, a marriage by consent *de præsenti;* and the common method of designating it is only for convenience, and as indicating the sort of evidence by which it is established." If the parties to a contract of marriage *per verba de futuro* consummate the marriage, the law presumes that, at the time of consummation, they agreed to convert the future into a present promise to marry, and the marriage will be held valid; but if this presumption of law be overcome by evidence that the parties did not intend at the time of the cohabitation to take each other as husband and wife, the mere cohabitation will not constitute marriage. Scott, J., delivering the opinion of the court in *Hebblethwaite* v. *Hepworth*, 98 Ill. 134, said: "A contract of marriage in the future, even where the parties may afterwards cohabit, is not understood to constitute marriage, unless where, at the time of the cohabitation, the parties accept each other as husband and wife, and so conduct themselves that that relation is understood and acquiesced in by relatives and other acquaintances." And in *Peck* v. *Peck*, 12 R. I. 485; S. C., 34 Am. Rep. 702, in which it was decided that a betrothal followed by cohabitation, but without a present agreement to become husband and wife, does not constitute a valid marriage. Durfee, C. J., delivering the opinion of the court, said: "We are of opinion that a mere executory agreement to marry does not become consummated by copulation unless the parties so intend. It is indispensable to marriage, whether under the statute or at common law, that the parties consent to be husband and wife presently; and though cohabitation following an engagement is evidence of such consent, it is not conclusive, but only *prima facie* evidence of it, and as such open to rebuttal by counter-proof. . . . . In the case at bar, we think the evidence shows that the parties after their engagement were all along looking forward to a formal ceremony to make them husband and wife, and never agreed or consented to become such without it." As was said by Lord Campbell in the case of *Queen* v. *Millis*, 10 Cl. & Fin. 782, "if the woman in surrendering her person is conscious that she is committing an act of fornication, instead of consummating her marriage, the *copula* cannot be connected with any previous promise that has been made, and marriage is not thereby constituted:" 2 Bish. Mar. & Div., sec. 259; *Port* v. *Port*, 70 Ill. 484; *Surtees* v. *Wotherspoon*, 11 Scotch Sess. Cas., 3d ser., 384. And of course, if the parties at the time of the copulation agree that the promise of future marriage shall not be thereby changed into matrimony, the *copula* will not constitute a valid marriage: 1 Bish. Mar. & Div., sec. 259.

THE CONTRARY DOCTRINE, that an agreement to marry at some future time, although followed by cohabitation, does not constitute a marriage, rests, so far as the courts of this country are concerned, upon the authority of the principal case and the case of *Duncan* v. *Duncan*, 10 Ohio St. 181. The principal case is cited in support of this doctrine in *Bissell* v. *Bissell*, 55 Barb. 325; S. C., 7 Abb. Pr., N. S., 16; and in *Van Tuyl* v. *Van Tuyl*, 57 Barb. 235; S. C., 8 Abb. Pr., N. S., 1; although the application of the doctrine was not necessary to the determination of the questions involved in those cases. There is also a *dictum* of Deady, J., in *Holmes* v. *Holmes*, 1 Saw. 99, S. C., 1 Abb. 525, countenancing the same doctrine. The principal case is characterized as a "well-considered case" in the case of *Duncan* v. *Duncan*, *supra*, and Brinkerhoff, C. J., who delivered the opinion of the court in that case, discussing the general question, said: "The idea that a contract for a future marriage, followed by cohabitation as husband and wife, is itself a valid marriage at common law, seems to have obtained currency on the credit of remarks made by several elementary writers of distinguished learning and

Digitized by Google

ability, and by certain judges of high character, speaking by way of *obiter dicta*, in cases in which this question was really in no way involved. But the better opinion now seems to be, that these remarks are unsupported by any case actually adjudicated and entitled to be considered as authoritative; and that such a contract never was a good marriage at common law, either in this country or in England; and the mistaken doctrine seems to have originated either in the inadvertent confounding of what might, in the absence of rebutting evidence, be good presumptive evidence of a marriage, with marriage itself, or from the fact that such a contract *per verba de futuro*, followed by cohabitation, was one of which the canon law, as administered by ecclesiastical courts in England, until restrained by statute, would enforce the specific performance." Mr. Bishop, after reviewing the principal case, and that of *Duncan* v. *Duncan*, *supra*, says: "Whatever may be the future rulings in the former two states, no practitioner elsewhere need fear the overthrow of the old doctrine by his own court, if he explains it properly to the judges. On principle, as those decisions proceeded from an entire misapprehension, they should be held as of no binding force at home:" 1 Bish. Mar. & Div., sec. 258 a. In the case of *Jewell's Lessee* v. *Jewell*, 17 Pet. 213, the circuit court instructed the jury that if they believed that, before any sexual connection between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble, even by mutual consent; and that if the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve; and that it is equally binding as if made in *facie ecclesiæ*.

On the question of the correctness of these instructions, the supreme court was equally divided. But in the subsequent case of *Hallett* v. *Collins*, 10 How. 181, Mr. Justice Grier, delivering the opinion of the court, said: "That marriage might be validly contracted by mutual promises alone, or what were called *sponsalia de præsenti*, without the presence or benediction of a priest, was an established principle of civil and canon law antecedent to the council of Trent. . . . . Whether such a marriage was sufficient by the common law in England, previous to the marriage act, has been disputed of late years in that country, though never doubted here." And in the case of *Meister* v. *Moore*, 96 U. S. 76, it was decided that an informal marriage by contract *per verba de præsenti* was a valid marriage at common law in this country. Mr. Justice Strong, in that case, speaking of such a marriage, said: "That such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country, from the earliest settlement to the present day."

THE DISTINCTION BETWEEN CONTRACTS OF MARRIAGE *per verba de præsenti* and those *per verba de futuro cum copula*, which the learned judge who delivered the opinion in the principal case attempts to draw, does not seem to be justified by the authorities: 1 Bish. Mar. & Div., sec. 255; *Hallett* v. *Collins*, 10 How. 182; *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 66. In the last-named case Sir William Scott (afterwards Lord Stowell) said: "But if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection." The effect, therefore, of the copulation of the parties seems to have been to do away with the distinction

Digitized by Google

between the contract *per verba de præsenti* and that *per verba de futuro*. And no distinction seems to be taken, either in this country or in England, between the contract *per verba de præsenti* and the contract *per verba de futuro cum copula*, so far as the effect of such contract upon the *status* of the parties is concerned. The effect of a marriage *per verba de præsenti* is fully considered in the note to *Londonderry* v. *Chester*, 9 Am. Dec. 72; see also *Dyer* v. *Brannock*, 66 Mo. 391; S. C., 27 Am. Rep. 359; *Mathewson* v. *Phœnix Iron Foundry*, 20 Fed. Rep. 281.

IN ENGLAND.—In *Wigmore's Case*, 2 Salk. 438, Holt, C. J., said: "By the canon law, a contract *per verba de præsenti* is a marriage; as, 'I take you to be my wife.' So it is of a contract *per verba de futuro*: 'I will take,' etc.; if the contract be executed, and he does take her, it is a marriage, and they cannot punish for fornication." And in the case of *Collins* v. *Jessott*, 6 Mod. 155, the same judge said: "If a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement. And if the contract be *per verba de futuro*, and after either of the parties so contracting, without previous release or discharge of the contract, marry another, it will be a good cause with them of a dissolution of a second marriage, and of decreeing the first contract's being perfected into a marriage." But nearly a century after the passage of the English marriage act of 26 Geo. II., c. 33, in 1753, which, as Sir William Scott said in *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 70, "swept away the whole subject of irregular marriages, together with all the learning belonging to it," in the case of *Queen* v. *Millis*, 10 Cl. & Fin. 534, all the judges gave it as their unanimous opinion that, at the time of the passage of the marriage act, by the law of England, a contract of marriage *per verba de præsenti* never constituted in itself a full and complete marriage, unless made in the presence and with the intervention of a minister in holy orders. On this question the law lords were equally divided, lords Brougham, Campbell, and Denman being of opinion that such a marriage was valid, and Lord Chancellor Lyndhurst and lords Cottenham and Abinger agreeing with the judges. The decision of the lower court against the validity was therefore affirmed. The subsequent case of *Catherwood* v. *Caslon*, 13 Mee. & W. 261, was decided upon the authority of *Queen* v. *Millis*, *supra*. For a discussion of the doctrine of this case, see 1 Bish. Mar. & Div., secs. 275–283. In the case of *Mathewson* v. *Phœnix Iron Foundry Co.*, 20 Fed. Rep. 256, Colt, J., said: "The proposition that the presence and intervention of a person 'in holy orders' is requisite to a valid marriage at common law in this country is contrary to the opinion o our ablest jurists, and to a long line of adjudications." See also the note to *Taylor* v. *Swett*, 22 Am. Dec. 157–163, where this subject is discussed at length.

IN SCOTLAND it is well settled that a marriage *per verba de præsenti*, or a marriage *per verba de futuro, subsequente copula*, is a valid and binding marriage: *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 54; *McAdam* v. *Walker*, 1 Dow, 148; *Honyman* v. *Campbell*, 2 Dow & Cl. 265; *Sim* v. *Miles*, 8 Scotch Sess. Cas. 89; *Currie* v. *Turnbull*, Hume, 373; *Morrison* v. *Dobson*, 8 Scotch Sess. Cas., 3d ser., 347. Lord Chancellor Eldon, in the case of *McAdam* v. *Walker*, 1 Dow, 182, said: "The fact of the *copula* following the promise is held to make that present and complete which before was future and incomplete." In *Honyman* v. *Campbell*, 2 Dow & Cl. 265, which was a suit for a declarator of marriage founded on a promise *subsequente copula*, there was no direct evidence of the promise; but from facts and circumstances, and chiefly from letters written by the defender to the pursuer (the former hav-

Digitized by Google

ing destroyed the latter's letters to him), the commissary court and the court of session in Scotland thought that there was sufficient ground to warrant the inference that a promise of marriage had been given and accepted previous to the *concubitus*, and declared for the marriage; and the lords on appeal affirmed the judgment. In the case of *Sim* v. *Miles*, 8 Scotch Sess. Cas. 89, a marriage by a promise *subsequente copula* was sustained, although the parties had been in a course of connection prior to the date of the letter affording evidence of the promise, and although no *copula* was proved to have taken place until nearly eight months after the promise. The presumption in such case is that the woman had reformed and refused to continue the connection unless placed upon an honorable footing: 1 Fras. Dom. Rel. 195; 1 Bish. Mar. & Div., sec. 261. But generally, where parties are living in a meretricious state, a promise to marry on some future condition does not effect a marriage by the mere continuation of such connection: *Robertson* v. *State*, 42 Ala. 509; *Estate of Beverson*, 47 Cal. 621; *Turpin* v. *Public Administrator*, 2 Bradf. 424; 1 Bish. Mar. & Div., sec. 261. And honorable courtship with *copula* is not sufficient to constitute a marriage: *Monteith* v. *Robb*, 6 Scotch Sess. Cas., 2d ser., 934.

THE PRINCIPAL CASE IS CITED in the following cases in support of these propositions: The principal case does not weaken the authority of *Starr* v. *Peck*, 1 Hill, (N. Y.), 270, on the question of the duty of this court to presume matrimony when the parties have cohabited, and there are circumstances from which a present consent may be inferred: *Caujolle* v. *Ferrié*, 23 N. Y. 107. Marriage is not, for some purposes, regarded as a contract: *Wade* v. *Kalbfleisch*, 58 Id. 285; S. C., 16 Abb. Pr., N. S., 109. In the absence of proof to the contrary, it will be presumed by the courts of New York that the law of another state in regard to a subject-matter is the same as the law in New York: *Paine* v. *Noelke*, 43 N. Y. Super. Ct. 187; S. C., 54 How. Pr. 337; *Henry* v. *Root*, 33 N. Y. 554; *McCulloch* v. *Norwood*, 36 N. Y. Super. Ct. 187.

THOMAS *v.* HUBBELL.

[15 NEW YORK, 405.]

SURETIES IN OFFICIAL BOND, CONDITIONED SIMPLY FOR FAITHFUL PERFORMANCE OF DUTY by the principal, are not precluded from contesting the grounds of the principal's liability by a judgment recovered against him in an action of which they had not notice.

APPEAL from a judgment against sureties in a sheriff's bond. The facts appear in the opinion. The case below is reported in 18 Barb. 9; and another decision of this court rendered on a subsequent appeal may be found in 35 N. Y. 120.

Amasa J. Parker, for the appellant.

Henry Hogeboom, for the respondents.

By Court, JOHNSON, J. The defendant's bond is upon condition to be void if Chester Hubbell shall well and faithfully, in all things, perform and execute the duties of deputy sheriff of

Digitized by Google

the county of Delaware, without fraud, deceit, or oppression. The bond was given to the sheriff upon Hubbell's appointment as deputy, and its apparent object is to secure the sheriff on account of any malfeasance or nonfeasance of the deputy in his office.

The sheriff was sued for Hubbell's permitting chattels, on which he as deputy had levied, to be taken out of his possession and disposed of. Of this suit Hubbell had notice, but the sureties were not notified. A recovery was had against the sheriff, the record of which was given in evidence in this case, under exception. It subsequently was offered to be proved that none of the property levied on belonged, at the time of the levy, to the defendant in the execution. Upon this offer, the question arises whether under the circumstances a breach of the condition of the bond was conclusively established against the sureties in the bond by the recovery against the sheriff, after notice of the suit and an opportunity to defend it being given to Hubbell.

The general rule is certainly clear that none but parties or sureties are concluded by a judgment. If no notice had been given to Hubbell of the suit against the sheriff, there would have been no pretense for saying that he could be concluded by the recovery against the sheriff. The terms of the condition of this bond do not bring it within the class of cases in which an indemnitor is concluded by the result of a suit against the person whom he has undertaken to indemnify, upon the ground that such is the fair interpretation of the terms of the contract. This condition is only that he will do his duty as deputy sheriff. In the class of cases alluded to, the contract of indemnity is held to stipulate for the result of a litigation to which the indemnitor is not a party, and to make his liability depend merely upon that result. The case of *Douglass* v. *Howland*, 24 Wend. 35, fully discusses this question, and shows that the cases which have applied it are not departures from or exceptions to the general rule that a judgment concludes only parties and privies, but do not fall within that rule at all, being dependent only upon the principle that one may contract to be answerable to another upon such lawful conditions as he pleases: *Lee* v. *Clark*, 1 Hill (N. Y.), 56, and *Duffield* v. *Scott*, 3 T. R. 374, stand upon that ground. *Rapelye* v. *Prince*, 4 Hill, 119 [40 Am. Dec. 267], is another instance of the application of the same principle, where the court say: "When one covenants for the results or consequences of a suit between other parties, the decree or judgment

Digitized by Google

in such suit is evidence against him, although he was not a party."

It is, however, well settled, where parties sustain the relation which existed between the parties to this suit, that the party entitled to be indemnified may throw upon the indemnitors the burden and risk of the primary litigation by giving to them the opportunity of defending the original suit: *Kip* v. *Brigham*, 6 Johns. 158. It then becomes the defense of the indemnitors, and they are concluded by its results, at least in the absence of fraud or collusion between the prosecuting party and him whom they are bound to defend. In this case notice was given to Hubbell, but not to the other obligors, and the question is whether they are concluded by the former recovery.

The only decided cases in this state which seem to favor the view that they are liable are *Bartlett* v. *Campbell*, 1 Wend. 50, and *Westervelt* v. *Smith*, 2 Duer, 449. In *Bartlett* v. *Campbell*, *supra*, notice of the previous suit had been given to the principal indemnitor, but not to the surety; and the court said that for this defect the plaintiff must be nonsuited; but they did not grant the nonsuit. The plaintiff gave other evidence, and the defendant was allowed to contest the question of fact on which the original recovery was based, and upon that question the jury found for the defendant. On writ of error to the common pleas, the question really presented to the supreme court was whether the original recovery was conclusive upon the party who had no notice. For, admitting the record to have been *prima facie* evidence, the defendant had overthrown it by obtaining a verdict against the fact on which it was founded. The case was considered by the court upon a concession of the defendant's counsel that if the form of the suit had been upon the contract as joint, notice to one of the indemnitors would have sufficed; and the conclusion of the court is worked out upon that assumption. This case can therefore scarcely be regarded as an authority to sustain the judgment now under review; and in principle it is in direct conflict with the rule as to the effect of a judgment against joint debtors, where one only is served with process and appears in the suit.

The case of *Westervelt* v. *Smith*, *supra*, was reviewed by this court, and put upon the ground that it fell within the class of cases before alluded to, in which one has stipulated to be bound by the event of a suit between strangers.

There is therefore no reason why this case, in which the language of the condition admits of no similar construction,

Digitized by Google

should be taken out of the general rule which declares the effect of judgments as to strangers, that they conclusively prove *rem ipsam*, and nothing else.

The jugment should be reversed, and a new trial ordered.

COMSTOCK, SELDEN, DENIO, and PAIGE, JJ., concurred.

BOWEN and SHANKLAND, JJ., were for affirmance.

Judgment reversed, and new trial ordered.

JUDGMENT AGAINST CONSTABLE AS EVIDENCE AGAINST HIS SURETIES: See *City of Lowell* v. *Parker*, 43 Am. Dec. 436, note 440, where other cases are collected.

SURETIES, WHETHER BOUND BY JUDGMENTS AGAINST PRINCIPALS: See *Parkhurst* v. *Sumner*, 56 Am. Dec. 94, note 96, where other cases are collected; *Littleton* v. *Richardson*, 66 Id. 759, note 765.

JUDGMENTS BIND ONLY PARTIES AND PRIVIES: See *Winston* v. *Westfeldt*, 58 Am. Dec. 278; *Parkhurst* v. *Sumner*, 56 Id. 94, note 96, where other cases are collected: *Lord* v. *Chadbourne*, 66 Id. 290, note 296. But one not a party or privy to a judgment may yet be bound by it, if he has expressly so covenanted: *Thomson* v. *MacGregor*, 81 N. Y. 597, citing the principal case.

THE PRINCIPAL CASE IS CITED in support of these propositions in the following cases: Where one, by the nature of his covenant, is bound, upon the request of the covenantee, to defend an action brought by a third person against the covenantee, in respect to the subject-matter of the covenant, the covenantee may throw upon the covenantor the burden and risk of the litigation by giving to him proper notice and opportunity to defend the suit; and in such case the result, if adverse to and binding upon the covenantee as *res judicata*, is, in any action by the covenantee against the covenantor upon the covenant, conclusive evidence of its breach: *National F. I. Co.* v. *McKay*, 5 Abb. Pr., N. S., 448. The same rules in respect to notice which apply to the indemnitor are applicable to his surety in like cases: *Bridgeport Ins. Co.* v. *Wilson*, 34 N. Y. 281. Where a stockholder is a surety, the judgment against the principal does not bind him: *Miller* v. *White*, 50 Id. 142. There is a class of cases in which an indemnitor is concluded by the result of a suit against the person whom he has undertaken to indemnify, upon the ground that such is the fair interpretation of the contract: *Bridgeport F. & M. Ins. Co.* v. *Wilson*, 7 Bosw. 434. Parties may litigate questions not determined by a former judgment: *Wilson* v. *Davol*, 5 Id. 625. It is also cited in *Thayer* v. *Clark*, 4 Abb. App. Dec. 395, as a case showing the distinction between those cases in which (in the absence of fraud) a judgment or decree against the principal concludes the sureties, and those in which it does not; and it is followed in *Fay* v. *Ames*, 44 Barb. 334.

Digitized by Google

NOLTON v. WESTERN RAILROAD CORPORATION.

[15 NEW YORK, 444.]

RAILROAD COMPANY IS LIABLE TO PASSENGER WHOM IT VOLUNTARILY UNDERTAKES TO CARRY, although gratuitously, for injuries sustained by the passenger without his own fault, and through culpable negligence chargeable to the company. This liability does not rest on contract, but on the public duty of the company to carry safely those whom it undertakes to carry.

APPEAL from a judgment overruling a demurrer to a complaint by a railroad passenger against the company, demanding damages for personal injuries. The plaintiff was a mail agent employed by the United States, in charge of mails transported over defendant's road; and he was carried without his paying any specific fare, in view of the general compensation received by the company for carrying the mail. The only question was, whether the non-payment of fare precluded the plaintiff from maintaining his action. The case below is reported in 10 How. Pr. 97. The appeal was submitted.

N. Hill, for the appellant.

W. A. Beach, for the respondent.

By Court, SELDEN, J. As the only objection which can be taken to the complaint upon this demurrer is that it does not contain facts sufficient to constitute a cause of action, it is entirely immaterial whether the action be considered as in form *ex contractu* or *ex delicto*. The only question is whether, upon the facts stated, the plaintiff can maintain an action in any form.

The plaintiff cannot, I think, avail himself of the contract between the defendant and the government, so as to make that the *gravamen* of his complaint and the foundation of a recovery. This is not like the cases in which a third person has been permitted to recover upon a contract made by another party for his own benefit. The distinction between them is plain. Those were cases where the defendant, for a consideration received from the party to the contract, had undertaken to do something ostensibly and avowedly for the direct benefit of the plaintiff, and when the advantage to the latter was one object of the agreement. Here the parties had no such intention. In contracting for the transportation of the mail agent, the parties had no more in view any benefit or advantage to him than if the contract had been to transport a chattel. The government took care of the public interests, and left those of the mail agent to such protection as the law would afford.

Digitized by Google

Another distinction is, that in the cases referred to the party claiming the benefit of the contract, and seeking to enforce it, was one who was specifically mentioned and pointed out in the contract itself, while here no one is designated; and to entitle the plaintiff to recover upon it, it must be regarded as a shifting contract, which can be made to inure to the benefit of any person who may temporarily assume the duties of mail agent. I think there is no precedent for such a construction of such a contract.

If, then, the plaintiff can recover at all, it must be upon the ground of some implied contract, or of some legal obligation or duty resting upon the defendants to exercise proper care and skill in the transportation of passengers; and the question is, whether, under the circumstances of this case, such a contract is implied, or such a duty imposed for the benefit of the plaintiff.

It would seem a startling proposition, that in all those cases where persons travel upon railroads, engaged not in their own business but that of others, and where their fare is paid by their employer, they are entirely at the mercy of the railroad agents, and without redress if injured through their recklessness and want of care and skill. If, however, railroad companies are liable in cases like the present, it is important to ascertain the precise nature and extent of that liability.

In the first place, then, it is clear that they are not liable by virtue of that custom or rule of the common law which imposes special and peculiar obligations upon common carriers. Persons engaged in the conveyance of passengers are not common carriers within the meaning of that rule which applies solely to those whose business it is to transport goods: Bac. Abr., tit. Carriers; 2 Kent's Com., sec. 40; Story on Bailm., sec. 498, and note.

If the complaint in this case, after stating that the defendant was a carrier of passengers and freight from Greenbush to Boston for hire and award, had simply averred that the plaintiff became a passenger in the cars of the defendant, and was so received by it, an implied contract would have arisen on the part of the defendant to transport the plaintiff with all due diligence and skill; because the law would have inferred from those facts that the defendant was to receive a compensation from the plaintiff himself. But this inference is repelled by the contract set forth, and the statement that the plaintiff was received as a passenger under it.

It was suggested by the plaintiff's counsel, upon the argu-

Digitized by Google

ment, that a contract might be implied, of which the agreement between the defendant and the government should form the consideration and basis. But although that agreement may be resorted to for the purpose of showing that the plaintiff became a passenger upon the cars by the consent of the defendant, and not as a mere intruder, it cannot, I think, be made available by the plaintiff as the consideration of an implied *assumpsit*. As to him, that agreement is *res inter alios acta*. He is not a party to it, or mentioned in it. His employment by the government may have taken place long after the agreement was made, and have had no reference to it. If any contract can be implied from that agreement, in favor of the plaintiff, it must be a contract to transport him from place to place, according to the terms of the agreement. Suppose, then, the cause of action, instead of being for an injury received through the negligence of the defendant, had been for not furnishing the necessary cars, or not running any train: could the plaintiff recover in such an action? Would the defendant be liable for its failure to perform the contract, not only to the party with whom the contract was made, and from whom the consideration was received, but to a third party, not named in it, and from whom they had received nothing? No one would claim this.

It may be said that the implied contract with the plaintiff is limited to an undertaking to transport safely or with due care. It is difficult to see, however, how there can be a contract to transport safely where there is no contract to transport at all. My conclusion therefore is, that this action cannot be maintained upon the basis of a contract express or implied.

It necessarily follows that it must rest exclusively upon that obligation which the law always imposes upon every one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The leading case on this subject is that of *Coggs* v. *Bernard*, Ld. Raym. 909. There the defendant had undertaken to take several hogsheads of brandy belonging to the plaintiff from one cellar in London, and to deposit them in another; and in the process of moving one of the hogsheads was staved, and the brandy lost through the carelessness of the defendant or his servants. Although it did not appear that the defendant was to receive anything for his services, he was nevertheless held liable by the whole court.

The principle of this case has never since been doubted, but there has been some confusion in the subsequent cases as to the

Digitized by Google

true nature of the obligation, and as to the form of the remedy for its violation. In many instances suits have been brought upon the supposition that an implied contract arises in all such cases that the party will exercise due care and diligence; and the language of Lord Holt in *Coggs* v. *Bernard*, *supra*, undoubtedly gives countenance to this idea. He seems to treat the trust and confidence reposed as a sufficient consideration to support a promise. This doctrine, however, can hardly be considered as in consonance with the general principles of the common law. In addition to the difficulty of bringing mere trust and confidence within any legal definition of valuable consideration, there is a manifest incongruity in raising a contract to do with care and skill that which the party is under no legal obligation to do at all.

The duty arises in such cases, I apprehend, entirely independent of any contract, either expressed or implied. The principle upon which a party is held responsible for its violation does not differ very essentially in its nature from that which imposes a liability upon the owner of a dangerous animal who carelessly suffers such animal to run at large, by means of which another sustains injury, or upon one who digs a ditch for some lawful purpose in a highway and carelessly leaves it uncovered at night, to the injury of some traveler upon the road. It is true, it may be said that in these cases the duty is to the public, while in the present case, if it exists at all, it is to the individual; but the basis of the liability is the same in both cases, viz., the culpable negligence of the party. All actions for negligence presuppose some obligation or duty violated. Mere negligence, where there was no legal obligation to use care, as where a man digs a pit upon his own land and carelessly leaves it open, affords no ground of action. But where there is anything in the circumstances to create a duty, either to an individual or the public, any neglect to perform that duty, from which injury arises, is actionable.

The present case falls clearly within this principle of liability. There can be no material difference between a gratuitous undertaking to transport property and a similar undertaking to transport a person. If either is injured through the culpable carelessness of the carrier, he is liable. If, according to the case of *Coggs* v. *Bernard*, Ld. Raym. 909, and the subsequent cases, an obligation to exercise care arises in one case, it must also in the other.

It is true that, according to the authorities, the party in such

Digitized by Google

cases is only liable for gross negligence. But what will amount to gross negligence depends upon the special circumstances of each case. It has been held that when the condition of the party charged is such as to imply peculiar knowledge and skill, the omission to exercise such skill is equivalent to gross negligence. Thus it was said by Lord Loughborough in *Shiells* v. *Blackburne*, 1 H. Black. 158, that "if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." The same doctrine is advanced by Parke, B., in *Wilson* v. *Brett*, 11 Mee. & W. 113. He says: "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it."

I regard this principle as peculiarly applicable to railroad companies, in view of the magnitude of the interests which depend upon the skill of their agents, and of the utter powerlessness of those who trust to that skill to provide for their own security.

This case is not like that of *Winterbottom* v. *Wright*, 10 Mee. & W. 109. There the defendant had not undertaken to transport the plaintiff either gratuitously or otherwise. He was simply bound by contract with the government to furnish and keep in repair the carriages used by the latter in transporting the mails. The relations of the parties in that case and in this are very different, and the cases cannot be considered as governed by the same principles.

I entertain no doubt that in all cases where a railroad company voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, in the absence, at least, of an express agreement exempting it from responsibility, if such passenger is injured by the culpable negligence or want of skill of the agents of the company, the latter is liable. The matter of compensation may have a bearing upon the degree of negligence for which the company is liable. That question however, does not arise here. Degrees of negligence are matters of proof, and not of averment. The allegations of negligence in this complaint are sufficient, whether the defendant is liable for ordinary or only for gross negligence.

The judgment should be affirmed.

BROWN, J., also delivered an opinion for affirmance.

All the judges concurred.

Judgment affirmed.

Digitized by Google

PAYMENT OF FARE AS AFFECTING LIABILITY OF CARRIER OF PASSENGERS: See *Gillenwater* v. *Madison & I. R. R. Co.*, 61 Am. Dec. 101, note 109; *Peters* v. *Rylands*, 59 Id. 746, note 749, where other cases are collected. When a railroad company voluntarily undertakes to carry a passenger upon its road, though without compensation, if he is injured by the culpable negligence of the agents of the company, it is liable, in the absence of any express agreement exempting it: *Bissell* v. *Michigan etc. R. R. Cos.*, 22 N. Y. 307; *Perkins* v. *N. Y. Cent. R. R. Co.*, 24 Id. 201; *Carroll* v. *Staten Island R. R. Co.*, 58 Id. 134, all citing the principal case. Without an express exemption provided by contract, a railroad company is liable for the consequences of its negligence to all persons traveling on its road as messengers or express agents, to the same extent as to other passengers: *Blair* v. *Erie R'y Co.*, 66 Id. 319, citing the principal case.

RAILROAD COMPANY'S LIABILITY FOR INJURY TO ONE NEITHER PASSENGER nor employee is governed by that pervading principle of social duty founded on the common law, that every person must so conduct his own affairs as not to injure the rights of another, expressed in the legal maxim, *Sic utere tuo ut alienum non lædas.* In such cases there is no relation arising out of any privity of contract: *Mad River etc. R. R. Co.* v. *Barber*, 67 Am. Dec. 312; *Kerrchacker* v. *Cleveland etc. R. R. Co.*, 62 Id. 246. The law always imposes upon every one who attempts to do anything for another, even gratuitously, some degree of care and skill in the performance of what he has undertaken. Mere negligence, where there is no obligation to use care, affords no ground of action; but where there is anything in the circumstances to create a duty to an individual or to the public, any neglect to perform that duty, from which injury arises, is actionable: *New York & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 52, citing the principal case. An injury to the person of one caused by or resulting from the negligence of another is a tort; because the negligence which causes it is the breach of a legal duty, not of a contract: *Wells* v. *New York Cent. R. R. Co.*, 24 Id. 188, citing the principal case. For an injury caused by negligence, carriers of persons may be liable, not upon any contract, express or implied, but for the violation of a duty which the law imposes upon them: *Boniface* v. *Relyea*, 5 Abb. Pr., N. S., 268; S. C., 36 How. Pr. 465; S. C., 6 Robt. 405.

WHAT IS GROSS NEGLIGENCE depends upon the particular circumstances of each case: *McGrath* v. *Hudson R. R. R. Co.*, 32 Barb. 155; S. C., 19 How. Pr. 224; *Phillips* v. *Renselaer & S. R. R. Co.*, 57 Barb. 652, both citing the principal case; and an averment of negligence in a pleading is sufficient to admit proof of gross negligence: *Rockford etc. R. R. Co.* v. *Phillips*, 66 Ill. 552; *Ohio etc. R'y Co.* v. *Selby*, 47 Ind. 481, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Buffett* v. *Troy & B. R. R. Co.*, 40 N. Y. 171, to the point that one taking his seat in a railroad car for transportation thereby becomes a passenger; and in *Smith* v. *New York Cent. R. R. Co.*, 29 Barb. 136, to the point that carriers of human beings are not in the strict sense, perhaps not in any sense, common carriers.

Digitized by Google

STOREY v. BRENNAN.

[15 NEW YORK, 574.]

NEW YORK STATUTE TO PREVENT BETTING AND GAMING gives the party to a wager an unconditional right to recover his stake from the stake-holder. The fact that the stake-holder, after the determination of the wager, paid the stakes to the winner by direction or consent of the loser, is no defense to an action afterwards brought by the latter, under the statute.

WHERE THERE IS NO EVIDENCE TO WARRANT JURY IN FINDING a material fact, the judge is not at liberty to leave it to them to determine whether or not such fact is proved; but he should direct them to find that it is not proved.

APPEAL from an order denying a new trial. The nature of the action and of the questions raised appear by the opinion.

L. Tremain, for the appellant.

N. Hill, for the respondent.

By Court, PAIGE, J. This case cannot be distinguished from that of *Ruckman* v. *Pitcher*, 1 N. Y. 411, which was an action by the loser of a bet, on the event of a trotting-match, against the stake-holder, after the money lost had been paid over by the stake-holder to the winner; and in which action the court of appeals decided that the loser was entitled to recover the sum deposited by him with the stake-holder. In that case the loser, after the wager was lost, on being asked by the defendant (the stake-holder) whether he had any objection to the money being paid to the winner, replied that he was satisfied, and directed the defendant to pay over the money. In the present case, immediately after the wager was determined, the plaintiff told the defendant to give up the money, referring to the money staked on the event of the cock-fight, and said it was Courtney's, the winner's, money. This is the whole evidence in relation to the plaintiff's direction to the defendant to pay over the money. It is therefore not a case of conflicting evidence. Upon this evidence the judge charged the jury that if, after the cock-fight had terminated, the plaintiff, without regard to any wager, directed the defendant to pay the money to Courtney, as a voluntary gift or gratuity, and not as money won upon the event of the cock-fight, the verdict should be for the defendant. It seems to me that the evidence did not warrant this charge to the jury. No reasonable interpretation of the direction and declaration of the plaintiff, having reference to the time (being immediately after the determination of the wager) and the circumstances under which they were made, could possibly author-

Digitized by Google

ize an inference of fact that the plaintiff intended that the money should be delivered to Courtney, not as having any right to it, but as a free and voluntary gift or gratuity of the plaintiff to him. It was within fifteen minutes after the termination of the cock-fight that the plaintiff directed the defendant to give up the money to Courtney, and declared that it was his money. The language used by the plaintiff, and the time when it was uttered, repel the idea that he intended to make a gift to Courtney. The words used by the plaintiff, "Give up that money to Courtney," are the appropriate words to be used as a direction to pay it over to Courtney as a stake won by him; and the additional words, "it was his, Courtney's, money," are confirmative of the idea that such was the intent of the plaintiff. The latter words are a recognition that the money was already Courtney's by reason of his winning of the wager; and the natural sense of the words, "give up that money," is, pay it to Courtney, as the result of the wager entitles him to it. These words, "give up that money; it is Courtney's money," are entirely inconsistent with the idea of a free and voluntary gift. The case of *Lewis* v. *Miner*, 3 Denio, 105, sustains this view of the case. Upon the undisputed evidence, the jury were not at liberty to infer that the plaintiff directed the money to be paid over as a gift to Courtney; and the judge committed an error in leaving it to them to make that inference. He should have instructed them, as a matter of law, to find a verdict for the plaintiff. Where the judge leaves it to the jury to infer a fact not warranted by the evidence, it is error, and a new trial will be granted: *Gale* v. *Wells*, 12 Barb. 84; *Harris* v. *Wilson*, 1 Wend. 511; *Small* v. *Smith*, 1 Denio, 583.

The idea of the charge was probably suggested by a paragraph in the opinion of Judge Jones in *Ruckman* v. *Pitcher*, 1 N. Y. 410, in which he says that if the consent and direction of the loser, that the stake-holder pay the money to the winner, be a justification to the stake-holder, it "must be on the ground that the consent and direction has been given for the payment of the money, not, etc., as a stake won by the winner, but as money of the loser directed by him to be paid to the winner, etc., as a free and voluntary gift or gratuity," etc. Judge Jones adds to these remarks, "that it would be highly improbable, I will not say impossible, that any such case should ever occur, and perfect good faith exist." It would be doing violence both to the language and intention of the plaintiff to hold that he directed the money deposited by him in the defendant's hands, as a stake upon the

Digitized by Google

event of the wager, to be paid to Courtney, not as money won by him, but as a free and voluntary gift from him to the plaintiff.

The object of the statute to prevent betting and gaming was the protection of the public morals. The act being enacted for the public good, it should be so construed as to attain as far as possible the end proposed, by suppressing the mischief against which it was directed. To sustain the charge in this case would be a substantial abrogation of the statute, as it would suggest a way in which its benign provisions could in most cases be evaded, and its policy defeated.

In my opinion, the judgment should be reversed, and a new trial ordered.

DENIO, C. J. If I had been a judge in the case of *Ruckman* v. *Pitcher*, reported in 1 N. Y. 392, I should not have concurred in the decision of the court, but should have dissented with Judge Bronson. But the point having been deliberately determined that an action will lie against a stake-holder who has paid over the bet to the winner, after the event, by the direction of the loser, we are bound to apply the law thus settled to the present and all subsequent cases.

In this case the defendant was a stake-holder of the money sought to be recovered, and after the fight had taken place and the event had been ascertained, the plaintiff, who had deposited his part of the money as a bet on the event of the game, directed the defendant, who was stake-holder, to give up the money to Courtney, the other party to the bet, saying it was his, Courtney's, money. The necessary and unavoidable inference from this was that the event had been determined in Courtney's favor; that the plaintiff acquiesced, admitted himself to be the loser, and directed the payment to be made upon the footing of money lost to Courtney by the determination of the game in his favor. There was not the slightest evidence, nor any reason to believe, or even to suspect, that the plaintiff directed the payment to be made as a gift or gratuity, irrespective of the bet, and the judge erred in submitting such a theory to the jury.

The judgment should be reversed.

All the judges who heard the argument concurred.

Judgment reversed, and new trial ordered.

INSTRUCTION ASSUMING HYPOTHESIS AT VARIANCE WITH FACT should not be given to the jury: See *Wintz* v. *Morrison*, 67 Am. Dec. 658. The submission to the jury of a question of fact for a finding, if there is no sufficient evidence of such fact, is erroneous: *Gaither* v. *Myrick*, 66 Id. 316, note 326,

Digitized by Google

where other cases are collected; *Heirn* v. *McCaughan*, Id. 588, note 603, where other cases are collected; *Liddle* v. *Hodges*, 2 Bosw. 544; *Mark* v. *Hudson R. B. Co.*, 56 How. Pr. 120, both citing the principal case. A judge is not at liberty to instruct a jury to base their findings upon a hypothesis unwarranted by the evidence: *Ronse* v. *Lewis*, 2 Keyes, 359; S. C., 4 Abb. App. Dec. 124, citing the principal case.

WAGER, WHEN RECOVERABLE: See *Johnson* v. *Fall*, 65 Am. Dec. 518, note 519, where other cases are collected.

RECOVERY OF MONEY PAID ON WAGER OR LOST BY GAMING: See *Morgan* v. *Groff*, 49 Am. Dec. 273, note 274; *Tarleton* v. *Baker*, 44 Id. 358, note 360, where other cases are collected; *Hickerson* v. *Benson*, 40 Id. 115; S. C., Id. 118; *Hockaday* v. *Willis*, Id. 606; *Allen* v. *Dodd*, Id. 632.

MONEY DEPOSITED ON WAGER, WHEN MAY BE RECOVERED BACK, and when not: See *Bledsoe* v. *Thompson*, 57 Am. Dec. 777, note, 778, where other cases are collected. A sum of money paid as a wager may be recovered back: *Hendrickson* v. *Beers*, 6 Bosw. 644, citing the principal case. And even if it is paid with the authority and consent of the depositor, it may be recovered from the stake-holder: *Mahoney* v. *O'Callaghan*, 38 N. Y. Super. Ct. 465, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Brush* v. *Kohn*, 14 Abb. Pr. 52, to the point that errors reviewable only on a case include a misdirection by the judge.

PARTRIDGE v. GILBERT.

[15 NEW YORK, 601.]

CONVEYANCES OF ADJOINING BUILDINGS HAVING PARTY-WALL TO DIFFERENT GRANTEES, the center line of the wall being made the boundary between them, give to each grantee a right to have his building supported by means of his neighbor's half of the wall. When either building becomes, by age and decay, so dilapidated that rebuilding becomes necessary, its owner may for that purpose, and on reasonable notice to the adjoining tenant, and using proper care and skill, take down and rebuild the party-wall, without incurring liability to the other tenant.

APPEAL from a judgment of the New York superior court. The plaintiffs were tenants of the store No. 18 Courtlandt street, and the defendants were owners of No. 20, adjoining. These buildings depended for support on a party-wall between them. The landlord of plaintiffs and the defendants each held their respective buildings by conveyances from a former owner of both lots, which deeds conveyed the premises with all easements, etc. The defendants' building became so old and dilapidated that tearing it down to rebuild became necessary; and in order to accomplish this, they found it absolutely needful to tear down and rebuild the party-wall, which they did, using all due care and skill, etc. In answer to special questions put by the presiding judge, the jury found that the removal of the wall was a

Digitized by Google

necessary measure of prudence under the circumstances. The question of the legal right of the defendants to remove the wall was reserved by the judge for the opinion of the court upon exceptions; and after argument, the defendants had judgment, from which plaintiffs appealed. The argument and decision below are reported in 3 Duer, 185.

S. P. Nash, for the appellant.

John D. Sherwood, for the respondent.

By Court, SHANKLAND, J. I am of opinion that the legal effect of the several conveyances to lots Nos. 18 and 20 stated in the case, was to vest the title in the respective owners to the center of the division wall, from its top down to the crown of the arch of the passage-way, and thence down to the center of the passage. Each owner had also the right to the support of the wall afforded by the leg of the arch which rested on the land of the other. Whether this right of support is derived from an implied contract or covenant, or reservation, arising out of the deed, executed when the title to the two houses was severed by the original owner of both, or whether it springs out of the necessity imposed by the law of vicinage, is of but little consequence. In either case the right is the same, so far as the question here involved is concerned. The more important question, and on which the parties differ, is the right of one owner thus situated to do the acts complained of in this case. The jury having found that the party-wall and arch were in such a condition that a just regard for life and property rendered their removal necessary, and that the stores in their then condition were unfit for occupation, it seems to me to follow, as a necessary legal right, that the defendants might remove them and rebuild others in their places, doing no unnecessary damage, as in this case.

If the defendants could have removed one half of the party-wall, without removing the other half also, they would have been liable for removing the latter; but the whole evidence established the fact that this was impossible. If the power to remove this dilapidated wall did not exist, then the defendants would have to submit to the inconvenience and danger of occupying their store with this impending ruin hanging over them, or to abandon it until the plaintiffs or their landlord saw fit to join in the act of rebuilding. Such a result would be a disgrace to the laws of any civilized nation.

The case of *Campbell* v. *Mesier*, 4 Johns. Ch. 334 [8 Am. Dec.

Digitized by Google

570], went farther than this case requires. There the chancellor held the defendant liable to contribute to the expense of erecting a wall under similar circumstances. Of course it assumed the taking down the old wall to have been justified, which is as far as is necessary to go in this case. I know that case has been questioned in some subsequent ones: *Sherred* v. *Cisco*, 4 Sandf. 480; but to me it seems to stand on a firm foundation. The equity jurisdiction which formerly existed in the court of chancery is now vested in the supreme court, so that if there was a distinction between the powers of the two courts, over these questions, it no longer exists.

But the right to take down the party-wall in case of necessity, and rebuild, may be well founded on an implied reservation in the grant, when William S. Smith, who owned both lots, conveyed lot 18 to Burrowes in 1796. Clearly, he granted the right to Burrowes to have his half of the wall supported by that leg of the arch which rested on the land he, Smith, retained; not only during the existence of the arch and wall then there, but it was a perpetual easement; as much so, and as enduring, as the easement of the passage-way itself.

The easement that grant conferred on Burrowes, as to one leg of the arch, it reserved to Smith as to the other leg of the arch. The two tenements became, as to their easements, both dominant and servient tenements, by virtue of the same grant. In all such cases the right to enter into and upon the servient tenement to make repairs, in case of necessity, always exists. This class of easements is properly termed "easements of necessity:" Law of Easements, 53; and arise out of some act of the owners of the dominant and servient tenement, without which the intention of the parties to the severance cannot be carried into effect, or their rights be enjoyed.

If the easement of the plaintiffs to pass through the passage-way had not been extinguished by its being bricked up in 1834, by the consent of the owner of lot No. 18, and the new wall erected by the defendants carried down to the earth by the consent of the plaintiffs' landlord, it is clear that an action could have been maintained for thus changing the wall in that particular. But it was proved that the owner of No. 18 assented to the destruction of the easement of the passage-way, and no claim is made on that account in this action. It was doubtless a benefit to both parties.

The case of *Matts* v. *Hawkins*, 5 Taunt. 20, cited by the appellants' counsel, is an authority to prove that the parties owned

Digitized by Google

this wall, each one half in severalty; but nothing further. There the parties owned adjoining lands, and had built a party-wall at joint expense, one half on the land of each. The plaintiff subsequently raised the wall higher than it had formerly been, for the purpose of adding to the buildings on his side; and it was for tearing down this addition to the old wall that the action of trespass was brought and sustained, for that half of the new wall which was over or upon the plaintiff's land. But the right to tear down a ruinous party-wall was not in question in the case, and it therefore throws no light on the subject.

The appellants' counsel concede that the defendants would have the right, in case of a party-wall out of repair, to enter upon it for the purpose of repair. I think rebuilding it in case of necessity for so thorough a work is repairing it, within the proper meaning of that term.

The defendants claim that the party-wall was in so dangerous a state that they had the right to abate it as a private nuisance. But I doubt whether the law applicable to the subject would warrant them in tearing down the archway, or digging into the foundation: *Jones* v. *Williams*, 11 Mee. & W. 176; *Adams* v. *Rivers*, 11 Barb. 390. I do not place my opinion on that branch of the defense.

The appellants ask for a new trial for the improper admission of evidence, which was objected to by him. But the evidence was strictly admissible, as tending to prove that the work was done with the least possible damage to the plaintiffs' business, and the reasons therefor.

The questions propounded to the jury were so framed as to cover all the material issues between the parties, and the responses to them by the jury were equivalent to a special verdict. There was no error in this respect, and the judgment should be affirmed.

DENIO, C. J. There is no question in this case as to the right of way between the two stores, by which access to the ground in the rear was provided for when the buildings were erected. The passage was closed long before the plaintiffs became lessees. No such right of way was demised to them, and they cannot, and do not, make any complaint for having been deprived of it. The same remark is true as to the trespass, if it was a trespass, committed by the defendants in placing the new wall in part upon land which did not belong to them, but which was the freehold of Surget, the adjoining proprietor. If they had no right to do this under the circumstances, as against

Digitized by Google

Surget, the plaintiffs' landlord, still the plaintiffs were not injured. The new wall was upon the precise site of the one which existed when the plaintiffs took their lease. Besides, there is reason to infer from the evidence that there was a mutual understanding between the defendants and Surget as to the situation of the new wall; for he is found co-operating with them in renewing the old one by erecting the temporary partition; and he soon after rebuilt his own store, making use of the new wall for its support. In regard to the injury for which the action is brought, to wit, the damage to their goods and the interruption of their business, the plaintiffs are in the same situation which their landlord would have been if he had occupied the store instead of leasing it, and had sustained the damages complained of without having consented to what the defendants did. The first question then is, What were the rights and duties of these respective proprietors as to the wall in question as between each other, after Smith, the proprietor of the whole land on which both buildings were situated, conveyed the easterly lot, which was afterwards leased to the plaintiffs? The building upon that lot was supported by the arch and the common wall between the two buildings. The conveyance, as it embraced just half the original lot, bounded the grantee by the middle of the arch and the center of the wall. It is to be presumed that the wall was then sufficiently strong to answer the purposes for which it was built, and that both edifices were in a tenantable condition.

It would seem to be clear, upon the most obvious principles of justice, that Smith could not, as against his grantee, have immediately taken down the wall, and thus have deprived the building on the lot he had conveyed of its support. He could not cut the wall through the center and take down the part which stood upon his own land. This would have destroyed the whole wall as effectually as though he had professedly taken down the whole. There is a late case in the English court of exchequer precisely in point. One Halliday held a mortgage containing a power of sale upon two houses, which had been built at the same time, and adjoined each other. Upon a sale under the power, the plaintiff purchased one of the houses, which was conveyed to him. The defendant purchased the other house under the same power, and took a conveyance of a subsequent date. The defendant, in excavating for a sewer upon his own premises, caused the walls of the plaintiff's house to give way, and the action was brought for this injury, and the plaintiff recovered a

Digitized by Google

verdict. Parke, B., interrupted the defendant's counsel on the motion for a new trial with the inquiry, "Did not the mortgagee by making one assignment before the other, in effect grant a right of support?" The counsel controverted the position. The verdict was sustained; the opinion of the court being given by Pollock, C. B. He said: "It seems to be clear that where a number of houses are built upon a plat of ground, all the houses belonging to the same person being all built together, and each obviously requiring the mutual support of its neighbors for their common protection and security, such right of mutual support equally exists, whether the owner parts first with one house and then with the other, or with two together; the ownership of the latter being afterwards divided, either by sale, mortgage, devise, or by any other means. . . . . It seems to be purely a matter of common sense that the possessors are not to be deprived of that mutual support, and that a person in possession of one of the houses shall not be permitted to say to his neighbors, 'You are not entitled to the protection of my house; I will pull it down to the ground, and let the houses on each side of it collapse, and fall into the ruins:'" *Richards* v. *Rose*, 9 Exch. 218; S. C., 24 Eng. L. & Eq. 406. In *Brown* v. *Windsor*, 1 Cromp. & J. 20, the plaintiff had built his house against the defendant's by his express permission, and had enjoyed the easement twenty-six years. Then the defendant, in undermining his own wall, injured the plaintiff's house. It was held that the plaintiff could sustain an action. It was considered that the plaintiff had established an easement for the support of his wall, by express agreement made when the house was erected, and also by prescription. These authorities are sufficient to show that, as the law is understood in England, the plaintiff's original right to the support of the store by the common wall was complete; and I am not aware of any authority to the contrary in this state or elsewhere.

It does not follow from what has been said that in every case where one building requires the support of another which it adjoins, and they belong to different owners, there is an easement for support in favor of the former against the latter. The rule is otherwise. In *Peyton* v. *Mayor etc. of London*, 9 Barn. & Cress. 725, the defendant was sued for taking down his own house without using any precautions to prevent the plaintiff's, which adjoined it, from falling, in consequence of which the plaintiff's house was injured, and in part fell down. It was not shown that the plaintiff was entitled to have his house sup-

Digitized by Google

ported by the defendant's house. Lord Tenterden, before whom the case was tried, was of opinion that it was the duty of the plaintiff to support his own house; and accordingly directed a nonsuit, which was sustained by the court of king's bench. This is analogous to the doctrine that a man may, in general, do what he will on his own land, so that he do not affect the adjoining premises of his neighbor, in their natural state: *Lasala* v. *Holbrook*, 4 Paige, 169 [25 Am. Dec. 524]; *Radcliff's Ex'r* v. *Mayor etc. of Brooklyn*, 4 N. Y. 195 [53 Am. Dec. 357]; *Panton* v. *Holland*, 17 Johns. 92 [8 Am. Dec. 369]; *Wyatt* v. *Harrison*, 3 Barn. & Adol. 871; *Farrand* v. *Marshall*, 21 Barb. 409. But if a person digging on his own land, or taking down an adjoining house, does the work so negligently that his neighbor's premises are thereby injured, an action lies: Id.; and *Walters* v. *Pfeil*, 1 Moo. & M. 362. So if the owner of a building not subject to an easement for the support of an adjoining building, but which actually supports to any extent such adjoining building, takes his own structure down without giving timely notice to the adjoining proprietor, so as to enable him to protect his building, and damages result, the former is responsible: *Peyton* v. *Mayor etc. of London*, *supra*; *Lasala* v. *Holbrook*, *supra*.

In this case, we hold that the owner of the building occupied by the plaintiffs was entitled to have it supported by the common wall while that wall remained in a condition to uphold it. But the jury have found that the wall, and the arch on which it stood, were so decayed and ruinous that a just regard to the safety of life and property rendered their removal necessary, and that the buildings, on that account, were not safe to be occupied for stores for the year ensuing the time the defendants commenced their wall. They have also found, what seems quite obvious, that the wall could not be split through the center, so as to leave the half which was on the plaintiffs' lot standing after the other half was taken down; and that the outer walls and the interior structure of the defendants' store could not be taken down without prostrating the wall. What, then, is the law in such a case? Must the party who is ready to rebuild await the actual falling down of his store, if the adjoining owner is unwilling, or, from having parted with the possession of his property for a term, is unable to join in rebuilding the wall? This position would be highly unreasonable, and it is not sustained by any authority.

In a case like this in all its material features, Chancellor Kent decided that the devisee of the party who had stood out against

Digitized by Google

having the old wall taken down was bound, in equity, to pay one half of the cost of the new wall to the owner of the adjoining building, who had erected it. This was going further than is required to sustain the defendants in this case. The decision, of course, includes the establishment of the right of the plaintiff to take down the old and erect the new wall; for if that was an illegal act, no claim to contribution would have arisen out of it. The learned chancellor accordingly quotes Pothier to show that no action would lie for the inconvenience occasioned to the party who refused to unite in rebuilding the wall, as follows: "If I necessarily deprive my neighbor of the profits of his business, arising from the use of his side of the wall, during the time of the repair of the party-wall, I am not bound to indemnify him for his loss, because I am only in the exercise of a lawful right, unless I consume unnecessary time in the construction of the wall." So Domat, in treating of "services," lays it down that where it is necessary to rebuild a wall which serves for bearing a building or supporting anything belonging to another person, he who is owner of the wall, or who ought to maintain it in good condition, will be liable only for the charges necessary to repair the wall; and whatever is laid out, either in demolishing that which rested on the wall or in supporting it, will be borne by the person who had the right to rest the said thing on the wall: Domat's Civil Law, b. 1, tit. 12, sec. 5.

I have noticed these authorities, not because I conceive that the subject of division walls is regulated in this country by the civil law, but to show that even by applying these principles, which are quite as favorable to parties claiming services upon the lands of others as the common law, the defendants would not, upon the facts found, have been liable to an action for taking down this wall.

My view of the rights of these parties is this: Each had a title to the soil to the division line, which was the center of the arch and wall; but this title was qualified by the easement which each owner had of supporting his building by means of the common wall. As the half of the wall standing on the land of the owner would not alone afford the requisite support, because the whole of the arch and the entire thickness of the wall was required for that purpose, the law gave him an interest in the nature of an easement, in the part of the wall standing on the land of the other party. This right existed as long as the wall continued to be sufficient for that purpose, and the respective buildings remained in a condition to need and to enjoy that sup-

Digitized by Google

port. When this ceased to be the case, and it became necessary to take down the wall and rebuild the stores, either the interest of each proprietor in the land of the other ceased with the existence of the state of things which had created it, or each was entitled to call upon the other to contribute towards rebuilding the wall on the same site, and in case of his default to build it himself, and call upon the other owner to reimburse him one half of the expense. The view of Chancellor Kent was, that the mutual rights of the several owners against each other continued, and that either might rebuild in case the other refused to co-operate, and claim contribution from the defaulting owner. In a case which was determined in the superior court of New York, that court held that the mutual easement ceased with the destruction of the buildings and the wall by fire, and that the respective parties were remitted to their original unqualified title to the division line: *Sherred* v. *Cisco*, 4 Sandf. 480.

I do not perceive any solid distinction between a total destruction of the wall and buildings and a state of things which should require the whole to be rebuilt from the foundation. In either case there is great force in saying that the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land, without any obligation to accommodate the other. Circumstances may have materially changed since the adjoining proprietors were content with such walls as would have supported two adjoining dwellings. If the right of mutual support continues by means of the original arrangement, or by prescription, it is for just such an easement as was originally conceded, or which has been established by long enjoyment. But in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions, and an entirely different character, would be required. And it might happen, too, that the views of one of the proprietors, as to the value and extent of the new buildings, would essentially differ from those of the other; and the division wall which would suit one of them would be inapplicable to the objects of the other. If it were necessary to determine this point in this case, I should be strongly inclined to adopt the views of the late Judge Sandford, in delivering the opinion of the superior court in the case just cited. But it is unnecessary, and might be improper, to pass upon that important practical question in this case; for, it being distinctly found that this wall and these old buildings were no longer fit to stand, the defendants violated no right which

Digitized by Google

existed in the adjoining proprietors in taking down their own building. This made it absolutely necessary to take down the wall. It would have fallen of itself if the defendants had not directly disturbed anything beyond their own premises. It was a benefit and not an injury to the plaintiffs that the defendants carefully took down the wall instead of suffering it to fall by its own weight. They gave them timely notice to provide for the security of their property. Although they have suffered damages, it is not owing to any wrongful act of the defendants, but to the misfortune of the plaintiffs in occupying a building which, if not actually untenantable, adjoined a wall and another building which were so far dilapidated that they required to be taken down. If the mutual easement for support had ceased, the plaintiffs could not call upon the defendants to erect another wall. Their resort, if they had any, would be against their own landlord. But the defendants did provide a new wall, which, when completed, furnished the support of which the plaintiffs had been temporarily deprived. If the right continued for each of the proprietors to call upon the other to join in building a new wall, still the plaintiffs have no ground for complaint; for the defendants have committed no breach of their obligation in that respect. Either with or without the co-operation of the plaintiffs' landlord, the defendants have erected a new wall, as beneficial, at least, for the plaintiffs' purposes as the old one was in its best estate. Due notice was given to the plaintiffs of what the defendants were about to do. There was no unnecessary delay in completing the work, and no want of care or skill in its execution.

The result of these views is, that the merits of case were correctly adjudged in the supreme court.

The manner of submitting the questions to the jury was not objectionable upon any point to which an objection was taken. The propositions which the judge propounded were those naturally arising upon the pleadings and proofs; they embraced the points which the defendants' counsel proposed in the substitute which they submitted; and the settlement of the form and language in which the submission was to be made was in the discretion of the judge. In point of form, there should have been a general verdict, or the finding of the jury should have been put in the form of a special verdict. It was in substance a special verdict; for, taken in connection with the facts admitted by the pleadings, it contained everything material to sustain the judgment. I do not find that any other exception

Digitized by Google

was taken to the form adopted in disposing of the case, though the defendants did except to what the judge held to be the legal result of the finding.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

PARTY-WALLS: See *Abrahams* v. *Krautler*, 66 Am. Dec. 693; *Jenkins* v. *Spooner*, 52 Id. 739; *Bisquay* v. *Jeunelot*, 44 Id. 483; *Richart* v. *Scott*, 32 Id. 779; *Campbell* v. *Mesier*, 8 Id. 570. The owner of a party-wall cannot pare off the part of the wall on his own land so as to render the remainder insufficient or unsafe: *Nash* v. *Kemp*, 49 How. Pr. 531. Neither party is allowed to do acts which in effect tend to destroy the character of the structure as a party-wall: *Phillips* v. *Bordman*, 4 Allen, 150. If a party-wall has become so dilapidated as to be unsafe, the owner of one of the adjoining buildings has a right to replace it, and in doing so is not liable for damages: *Schile* v. *Brokhahus*, 80 N. Y. 618. The owners of a party-wall continue to own the land, as before the building of the wall, in severalty: *Cole* v. *Hughes*, 54 Id. 448; *Ingals* v. *Plamondon*, 75 Ill. 123. And the land not used for or required by the party-wall cannot be employed by a party merely for the purpose of extending a brown-stone facing over it: *Nash* v. *Kemp*, 12 Hun, 597. There is no solid distinction between the total destruction of a party-wall and building, and a state of things which would require the whole to be rebuilt from the foundation: *Pierce* v. *Dyer*, 109 Mass. 377. The principal case is cited in support of all of the above propositions. It was said in *Brooks* v. *Curtis*, 50 N. Y. 643, that the question of the right to make the foundations of a new party-wall deeper, and the new wall itself higher, than the old one, was not discussed in the principal case.

PEOPLE *v.* MCCANN.

[16 NEW YORK, 58.]

PROVISIONS OF GENERAL NATURE IN LOCAL STATUTE NOT INDICATED IN TITLE are valid notwithstanding a constitutional requirement that every local bill shall embrace but one subject, which shall be expressed in the title; as, in case of provisions relating to courts throughout the state contained in a statute entitled "An act to enlarge the jurisdiction of the courts" of a particular locality.

CHARACTER OF EVERY STATUTE IS DETERMINED BY PROVISIONS, AND NOT BY TITLE, for the purpose of ascertaining whether it is general or local.

NEW YORK ACT OF 1855, AUTHORIZING COURTS OF OYER AND TERMINER TO GRANT NEW TRIAL, ALTHOUGH NO EXCEPTION WAS TAKEN BELOW, does not require such court to reverse for every error which would be the subject of an exception, but only when satisfied that the verdict is against law or evidence, or that justice requires a new trial.

UNDER SAID ACT, in ordinary cases, the court cannot determine that such is the character of the verdict, unless the whole evidence is brought up. Yet if the charge is erroneous on a point of law fundamental to the de-

Digitized by Google

fense, and the conviction appears to have been founded on that error, a reversal is proper, although the whole evidence is not before the court, and no exception was taken.

BURDEN OF PROOF OF INSANITY IN CRIMINAL CASE IS ON DEFENDANT, but a preponderance of evidence is sufficient to establish it, and an instruction that it must be proved beyond a reasonable doubt is erroneous. *Per* Bowen, J.

SANITY IS ELEMENT IN CRIME OF MURDER, AND MUST BE PROVED by the prosecution. To charge that, sanity being the normal state, there is no presumption of insanity, but the burden of proving it is upon the prisoner, is error; the prisoner is entitled to the benefit of any reasonable doubt of his sanity. *Per* Brown, J.

WRIT of error to revise a conviction of murder. The prisoner was tried for killing his wife, and was convicted notwithstanding a defense of insanity, under a charge by the judge that the burden of proving insanity was on the defense. His counsel brought error, and as the charge had not been excepted to, asked for a new trial under laws of 1855, 615, c. 337, authorizing the granting of a new trial in cases punishable by death or imprisonment for life, although no exception was taken. But the supreme court held the statute unconstitutional, and sustained the charge. The defendant then sued out a writ of error from this court. For the charge given by the judge on the trial, see 15 How. Pr. 518. For the argument and opinions in the supreme court, see 3 Park. Cr. 272.

Lyman Tremain and Rufus W. Peckham, for the plaintiff in error.

Hamilton Harris, for the defendants in error.

By Court, BOWEN, J. On the trial of the prisoner, the presiding justice charged the jury, among other things, as follows: "The fact of the killing is admitted; that the act was done by the prisoner is not disputed; thus the issue is really reversed from the usual one. The question of his insanity is matter of positive defense, to be affirmatively proved; a failure to prove it is (like the failure to prove any other fact) the misfortune of the party attempting to make the proof; and in this case, as in all cases of fact, you are not to presume what has not been proved, under the distinctions and upon the principles already given you. The act being plainly committed, and that the prisoner did it being undoubted, and the defense set up on his part that he was insane, the burden of the proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted; but as sanity is the

Digitized by Google

natural state, there is no presumption of insanity, and the defense must be proved beyond a reasonable doubt. If (canvassing the whole evidence on the legal principle laid down in the charge) the prisoner has satisfied you so far beyond a reasonable doubt that you find that he was at the time of the killing so far really insane as not to be responsible (under the distinctions stated to you) for this particular act, you acquit; otherwise you cannot."

No exception was taken to any part of the charge to the jury; but it is claimed by the prisoner's counsel that, by virtue of the provisions of the act of May 12, 1855, Laws of 1855, 613, the whole charge is before the court for review on the writ of error; and that if any part of it is found to be erroneous, the judgment must be reversed for that cause. The third section of the act provides that "every conviction for a capital offense, or for one punishable as a minimum punishment by imprisonment in state prison for life, shall be brought before the supreme court and court of appeals from the courts of oyer and terminer of this state, or from the courts of general sessions of the peace in and for the city and county of New York, by a writ of error with a stay of proceedings as matter of right. And the said appellate court may order a new trial, if it shall be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall be taken or not in the court below." The title of this act is, "An act to enlarge the jurisdiction of the courts of general and special sessions of the peace in and for the city and county of New York;" and the whole act relates exclusively to the courts mentioned in the title and the courts of oyer and terminer of the city of New York, except the third section. It is claimed that the act contravenes the section of the constitution of this state, art. 3, sec. 16, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title," and is therefore void. So far as the provisions of the act regulate, or were intended to regulate, the proceedings in courts of oyer and terminer in the state generally, the subject of it is not expressed in the title. But those provisions are neither local nor private, and had the act contained no other, and yet been passed with its present title, or without any title, it clearly would not have come within the constitutional prohibition; and the question is, Are these provisions rendered void by reason of their being contained in the same act with other

Digitized by Google

provisions of local application, the title to the act referring only to the latter provisions? I think not. The act, so far as its provisions relate to the courts of oyer and terminer of the state generally, is a public act of general application, and is therefore not within the prohibition. It is not to be deemed a private or local act because its title so indicates. The character of it is to be determined by its provisions, and not its title.

But the court of review is not required by the act to reverse the judgment in a capital case for every error committed upon the trial which would be the subject of an exception. It is only when the court is satisfied that the verdict is against the weight of evidence or against law, or where justice requires it, that the judgment is to be reversed.

When an erroneous ruling or an erroneous charge is excepted to, the judgment is reversed, unless the appellate court is satisfied that the party could not have been prejudiced thereby; but this act requires a reversal only where the court is satisfied that the party has been actually prejudiced; and I do not see how the court can ordinarily be thus satisfied, unless upon a review of the whole evidence introduced upon the trial, a very small portion of which is before us in this case.

The prisoner's counsel, however, complain of that part of the charge in which the jury were instructed, in effect, that unless they were satisfied beyond a reasonable doubt that the prisoner was insane at the time of the homicide, he was not entitled to a verdict of acquittal on that ground. If this part of the charge was erroneous, I think it must be held that the verdict was, in the language of the statute, "against law." That the deceased died from blows inflicted by the prisoner was not disputed upon the trial, the only defense interposed being insanity; and as evidence was introduced tending to substantiate the defense, the verdict should have been predicated upon correct legal rules applicable to such defense.

It is a general rule, applicable to all criminal trials, that to warrant a conviction the evidence should satisfy the jury of the defendant's guilt beyond a reasonable doubt; and it has been held that there is a distinction in this respect between civil and criminal cases. This rule is based upon the presumption of innocence, which always exists in favor of every individual charged with the commission of a crime. It is also a rule, well-established by authority, that where, in a criminal case, insanity is set up as a defense, the burden of proving the defense is with the defendant, as the law presumes every man to be sane. But

Digitized by Google

I apprehend that the same evidence will establish the defense which would prove insanity in a civil case. The rule requiring the evidence to satisfy the jury beyond a reasonable doubt is one in favor of the individual on trial charged with crime, and is applicable only to the general conclusion, from the whole evidence, of guilty or not guilty.

In *State* v. *Spencer*, 21 N. J. L. 196, Chief Justice Hornblower laid down the rule that, in order to acquit a person on the ground of insanity, the proof of insanity, at the time of committing the act, ought to be as clear and satisfactory as the proof of committing the act ought to be in order to find a sane man guilty.

But with all due deference, I think the rule is incorrect in principle, and contrary to the ancient authorities, especially if, as is said by elementary writers, a jury is authorized to find a fact, when the effect will be to charge an individual with a debt, from evidence less satisfactory than when it will convict him of a crime.

In *Commonwealth* v. *Kimball*, 24 Pick. 366 [35 Am. Dec. 326], it was held that a charge in a criminal case, that when the government had made out a *prima facie* case it was incumbent upon the defendant to restore himself to that presumption of innocence in which he was at the commencement of the trial, was erroneous, and that the instruction should have been that the burden of proof was upon the commonwealth to prove the guilt of the defendant, and that he was to be presumed to be innocent unless the whole evidence in the case satisfied them he was guilty.

In *Commonwealth* v. *Rogers*, 7 Met. 500 [41 Am. Dec. 458], the defendant was tried on an indictment for murder, and insanity was set up as a defense; and after the jury had retired to consider of their verdict, they returned into court to inquire whether they must be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal. The chief justice, in reply, instructed them that if the preponderance of the evidence was in favor of the insanity of the prisoner, they would be authorized to find him insane.

In *Commonwealth* v. *York*, 7 Boston L. R. 510, the defendant was tried for homicide; and in answer to a question from the jury whether it was for the prisoner to prove provocation, or mutual combat, and whether he was to have the benefit of any doubts upon that subject, the judge who presided at the trial said in reply, among other things, "that the rule of law is,

Digitized by Google

when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder, and that the proof of matter of excuse or extenuation lies on the accused; . . . . but when there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact upon which the excuse or extenuation depends, according to the preponderance of evidence."

I think the part of the charge complained of is erroneous, and that, although no exception was taken, the error is such that, under the provisions of the statute above referred to, the judgment should be reversed for that cause; and if I am right in the above conclusion, it is unnecessary to consider the other questions in the case.

All the judges concurred.

Judgment reversed and new trial ordered.

BROWN, J., also delivered an opinion in favor of reversal. He stated, in substance, that he could not assent to the doctrine laid down in the charge in the court below with respect to the burden and weight of evidence of insanity in criminal cases, and that the trial judge had treated the condition of the prisoner's mind, as to sanity, as a thing distinct from the act constituting the crime, and as in the nature of an affirmative defense by the prisoner, like those defenses in civil actions which admit the cause of action, and allege it to have been determined by matter subsequent. After giving a summary of the charge, he said that it was strictly applicable to the defense of insanity in civil, but not in criminal, cases. He admitted that sanity was the normal mental condition, and that insanity was not to be presumed; but he denied that the burden of proof shifted in a murder case where the killing was admitted, and the defense of insanity was set up, and insisted that it was still necessary for the prosecution to show all the essential constituents of the offense, including the *malum animum*. He denied, also, the doctrine of the court below, that homicide was *per se* criminal, although he admitted that the presumption was that it was so, and that the killing being conceded, the law presumed sufficient understanding and malice. But he said they must exist as facts to constitute the offense, since they were of the essence of it, and the jury must believe them to exist, and the presumption of their existence was a mere rule of evidence. He said that proof must be carefully distinguished from burden of proof, which he defined as the obligation imposed upon a party alleging a fact to prove it. It might be proved by ordinary evidence, or, in some cases, presumed, but in either case must be established by the party asserting it. If presumed, the presumption might be rebutted; and if the rebuttal left the fact doubtful, the party alleging it must suffer. Sound memory and discretion, a vicious will, being essential to the crime of murder, the prosecution must establish them. The vicious act and vicious will must concur to make out the crime: 4 Bla. Com. 21. If either was wanting, there was no murder or manslaughter. If there was a doubt as to the vicious act,

Digitized by Google

the killing, the prisoner must have the benefit of it. So if there was a doubt as to the vicious will, why should the prisoner be deprived of the benefit of it? If the understanding is deficient, the will and act do not concur; because if there is no understanding, there is no choice; and if there is no choice, the will, being but the determination of the choice, cannot act. Lord Coke's definition of murder, which, with some slight modifications, is the statutory definition, is: "When a person of sound memory and discrimination unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied:" 3 Co. Inst. 47. "Every member of this sentence," the learned justice continued, "is of the weightiest import in determining the constituents of the crime." He proceeded, then, to analyze the definition, and to show that each member described an essential element in the complete crime. Every one of them, therefore, must be proved or presumed in order to convict, each of them being a part of the primary case of the prosecution to be established beyond a reasonable doubt. Though the law presumes malice from the killing, yet if the evidence leaves it doubtful whether the act was intentional or accidental, should not the accused have the benefit of it? And is he not entitled to the same benefit upon the question of his sanity? If he was not sane when the act was done, he is no more responsible for it than for the act of another man. The cases under the license laws, and under the English game-laws where the doubt is as to the license, or the necessary qualifications, his honor thought not to be analogous to the present case. These matters relied upon in those cases as a defense were entirely separate from and independent of the act constituting the offense. Commenting upon *Commonwealth* v. *York*, 9 Met. 93, S. C., 43 Am. Dec. 373, and *Commonwealth* v. *Rogers*, 7 Met. 500, S. C., 41 Am. Dec. 458, the learned justice declared them irreconcilable in principle, the reasoning of the latter case being utterly unsound, since the defense of insanity was not a confession and avoidance, as there stated, but an absolute denial of capacity to commit crime. Quoting the answer of the judges, as given by Tindal, C. J., in *McNaughton's Case*, 47 Eng. Com. L. 131, he said it did not dispose of the question, and though valuable, it furnished no guide when the question of insanity was shrouded in doubt. He declared, also, that what was said by Hornblower, C. J., in *State* v. *Spencer*, 21 N. J. L. 196, was inconsistent with itself; the result of it, however, seemed to be, that the jury are to be governed by the degree of uncertainty in which the proof leaves the question of insanity. His honor further remarked that the observations of the eminent judges in the cases referred to should doubtless be received with great respect, but would be entitled to greater weight if it appeared that "their attention was directed to the circumstance that, notwithstanding the legal presumption, the sanity of the prisoner's mind is, under all the definitions of the crime, to be made out affirmatively upon the trial as a part of the case for the prosecution." He concluded that there was error in the charge of the court below, and a new trial should be awarded, if his brethren saw no objection to the form in which the question had been brought up under the statute, he not having been able to examine that subject.

CONSTITUTIONALITY OF STATUTES EMBRACING SUBJECTS NOT EXPRESSED IN TITLE.—This subject is discussed in the note to *Davis* v. *State*, 61 Am. Dec. 337-346. See also *Belleville etc. R. R. Co.* v. *Gregory*, 58 Id. 589; *Santo* v. *State*, 63 Id. 487, and note. The principal case is cited in many subsequent decisions in New York as an authority upon the construction and effect of the constitutional provision of that state upon this subject. Thus is it cited in *People* v. *Common Council of Brooklyn*, 13 Abb. Pr., N. S., 126;

Digitized by Google

Murray v. *Mayor etc. of New York*, 11 Jones & S. 167; and *Smith* v. *Mayor etc. of New York*, 7 Robt. 194; S. C., 34 How. Pr. 511, to the point that generally provisions on a subject of a local nature contained in a local statute, but not expressed in its title, are void. But where the bill, though local in its main features, contains provisions of a general nature not expressed in its title, it is well settled, upon the authority of the principal case, that these latter provisions are valid: *People* v. *Stevens*, 2 Abb. Pr., N. S., 351; S. C., 51 How. Pr. 146; *Bretz* v. *Mayor etc. of New York*, 4 Abb. Pr., N. S., 260; S. C., 35 How. Pr. 136; S. C., 6 Robt. 331; *Lewenthal* v. *Mayor etc. of New York*, 61 Barb. 521; S. C., 5 Lans. 534; *People* v. *Morgan*, 65 Barb. 486; S. C., 1 Thomp. & C. 111; *Fall Brook Coal Co.* v. *Lynch*, 47 How. 522; *McLain* v. *Mayor etc. of New York*, 3 Daley, 134; *Fellows* v. *Mayor etc. of New York*, 8 Hun, 489; *Richards* v. *Richards*, 14 Id. 28; S. C. in court of appeals, 76 N. Y. 189; *Murray* v. *Mayor etc. of New York*, 11 Jones & S. 167; *Baldwin* v. *Mayor etc. of New York*, 2 Keyes, 409, *per* Hunt, J., dissenting; *Williams* v. *People*, 24 N. Y. 407; *People* v. *Supervisors of Chautauqua Co.*, 43 Id. 13. So, where such general provisions are contained in the charter of a corporation: *Fall Brook Coal Co.* v. *Lynch*, 47 How. Pr. 522. It seems that local exceptions in a general statute, though not indicated in the title, are valid, but if not, they do not avoid the whole act, but are simply themselves inoperative: *In re New York Railway Co.*, 7 Hun, 240. But in *People* v. *Supervisors of Chautauqua Co.*, 43 N. Y. 13, Folger, J., speaking for the court, while admitting, on the authority of the principal case, that general provisions contained in a local statute and not referred to in the title are nevertheless valid, refused to concede that the joining of two subjects in a bill, one public or general, and one private or local, will save the private matter from conflicting with that clause of the section of the constitution which prohibits a private bill from embracing more than one subject. Where an act contains distinct matter not expressed in the title, it is not void entirely, but is valid as to what is expressed: *In re De Vancene*, 31 How. Pr. 341. Distinct provisions of a bill need not be embraced in the title, but only distinct subjects: *State* v. *Young*, 47 Ind. 168, *per* Buskirk, J., and Downing, C. J., dissenting, citing the principal case. This doctrine is thus expressed in *Central etc. R. R. Co.* v. *Twenty-third St. R. R. Co.*, 54 How. Pr. 179, citing the principal case: "A statute which embodies various different provisions relating to a common subject, and having a natural, although not necessary, connection therewith and with each other, and which by its title so designates the subject of the entire enactment as that neither the legislature nor the public at large is likely to be misled or deceived thereby, is not obnoxious to the constitutional inhibition." So in *Alexander* v. *Bennett*, 6 Jones & S. 498, and *People* v. *Lawrence*, 41 N. Y. 139, it is held, citing the principal case, that the title of an act need not express the details, but the subject only. It was held in *People* v. *Allen*, 42 Id. 418, that the doctrine of the principal case would not support the constitutionality of an "act to incorporate the Schenectady Astronomical Observatory," containing an appropriation of money from the school fund to support the observatory, the latter subject not being expressed in the title. The court distinguished the principal case from the one at bar, on the ground that the "intent was to accomplish a single main object, which was well expressed in the title."

ACT VOID IN PART NOT NECESSARILY VOID IN TOTO: See *Santo* v. *State*, 63 Am. Dec. 487, and note. In *Hurlburt* v. *Banks*, 1 Abb. N. C. 166, S. C., 52 How. Pr. 205, the principal case is cited to the point that though part of an act may be unconstitutional and void, another distinct part not necessarily

Digitized by Google

identified with it may not be, the act being perfect without the unconstitutional provision.

TITLE OF ACT, WHEN RESORTED TO FOR PURPOSE OF CONSTRUING IT: See *Blakeney* v. *Blakeney*, 30 Am. Dec. 574. In *Pumpelly* v. *Village of Oswego*, 45 How. Pr. 244, it is held, citing the principal case, that the title is not to be resorted to where the words of the statute are clear and positive; and generally, that the character of an act, as to its being public or private, or the like, is to be determined by its provisions, and not by its title, the principal case is cited in *McLain* v. *Mayor etc. of New York*, 3 Daly, 34; *Pumpelly* v. *Village of Oswego*, *supra*; *Goodrich* v. *Russell*, 42 N. Y. 184; *People* v. *Hills*, 35 Id. 451.

STATUTE, WHEN DEEMED LOCAL.—All the provisions of an act, it is held, must be local to make the act local: *McLain* v. *Mayor etc. of New York*, 3 Daly, 34. Any law limited to any particular locality is local, irrespective of the population of such locality, whether great or small: *People* v. *O'Brien*, 38 N. Y. 195. An act authorizing the common council of a certain municipality to elect a number of directors of a designated railroad is local, although by its title it is merely an act to amend a certain chapter of the general laws: *People* v. *Hills*, 35 N. Y. 451, all citing the principal case. It is cited also in *People* v. *Davis*, 61 Barb. 463, as not deciding the question whether or not a statute relating to the courts of special sessions of the peace in New York city is a local statute. The court there held that such a statute was not local, because it related to the administration of justice, which is a matter of public concern. Cardozo, J., delivered the opinion. In *Macomber* v. *Mayor etc. of New York*, 17 Abb. Pr. 39, the principal case was referred to as rendering it doubtful whether "an act to enable the supervisors of the city and county of New York to raise a tax" was a local statute.

BURDEN AND SUFFICIENCY OF PROOF RESPECTING INSANITY IN CRIMINAL CASES: See *State* v. *Marler*, 36 Am. Dec. 398; *Commonwealth* v. *Rogers*, 41 Id. 458; *Commonwealth* v. *York*, 43 Id. 373; *Carter* v. *State*, 62 Id. 539, and cases cited in the notes thereto. It is difficult to say just what was determined on this point in the principal case. The views of the two judges who delivered opinions are entirely at variance. They agree only in holding that the accused in a criminal case, relying on insanity as a defense, need not prove it beyond a reasonable doubt in order to secure an acquittal. In citing the case on this point, however, it seems to be generally assumed that the opinion of Brown, J., was the opinion of the court. In *King* v. *State*, 9 Tex. App. 554, the case is cited to the point that the burden of proof of insanity is not on the defendant in a criminal case. It is cited also in *People* v. *Waltz*, 50 How. Pr. 232, and *Polk* v. *State*, 19 Ind. 172, to the point that the burden of proof on that question is on the prosecution, and that to convict, the jury must be satisfied of the prisoner's sanity, beyond a reasonable doubt. In the former of these cases, Westbrook, J., charging the jury, says, after stating that the jury must acquit if they have any reasonable doubt of the prisoner's sanity: "I give the prisoner the full force of that rule in consequence of the case of *People* v. *McCann*, 16 N. Y. 58. Up to that time, as I understand the law to have been in this state, upon the prisoner devolved the burden of proving that he was insane; that the law presumed a person who committed crime to be sane, insanity being a matter of defense to be proven, and proven beyond all doubt. But this case shifts this responsibility, and throws it upon the people. The people must satisfy you beyond all reasonable doubt that the prisoner understood this act; that he had reason, perception, and understanding sufficient to know that the laws of God and the land said he should

Digitized by Google

not do it." Mr. Chief Justice Cooley, in *People* v. *Garbutt*, 17 Mich. 23, refers to the principal case as "clear and satisfactory" on this point, and holds that the prosecution need not offer proof of sanity in the first instance, but may rest upon the presumption of sanity until some evidence to the contrary is introduced; but though the defense must take the initiative, the jury must bear in mind that the burden of proof on this point, as on other parts of the case, is on the prosecution. In *Patterson* v. *People*, 46 Barb. 639, Bacon, J., after stating, in substance, the doctrine of the principal case on this point, as laid down by Brown, J., said that he did not "clearly apprehend nor quite appreciate the course of reasoning by which this conclusion is reached," and declared it opposed to several well-considered cases. But admitting the decision to be sound, he thought it did not warrant the position that, where self-defense was relied on in a murder case, the jury should acquit if they had a reasonable doubt that the defendant in good faith, upon the appearances, apprehended his life to be in danger when he killed the deceased, the two defenses being entirely dissimilar, and that the defendant in that case, to make out his justification, must prove it beyond a reasonable doubt. In *People* v. *Coffman*, 24 Cal. 237, the principal case is cited, and the court, adopting the doctrine of Bowen, J., hold that the burden of proof of insanity in a criminal case is on the defendant, but that no more stringent proof is necessary than in a civil case involving the question of sanity or insanity.

OTHER POINTS TO WHICH PRINCIPAL CASE IS CITED are: That in a capital or other criminal case a mere technical error, not prejudicial to the prisoner, nor affecting any substantial right, is no ground of reversal: *Gardiner* v. *People*, 6 Park. Cr. 190; *People* v. *Gonzalez*, 35 N. Y. 60; see also *McKinney* v. *People*, 43 Am. Dec. 65. That to warrant a conviction in a criminal case the evidence must exclude every reasonable hypothesis of innocence: *People* v. *Schryver*, 42 N. Y. 6; see also *Hipp* v. *State*, 33 Am. Dec. 363; *Sumner* v. *State*, 36 Id. 557; *Commonwealth* v. *York*, 43 Id. 373; *State* v. *Smith*, 54 Id. 578. In *Brotherton* v. *People*, 14 Hun, 486, the case is referred to as an instance of a reversal of a conviction for misdirection to which no exception was taken; but it is said that this depended upon the statute, and is not the general rule.

WILLIAMS *v.* NEW YORK CENTRAL R. R. CO.

[16 NEW YORK, 97.]

DEDICATION OF LAND FOR HIGHWAY DOES NOT PASS FEE, BUT EASEMENT, or right of use only.

APPROPRIATION OF HIGHWAY FOR RAILROAD, without the consent of the owner of the fee, or compensation, is the imposition of an additional burden upon his land, and entitles him to damages and also to an injunction, the injury being continuous in its nature.

APPEAL from a judgment in favor of a railroad company sued for land damages. Prior to 1837 Williams, being owner of lands between what were then the villages of Syracuse and Lodi, which he desired to bring into market as town lots, laid out a highway through them, which was accepted and used as a public street, and ultimately became "Washington street" in the

Digitized by Google

city of Syracuse. The defendant railroad company obtained authority from the legislature, in virtue of the power of eminent domain, to lay its track and run its trains along this street, and proceeded to do so, without making any compensation to Williams as owner of the land. The action was brought to recover damages for such use of the land. The decisions below were in favor of the company (18 Barb. 222), and the landowner appealed.

John Sessions, for the appellant.

Nicholas Hill, for the respondent.

By Court, SELDEN, J. This is a suit in equity, the object of which is to obtain a perpetual injunction restraining the defendants from continuing to use and occupy with their railway a portion of a certain highway or street in the village of Syracuse known as Washington street, and to recover damages for its past occupation. Washington street was gratuitously dedicated to the use of the public by the plaintiff and others, through whose land it was laid; and the Utica and Syracuse Railroad Company, to the rights and liabilities of which the defendants have succeeded, constructed their railway upon it without making any compensation to the plaintiff, and without his consent. At the time the track was laid the plaintiff was the owner of a large number of lots fronting upon the street, a portion of which he has since sold, with a reservation of his claim against the railroad company for damages, and a portion of which he still owns. The damages which have accrued, both upon the sold and unsold portions of the premises, are claimed in this suit.

The defendants, in justification of their occupation of the street, show that the charter of the Utica and Syracuse Railroad Company, Laws of 1836, 319, sec. 11, declares that their road might "intersect" and be built upon any highway, and that this right is confirmed by the general railroad act of 1850.

They also show the express consent of the municipal authorities of the village, as well as of the city of Syracuse, to such occupation. The principal question, therefore, and the only one which I deem it necessary to consider, is whether the state and municipal authorities combined could confer upon the railroad company the right to construct their road upon this street without obtaining the consent of the plaintiff or making him compensation.

If the railway encroaches in any degree upon the plaintiff's proprietary rights, then it is clear that the constitutional inhi-

Digitized by Google

bition, which forbids the taking of private property for public use "without just compensation," applies to the case. It is conceded that by the dedication the public acquired no more than the ordinary easement or right to use the premises as a highway; and that the plaintiff continues the owner in fee in respect to the unsold lots to the center of the street, subject only to this easement; but it is contended that the taking and use of the street by the railroad company does not encroach upon the reserved rights of the plaintiff, because the use of a street for the purposes of a railroad is only "one of the modes of enjoying the public easement."

Before examining this position in the light of principle, it will be well, as the question is one of great importance, to ascertain how far it may be regarded as settled by authority. In doing this, it is indispensable, to avoid confusion, to separate those cases which bear directly upon the question from numerous cases which, although they may appear upon a cursory reading to have some bearing upon the subject, will be found, upon closer examination, to throw no light upon it.

In the first place, then, it should be observed that this case bears no analogy to that class of cases in which the main inquiry is not as to any violation, either direct or consequential, of the corporeal rights of property of the plaintiff, but rather to those incidental injuries which unavoidably result from the construction of railways through the streets of populous towns and villages, such as noise, smoke, frightening of horses, obstruction to the free and convenient use of the street, etc. I will refer to two or three of the cases belonging to this class which might be supposed, unless closely examined, to have something to do with the question.

The case of *Drake* v. *Hudson River R. R. Co.*, 7 Barb. 508, was a suit brought by a number of persons claiming to be owners of lots fronting on Hudson street, in the city of New York, to restrain the defendants from laying down their rails in that street. Although it was alleged in the complaint that the plaintiffs were owners in fee of the soil to the center of the street, and the point was made that the conversion of the street into a railroad track was a violation of their rights of property, yet as the plaintiffs entirely failed to establish any title in themselves to the soil of the street, the question presented here did not and could not arise. Justice Jones, who delivered the leading opinion, says: "The plaintiff can, consequently, have or claim no right or title to the legal estate of the portions of Hudson and

Digitized by Google

Canal streets taken by the corporation of the city by authority of law for the purpose of laying out and forming or opening the same."

Justice Edwards also denied that the plaintiff had any title to the soil of the street. Indeed, no case is likely to arise in the city of New York which would be entitled to any weight in the decision of this question, for the reason that it is claimed, and apparently with much justice, that, as to a large portion of the streets in that city, the fee of the land, and not a mere easement, is vested in the corporation. Judge Hoffman, in his recent work on the corporate powers of the city, after arguing with much clearness and force in favor of the position, says: "In every street, then, opened under the provision of the acts of 1807 and 1813, the fee in the soil is vested in the corporation. It is divested from the original owners:" Hoffman's Treatise, 289.

There are also two cases which have arisen in the city of Brooklyn which it may be well briefly to notice, viz.: *Plant* v. *Long Island R. R. Co.*, 10 Barb. 26; and *Hentz* v. *Long Island R. R. Co.*, 13 Id. 646. In neither of these cases did the question here presented arise. In the first, the defendants, under an authority from the common council of the city of Brooklyn, had constructed a tunnel under the street upon which the plaintiff's premises were situated. The opinion of the court was delivered by Justice Edwards, who, while he argued at some length in favor of the power of city corporations to deal with streets in a way not authorized in respect to highways in the country, nevertheless held that the question now under consideration did not arise, after insisting that it did not appear in the case, but that the plaintiff might have received compensation, he says: "But again, suppose that no compensation has been made to the owners of the adjoining lands, and no consent has been obtained from them, how can the plaintiff take advantage of it in this suit? He does not claim damages for trespass upon land owned or possessed by him, nor for an injury done to the soil in front of his lot. He claims consequential damages for injury alleged to have been done to his business."

In the second, which was a special-term case, Judge Strong, before whom it was heard, cautiously reserves his opinion upon the point before us. After showing that the plaintiff had established no title to the soil of the street, he says: "But if the plaintiff had a full title to the land in question when it was first taken, and if he would then have been entitled to any compensation from the defendants for appropriating it to a species of

Digitized by Google

locomotion different from that for which it had been dedicated or acquired (concerning which it is not necessary that I should give an opinion, nor do I), there is still a serious obstacle in the way of obtaining an injunction."

The case of *Ohio & Lexington R. R. Co.* v. *Applegate*, 8 Dana, 289, having been decided by the highest court in Kentucky, is apparently relied upon; but it clearly belongs to the same class with those already considered. Chief Justice Robertson there discusses the general subject very elaborately, and in a variety of aspects; but, upon careful analysis, it will be found that the only points involved in the case were, whether the railroad was a purpresture, or such an interference with the incorporeal rights or easements appurtenant to the plaintiff's lots, situated upon the street, as constituted it a private nuisance. Indeed, the latter may be considered the only point, as there clearly could be no purpresture when the road was constructed by the express authority of both the municipal and state governments. No such question as that presented in this case could have arisen, because the fee of the land over which the street was laid was regarded as being, not in the plaintiffs, but in the corporation of Louisville. This clearly appears from the language of the chief justice. In one portion of his opinion he says: "Although, therefore, an ordinary public way may be discontinued or applied to some other public purpose than that for which it was first established, without any legal liability for pecuniary compensation to the local public, or to any owner of adjoining lands, because neither such public nor proprietor had any right of property in the way, or any other legal interest in it than that which was common to all the people; and though, also, the mayor and council, holding the legal title to the streets of Louisville in trust, chiefly for public purposes, might regrade and improve those streets," etc.

This extract shows not only that the plaintiffs had no title to the soil, but that they were seeking redress for being deprived of their easement in the street, and that this was the point under consideration by the court.

These cases and others of the same class may be considered as settling the question that a railroad in a populous town is not a nuisance *per se*, and that when the railroad company has acquired the title to the land upon which its road is located, such company, being in the exercise of a lawful right, is not liable unless guilty of some misconduct or negligence for any consequential injuries which may result to others from the operation and use

Digitized by Google

of its road; but they decide nothing whatever in regard to the question to be considered in this case; and it would not have been necessary to notice them at all, were it not that in some of them so many points are discussed, which were not before the court, that without a close examination what is really decided would not readily be seen.

There is also another class of cases in which, although the injury complained of is to the corporeal rights of the plaintiff, yet, being merely consequential, and no direct trespass or unauthorized intrusion upon the plaintiff's property being alleged, the question under consideration here could not arise. Such are cases of *Fletcher* v. *Auburn and Syracuse R. R. Co.*, 25 Wend. 464; *Chapman* v. *Albany and Schenectady R. R. Co.*, 10 Barb. 360. In these and the like cases, the title of the company to the ground on which its road is built is not disputed; it is unnecessary, therefore, to notice them further here.

We come, then, to the consideration of the cases which do bear, with more or less weight, upon the question to be decided, and upon which, so far as authority is concerned, its decision must mainly depend. The first among these cases, in the order of time as well as of importance, is that of *Trustees of the Presbyterian Society of Waterloo* v. *Auburn and Rochester R. R. Co.*, 3 Hill (N. Y.), 567. The declaration was in trespass for entering upon the plaintiff's premises, digging up the soil, and constructing their railroad track upon it. The defense was, that the *locus in quo* was a public highway, and that the charter of the company expressly authorized it to construct its road upon and across any highway. The point, therefore, was presented in the most direct manner possible, and the defense was most emphatically overruled. The language of Chief Justice Nelson is most pertinent and forcible. He says: "But the plaintiffs were not divested of the fee of the land by the laying out of a highway; nor did the public thus acquire any greater interest therein than a right of way, with the powers and privileges incident to that right; such as digging the soil, and using the timber and other materials found within the limits of the road, in a reasonable manner, for the purpose of making and repairing the same. Subject to this easement, and this only, the rights and interests of the owner of the fee remained unimpaired. It is quite clear, therefore, even if the true construction of the eleventh section accords with the view taken by the counsel for the defendants, that the legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes

Digitized by Google

other than those to which it had been originally dedicated, in pursuance of the highway act, without first providing a just compensation therefor."

It was urged in that case, as in this, that using the road for a railway was only a different mode of exercising the right which had been acquired by the people; that the use was virtually the same, viz., that of accommodating the traveling public. But the argument met with no favor from the court. Judge Nelson says: "It was said on the argument that the highway is only used by the defendants for the purposes originally designed, the accommodation of the public, and for this compensation has already been made. This argument might have been used with about the same force in the case of *Sir John Lade* v. *Shephard*, 2 Stra. 1004."

He adds on this subject: "The claim set up [by the defendants] is an easement; not a right of passage to the public, but to the company, who have the exclusive privilege of using the track of the road in their own peculiar manner. The public may travel with them over the track, if they choose to ride in their cars."

This case, decided by our late supreme court upon full consideration and in so emphatic a manner, ought to be conclusive, unless it appears upon principle to be clearly erroneous. It has never been overruled, nor has its force been materially impaired by any decision in this state. The case of *Adams* v. *Saratoga and Washington R. R. Co.*, 11 Barb. 414, might seem, both from the note of the reporter and from some of the remarks of the learned judge who delivered the opinion, to be inconsistent with the case just reviewed; but upon careful examination, it will be found that nothing which was necessarily decided in it conflicts in the slightest degree with that case.

The action was ejectment, to recover portions of a street in the village of Whitehall, called Church street, upon and along which the defendants had constructed their railroad track. Jeremiah Adams, under whom the plaintiff claimed, had originally dedicated the street to the use of the public, laying out lots on each side, all of which he had sold and conveyed to different individuals. The plaintiff's claim rested upon the ground that the title of the purchasers of these lots did not extend to the center of the street. The court, however, rejected this claim, and held that the plaintiff had no title whatever to the land occupied by the defendants' road. This certainly was sufficient to dispose of the case, and all that was said, therefore, upon the question

Digitized by Google

depending here, was strictly *obiter*. The same may be said in regard to the case of *Milhau* v. *Sharp*, 15 Barb. 193. The question did not arise in that case.

We might, therefore, with propriety perhaps, consider the case of *Trustees of the Presbyterian Society of Waterloo* v. *Auburn and Rochester R. R. Co.*, 3 Hill (N. Y.), 567, as definitively settling the point in this state.

I will, however, refer to the case of *Philadelphia and Trenton R. R. Co.*, 6 Whart. 25 [36 Am. Dec. 202], by way of illustrating the reasoning that must be resorted to in order to sustain the right of a railroad company to occupy a highway without making any compensation to the individual owners of the fee. The case came before the supreme court of Pennsylvania, upon exceptions to the report of the jurors or commissioners appointed by the court of quarter sessions of Philadelphia county to designate the route of the road, they having located a part of the road upon and along Front street, in the district of Kensington, a part of the city of Philadelphia.

Exceptions were taken by the commissioners having charge of the streets in Kensington, and also by the individual proprietors of lots on Front street; by the former, on the ground that the location of the road upon the street interfered with the public easement vested in the corporation of the city, and by the individual citizens, on the ground that private property was taken for public use without compensation, contrary to the provision of the state constitution.

The exception of the commissioners is answered by Chief Justice Gibson in this wise: he says: "The legal title to the ground, therefore, remains in him who owned it before the street was laid out; but even that is an immaterial consideration, for an adverse right of soil could not impair the public right of way over it, or prevent the legislature from modifying, abridging, or enlarging its use, whether the title was in a corporation or a stranger." It is unnecessary here to question the soundness of this position, although a doubt might arise whether an easement, which is *quasi* at least a matter of contract, can properly be abridged or enlarged by the legislature. The doctrine may perhaps be true in respect to the streets of a city, so far as the corporation alone is concerned, on the ground that the easement is not for the exclusive benefit of the corporators, but of the whole people, and therefore, that the ultimate trust is in the state government; but that the legislature have the power to enlarge a use, as against the donor or vendor of such use, is a doctrine to which I cannot give my assent.

Digitized by Google

But the chief justice gives a different answer to the exception by the individual proprietors. He says: "What, then, is the interest of an individual inhabitant, as a subject of compensation, under the constitutional injunction that private property be not taken by a corporation for public use without it? Even agreeing that his ground extends to the middle of the street, the public have a right of way over it. Neither the part used for the street nor the part occupied by himself is taken away from him; and as it was dedicated to public use, without restriction, he is not within the benefit of the constitutional prohibition, which extends not to matters of annoyance."

Is this sound doctrine? Is it true that one who dedicates land for a highway, or street, dedicates it to the public use without restriction? I apprehend it is an assumption wholly unfounded, and contrary to a multitude of cases in which it has been held that the public acquire nothing beyond the mere right of passing and repassing upon the highway, and that in all other respects the rights of the original owner remain unimpaired.

I will not dwell longer upon this case, as it will not be seriously, and cannot be successfully, contended either that the dedication of land for a highway gives to the public an unlimited use, or that the legislature have the power to encroach upon the reserved rights of the owner by materially enlarging or changing the nature of the public easement.

The only plausible ground which can be taken is that which was assumed in the case of *Trustees of the Presbyterian Society of Waterloo* v. *Auburn and Rochester R. R. Co.*, 3 Hill (N. Y.), 567, and which has also been assumed here; viz., that to convert a highway into a railroad track is no material change in or enlargement of the uses to which it was originally dedicated; that the construction of a railroad along a highway is simply one of the modes of accomplishing the object of the original dedication; viz., that of creating a thoroughfare and passageway for the public; in short, that the railroad is a species of highway, and that the two uses are substantially identical.

But is this assumption just? Are the two uses the same? If the only difference consisted in the introduction of a new motive power, it would not be material. But is there no distinction between the common right of every man to use upon the road a conveyance of his own at will and the right of a corporation to use its conveyances, to the exclusion of all others?—between the right of a man to travel in his own carriage without pay and

Digitized by Google

the right to travel in the car of a railroad company on paying their price?

It may be said that the use of the road as a common highway is not subverted; that a man may still drive his own carriage upon it. Without pausing to notice the fallacy of this argument, and the impracticability of the enjoyment of such a right where railroad trains are passing and repassing every half-hour, let us look at the subject in another point of view. The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied; nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers, and his iron rails, and make a railroad upon a highway. Here, then, are two easements, one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it is carved out and is a part of the public easement, and is therefore the gift of the public. This would do if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted?

But it is unnecessary to refine upon this case. Any one can see that to convert a common highway, running over a man's land, into a railroad is to impose an additional burden upon the land, and greatly to impair its value. As no compensation has, in this case, been made to the owner, his consent must in some way be shown. The argument is, that as he has consented to the laying out of a highway upon his land, *ergo*, he has consented to the building of a railroad upon it; although one of these benefits his land, renders access to it easy, and enhances its price, while the other makes access to it both difficult and dangerous, and renders it comparatively valueless. Were the transaction between two individuals, every one would see at once the injustice of the conclusion attempted to be drawn. It is the public interest supposed to be involved which begets the difficulty, and it is just for this reason that the constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use without compensation—a provision no less necessary than just, and one which it is the duty of the courts to see honestly and fairly enforced.

Digitized by Google

The case stated by the learned justice who delivered a dissenting opinion in the supreme court is a striking illustration of the injustice that would frequently be done under the rule contended for by the defendants. A street was laid out through a man's land, and he was assessed several hundred dollars for benefits, in addition to the land taken, and before the street was opened, it was taken by a railroad company and converted into the track of their road. The owner lost his land, had to pay several hundred dollars, and had the annoyance of the railroad besides, while the railroad company got the road for nothing.

The case of *Inhabitants of Springfield* v. *Connecticut R. R. R. Co.*, 4 Cush. 63, shows what the supreme court of Massachusetts thought of the argument that the uses are the same. It was insisted there, on the part of the defendants, that the power conferred upon them by the legislature to build their road between certain termini gave them by necessary implication the right to build their track upon any intervening highway. But Chief Justice Shaw, in reply to this argument, says: "The two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated. The whole course of legislation on the subject of railroads is opposed to such a construction."

I concur with the learned chief justice, and have no hesitation in coming to the conclusion that the dedication of land to the use of the public as a highway is not a dedication of it to the use of a railroad company; that the two uses are essentially different; and that consequently a railway cannot be built upon a highway without compensation to the owners of the fee. The legislative provisions on the subject were probably intended, as was intimated in *Trustees of the Presbyterian Society of Waterloo* v. *Auburn and Rochester R. R. Co.*, 3 Hill (N. Y.), 567, to confer the right so far only as the public easement is concerned, leaving the companies to deal with the private rights of individuals in the ordinary mode. If, however, more was intended, the provisions are clearly in conflict with the constitution, and cannot be sustained.

It follows that the defendants, in constructing their road upon Washington street without the consent of the plaintiff, and without any appraisal of his damages or compensation to him in any form, were guilty of an unwarrantable intrusion and trespass upon his property, and that he is entitled to relief. Although he had a remedy at law for the trespass, yet as the tres-

Digitized by Google

pass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold; because, as to those lots, there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit in effect deprives the defendants of the right to have them assessed by a jury. But as this question has not been raised, it is unnecessary to consider it.

The judgment must be reversed, and there must be a new trial, with costs to abide the event.

SHANKLAND, J., read an opinion concurring in the result of the foregoing, and discussing certain questions of evidence which the disposition of the main point, in accordance with his opinion and that of SELDEN, J., rendered it immaterial to decide, and which were, therefore, not passed upon by the court.

COMSTOCK and PAIGE, JJ., took no part in the decision. All the other judges concurred.

Judgment reversed and new trial ordered.

RAILROAD IN STREET, POWER OF STATE TO AUTHORIZE: See *Davis* v. *Mayor etc. of New York*, 67 Am. Dec. 186; *Commonwealth* v. *Erie etc. R. R. Co.*, Id. 471; *Protzman* v. *Indianapolis etc. R. R. Co.*, 68 Id. 650, and cases cited in the notes thereto. The principal case is cited to the following points relating to this subject: The dedication of land for a street or highway does not preclude the owner of the fee from objecting to the construction of a railroad therein, the use of the street or highway for railroad purposes being the imposition of a new burden or easement upon the land, which neither the state nor the municipality can authorize without the consent of the owner of the fee, except upon the terms of making compensation to him in the manner provided by the eminent-domain statutes of the state: *Appeal of North Beach etc. R. R. Co.*, 32 Cal. 510, 511; *Cox* v. *Louisville etc. R. R. Co.*, 48 Ind. 190; *Heath* v. *Barman*, 49 Barb. 498; *New York etc. R. R. Co.* v. *Mayor etc. of New York*, 1 Hilt. 585; *Kelsey* v. *King*, 33 How. Pr. 44, 45; *Matter of New York etc. R. R. Co.*, 15 Hun, 66; *Ford* v. *Chicago etc. R. Co.*, 14 Wis. 616. Such an occupation of a highway by a railroad company is not merely a new use of the public easement therein: *Wager* v. *Troy etc. R. R. Co.*, 25 N. Y. 532; it is a devotion of the highway to a use not common to all travelers, but exclusive in the company: *New York etc. R. R. Co.* v. *Mayor etc. of New York*, 1 Hilt. 585. A statute or ordinance authorizing the construction of a railroad in a street, the fee in which is not in the public, is therefore to be construed merely as a consent to such use with the consent of the abutters owning the fee, or after making compensation to them as provided by law, and the railroad company avails itself of the consent conferred by the statute or ordinance at its peril if the consent of the abutters is not obtained, or if compensation is not made to them: *Indianapolis etc. R. R. Co.*

Digitized by Google

v. *Hartley*, 67 Ill. 445; *Washington Cemetery* v. *Prospect Park etc. R. R. Co.*, 68 N. Y. 397; S. C., 4 Abb. N. C. 22. The interest of an owner of the fee in a highway can be appropriated without his consent only under the eminent-domain statutes: *Matter of Elevated R. R. Co.*, 7 Hun, 240. The abutter injured by such an appropriation, without his consent, of a highway in which he has a fee, may have his action for damages: *Cox* v. *Louisville etc. R. R. Co.*, 48 Ind. 190. Or he may have an injunction against such appropriation of the highway without his consent and without compensation: *Washington Cemetery* v. *Prospect etc. R. R. Co.*, 7 Hun, 656; *Milhau* v. *Sharp*, 27 N. Y. 625; *Henderson* v. *New York etc. R. R. Co.*, 78 Id. 430. The last of the cases above cited was a new hearing of the principal case, the original plaintiff having died, and his administrator and the residuary legatees having been substituted as plaintiffs. The legislature may undoubtedly confer authority to construct a railroad in a street or other highway, if the consent of the owner is obtained, or if compensation is made to him: *Patten* v. *New York Elevated R. R. Co.*, 3 Abb. N. C. 314. And if the fee in the street or highway is in the public, there is no doubt of the power of the legislature to authorize the construction of a railroad therein without the consent of the abutters or compensation to them: *Knox* v. *Mayor etc. of New York*, 55 Barb. 411; S. C., 38 How. Pr. 73; *Patten* v. *New York Elevated R. R. Co.*, 3 Abb. N. C. 345; *People* v. *Kerr*, 20 How. Pr. 137; S. C., 37 Barb. 405; S. C. in court of appeals, 27 N. Y. 192; *Kellinger* v. *Forty-second Street etc. R. R. Co.*, 50 Id. 210, distinguishing the principal case. The case is distinguished on the same point in *Calkins* v. *Bloomfield etc. Gas-light Co.*, 1 Thomp. & C. 548. An abutter on a street having no title to the soil therein has no claim for compensation against a railroad company laying its track there: *Carson* v. *Central R. R. Co.*, 35 Cal. 331.

It was held in several cases in the supreme court of New York that the doctrine of the principal case did not apply to street-railroads whose cars are moved by horse-power, or otherwise than by steam, and that the laying of a track for horse-cars in a public street upon a level with the grade of the street, with the consent of the state or municipality, was not the imposition of a new easement entitling the owner of the fee in the street to compensation: *Brooklyn etc. R. R. Co.* v. *Brooklyn City R. R. Co.*, 33 Barb. 423; *Mason* v. *Brooklyn etc. R. R. Co.*, 35 Id. 376, distinguishing the principal case. But it was subsequently determined that the rule of the principal case applied to horse-car railroads as well as to those whose trains are propelled by steam: *Craig* v. *Rochester etc. R. R. Co.*, 39 Id. 494, 496; S. C. in court of appeals, 39 N. Y. 407, approving and following *Williams* v. *New York Central R. R. Co.*

In *Mahon* v. *New York Central R. R. Co.*, 24 N. Y. 661, it was held, citing the principal case, that where a turnpike company abandoned its road, the legislature could not authorize its transfer to a railroad company without the consent of the owners of the fee or compensation to them. The case is cited also in *People* v. *Cassity*, 2 Lans. 296, to the point that the interest of a railroad company in a street in which its track is located, if lawfully acquired, is a valuable interest in the land itself, distinct from the public easement. So it is cited to the point that where a railroad company is authorized to construct a track, switch, or turn-out in a street, it is error to charge that such construction is a private nuisance: *Carson* v. *Central R. R. Co.*, 35 Cal. 333.

LAND BOUNDED IN TERMS ON STREET OR HIGHWAY extends to the middle of the same if the grantor owns so far: *Paul* v. *Carver*, 67 Am. Dec. 413,

Digitized by Google

and note collecting other cases in this series; *People* v. *Law*, 34 Barb. 501; S. C., 22 How. Pr. 115, citing the principal case; otherwise where the exterior line of the street or highway is specifically designated as the boundary: *White's Bank* v. *Nichols*, 64 N. Y. 75.

INJUNCTIONS AGAINST TRESPASS OR NUISANCE.—As to injunctions against trespass, see *Bird* v. *Wilmington etc. R. R. Co.*, 64 Am. Dec. 739; *Burnley* v. *Cook*, 65 Id. 79, and cases cited in the notes thereto. As to injunctions against nuisances, see *Wolcott* v. *Melick*, 66 Id. 790; *Davis* v. *Mayor etc. of New York*, 67 Id. 186; *Dumesnil* v. *Dupont*, 68 Id. 750, and notes. See, particularly as to injunctions against the construction of railroads in streets or highways, *Davis* v. *Mayor etc. of New York*, *supra*, and note. To the point that injunction is a proper remedy, in case of a continuing trespass or nuisance to prevent a multiplicity of suits, the principal case is cited in *Davis* v. *Lambertson*, 56 Barb. 485; *Hutchins* v. *Smith*, 63 Id. 253; *Johnson* v. *Rochester*, 13 Hun, 285; *McKeon* v. *See*, 51 N. Y. 307. In *Sidener* v. *Norristown etc. Co.*, 23 Ind. 626, and *Merrill* v. *Calkins*, 73 N. Y. 584, the case is cited to the point that an injunction will lie to prevent the taking of land for a railroad or other improvement without making due compensation.

THE PRINCIPAL CASE IS CITED TO OTHER POINTS as follows: Generally, when an owner of land dedicates it to a particular public use not inconsistent with law or public policy, neither the state nor the municipality within which such land lies can divert to another public use, except by the power of eminent domain: *United States* v. *Illinois etc. R. R. Co.*, 2 Biss. 179. The appropriation by a railway company for its track of land dedicated for a park, without the consent of the owner of the fee, or compensation to him, is such a disseisin as will entitle him to recover: *Perrin* v. *New York Central R. R. Co.*, 36 N. Y. 121. When land dedicated for a highway ceases to be used for that purpose, it reverts to the owner of the fee: *Van Amringe* v. *Barnett*, 8 Bosw. 372. But where land appropriated by a private corporation for a plank road is abandoned as such, but is then used as a highway, it is held that this is not such a change of use as to cause the land to revert, both uses being public, distinguishing the principal case: *Heath* v *Barman*, 49 Barb. 498. The right of a railroad company to the soil over which its track runs is held, in *People* v. *Cassity*, 46 N. Y. 49, to be an easement or interest in the land, where it is not the absolute owner, citing the principal case. So it is held that the occupation of land for constructing and maintaining a ditch for the drainage of other lands, pursuant to a statute, does not deprive the owner of the fee, but is the imposition of an easement, entitling him to compensation: *People* v. *Haines*, 49 Id. 590. Upon the authority of the principal case, and others like it, it is held, in *Calkins* v. *Bloomfield etc. Gas-light Co.*, 1 Thomp. & C. 548, affirmed in S. C., 62 N. Y. 386, 388, that a gas company cannot be authorized to lay its pipes in a country highway without the consent of the owner of the fee, and without compensation to him. But it is held that the construction of a sewer in a street for the benefit of the public at large does not entitle the owner of the fee to compensation, distinguishing the principal case: *Kelsey* v. *King*, 32 Barb. 415; S. C., 11 Abb. Pr. 183. A statute authorizing the construction of a railway over a stream, or the like, will not legalize the invasion of private rights: *Robinson* v. *New York etc. R. R. Co.*, 27 Barb. 521. In *San Francisco etc. R. R. Co.* v. *Caldwell*, 31 Cal. 372, the principal case is cited, with others, as to the authority of the legislature to determine whether the benefits to be derived by the public from an improvement are sufficient to justify the exercise of the power of eminent domain in its behalf. In *White's Bank* v. *Nichols*, 64 N. Y. 75, it was held that where

Digitized by Google

a party having an easement in land sought to appropriate it to his exclusive use, the owner was not entitled to an unqualified judgment for the possession in ejectment, but only to a judgment for the possession subject to the easement, and the principal case was distinguished as one in which the defendant was a mere trespasser, having no right in the premises.

AUSTIN v. SEARING.

[16 NEW YORK, 112.]

CONSTITUTION AND BY-LAWS OF VOLUNTARY CHARITABLE ASSOCIATION, such as an Odd-Fellows' lodge, are of no legal validity and effect except as contracts, and are binding only on members who are shown to have personally assented to them.

CONSTITUTION OF GRAND LODGE OF ODD-FELLOWS is not binding on the members of an unincorporated subordinate lodge who are not shown to have subscribed it, unless it is adopted by the constitution of the subordinate lodge which such members have subscribed.

PROVISION FOR FORFEITURE OF PROPERTY OF SUBORDINATE LODGE in the constitution of an Odd-Fellows' grand lodge for misconduct, on the adjudication of the grand lodge, is not binding upon members of an unincorporated subordinate lodge, even though they have assented to it, such provision being against public policy; and an adjudication of forfeiture under such provision will not be enforced by the courts.

WHETHER VOLUNTARY CHARITABLE ASSOCIATION CAN SUE or be sued in the name of its president or treasurer, under the New York statutes of 1849 and 1851, *quære*.

APPEAL from a judgment of the supreme court in favor of the defendants upon demurrer to the complaint in an action brought by the plaintiff, as treasurer of Cayuga Lodge No. 80, Odd-Fellows, to recover certain lodge property. From the complaint it appeared that the plantiff and those for whom he sued, together with the defendants in this action, were formerly members of said lodge. It appeared also that the charter was revoked, after due proceedings in the grand lodge, in accordance with its constitution, and the complaint alleged that the property of the lodge now sued for became thereby divested, and vested in the grand lodge as trustee, to be restored to said lodge if it should be reinstated. That the defendants were at the time of the revocation of the charter officers of the lodge, and as such had control of its property; that the grand master had demanded it of them, but they refused to deliver it; that the charter was afterwards reissued to those whom the plaintiff represented, they not having participated in the insubordination which caused the revocation. It was claimed that they thereby

Digitized by Google

became reinvested with the title to the property. The complaint further charged combination and confederacy to defraud the plaintiff and his associates. The nature and organization of the lodge, of the state grand lodge, and of the grand lodge of the United States, and their relations to each other, were fully set out. Copies of the constitution of the subordinate lodge, and also of the state grand lodge, were annexed to the complaint and made part of it. The demurrer was on the ground of defect of parties, and also because the complaint did not state facts sufficient to constitute a cause of action. Other facts are stated in the opinion of Selden, J.

Benjamin F. Hall, for the appellant.

George Rathbun, for the respondents.

By Court, SELDEN, J. The complaint, upon which the questions in this case arise sets out what appears to be a regular governmental organization, with its constitution and laws, and powers legislative and judicial. The head of this organization is a congress of representatives, called the grand lodge of the United States, which not only legislates for all lodges in the several states, but also exercises judicial powers over them; for the complaint states that the grand lodges of the several states are subject at all times to the resolves, orders, and decrees of the congress of representatives, and are amenable to its constitutional authority. The grand lodges of the several states and districts exercise similar powers. They grant, revoke, and renew charters, make by-laws, and pass judicially upon charges presented against subordinate lodges, expelling or reinstating them at pleasure. These powers extend to the confiscation of the entire property of a subordinate lodge whenever, in the opinion of the grand lodge, upon a case brought regularly before it, it shall satisfactorily appear that such subordinate lodge is guilty of insubordination. Now, all this is very well, so long as the lodges neither violate nor ask any aid from the laws; but it may with propriety be doubted whether the judicial power of the state is to be invoked to uphold and enforce the decrees of these self-constituted judicatories.

It is to be remarked that these lodges are charitable institutions, whose objects commend them extensively to public favor, and that there are four hundred of them in northern New York alone, and being purely voluntary associations, there is of course no limit to the amount of property which they may acquire. If this suit can be maintained, then all this property, however

Digitized by Google

vast, is ultimately controlled, not by any power within the state, but by the grand lodge of the United States; for by the constitution of these lodges, as given in the complaint, it will be seen that on the expulsion of any subordinate lodge (which is a matter resting entirely in the will of the grand lodge of the state or district), the whole property of the lodge expelled is, *ipso facto*, vested in the grand lodge, which is under no obligation to reinstate the lodge or restore the property; and as the grand lodge of the state is bound to obey the decrees of the national lodge, the whole property is thus brought under the control of the latter. This is entirely unobjectionable, so long as submission to these decrees is merely voluntary; but the question is, whether that submission is to be legally and judicially enforced.

Let us see what a chancellor of England said about a case very similar to this. I refer to the case of *Lloyd* v. *Loaring*, 6 Ves. 773. That was a bill filed by Evan Lloyd and two other persons to get possession of the dresses, decorations, books, papers, etc., of a lodge of Freemasons, called the Caledonia Chapter No. 2. The plaintiff stated that this lodge was regularly organized under a charter from the grand or head chapter of Royal Arch Masons; that they were its chief officers, and as such were entitled by virtue of the rules of the society to the charge and custody of the property, etc., which the defendants had forcibly removed. The defendants demurred there, as here, to the bill. The opinion of Lord Chancellor Eldon in that case is so precisely applicable to this that I will make one or two extracts from it. He said: "A bill might be filed for a chattel, the plaintiffs stating themselves to be jointly interested in it with several other persons; but it would be very dangerous to take notice of them as a society having anything of constitution in it. In this bill there is a great affectation of a corporate character. They speak of their laws and constitution, and the original charter by which they were constituted. In *Cullen* v. *Duke of Queensbury*, Lord Thurlow said he would convince the parties that they had no laws and constitutions." And again: "That this court will hold jurisdiction to have a chattel delivered up, I have no doubt; but I am alarmed at the notion that these voluntary societies are to be permitted to state all their laws, forms, and constitutions upon the record, and then to tell the court they are individuals. . . . . The bill states that they subsist under a charter granted by persons who are now dead; and therefore, if this charter cannot be produced, the society is gone. Upon

Digitized by Google

principles of policy, the courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters."

This appears to me to be apt and sensible language in the case in which it was used where the charter, constitution, etc., were barely referred to; but with what increased force does it apply to the case before us, in which we have spread upon the record two formal constitutions, one of which contains fifteen distinct articles, the other eleven, each article being subdivided into a variety of sections, and altogether embracing a complete system of governmental polity. There is, however, no objection to all this, provided we apply to these articles the same rules as to ordinary agreements *inter partes*, and give to them no peculiar force as the constitution and laws of an organized body.

Admitting, then, the action to be well brought in the name of the treasurer, under the act of April 7, 1849, about which I will not stop to inquire, it is clear that the plaintiff can only recover by showing either a legal or equitable title to the property in question in the lodge which he represents, that is, in the associated members of that lodge. How does he show this? It is conceded by the complaint that the property originally belonged to the lodge expelled, of which the defendants were members. The defendants, therefore, were tenants in common, with the plaintiff and his associates, of the property, and had an equal right with them to its custody. It is incumbent on the plaintiff to show a legal transfer of this title. This he assumes to do by showing the expulsion, by the grand lodge, of the old Cayuga lodge, and the restoration of the new. The effect is supposed to be wrought through the operation of the constitutions of the two lodges. But it is obvious that these constitutions can have no binding force whatever, except what they derive from the assent of each individual member. That is, any member, to be bound by them, must have personally assented to their provisions. It is only as contracts that these constitutions are in the least obligatory. The counsel for the plaintiff takes this view of the case in his printed argument. He says: "The court is sitting to judge between individuals as to rights acquired by the contracts between them. It is immaterial whether such contracts are made in the form of subscriptions to general constitutions and by-laws, or to separate articles of agreement."

Viewed, then, as contracts, these constitutions must be subject to the same rules with all other contracts. It must be clearly shown that the defendants have assented to the written constitutions of these lodges.

Digitized by Google

The complaint avers that the members of the present Cayuga lodge "have, each and every one of them, in conformity with the usages and requirements of the order, subscribed to an article of association denominated a constitution, a copy of which is hereunto annexed," etc. There is also a general averment that the grand lodges in the several states have constitutions to which their members are obligated to subscribe, and do subscribe, and that one of these grand lodges is denominated the Grand Lodge of Northern New York, and that this lodge has public and printed articles of association, styled a constitution, a copy of which is thereunto annexed. But there is no averment that this constitution was ever in fact subscribed by anybody, nor does the complaint contain any direct averment that the defendants ever subscribed the constitution of any lodge, either grand or subordinate. The averment relied upon by the plaintiff upon the subject is this: after stating the existence of the original Cayuga lodge, and that the plaintiff and his associates and the defendants were all members of that lodge, the complaint proceeds thus: That, as such members and associates, they had, each and every of them, covenanted with each other to observe, obey, conform to, and abide by the constitution, by-laws, rules, and regulations of the said lodge, and of said Grand Lodge of Northern New York.

Covenanted? How? Under their hands and seals? It is not so averred. There is neither profert nor offer to produce the covenant. Will this do in a legal pleading? I apprehend not. It is altogether too vague.

Again: what constitution did they covanant to observe? The averment says "the constitution, by-laws, etc., of the Cayuga lodge and of said Grand Lodge of Northern New York," but does not set forth the constitutions in this connection, nor give any reference by which they can be identified or their provisions ascertained. We may conjecture that the plaintiff means the same constitutions which are referred to elsewhere in the complaint, but it is not so averred.

If we look at the whole complaint, we shall see that it is not intended to be averred that the defendants ever subscribed the constitution of the grand lodge. This was done only by the members of the grand lodge itself. It is difficult to see, therefore, how the provisions of that instrument are to be made obligatory upon the defendants as a contract. There is nothing in the constitution of the expelled lodge (which probably was subscribed by the defendants, although that is not in terms

Digitized by Google

averred) which adopts the constitution of the grand lodge. It is this latter constitution alone which confers the power by which the property in question is claimed to have been transferred.

But were it distinctly averred that the defendants had subscribed the constitution of the grand as well as of the subordinate lodge, I should still be of the opinion that public policy would not admit of parties binding themselves by such engagements. The effect of some of the provisions of these constitutions is to create a tribunal having power to adjudicate upon the rights of property of all the members of the subordinate lodges, and to transfer that property to others; the members of this tribunal being liable to constant fluctuations, and not subject in any case to the selection or control of the parties upon whose rights they sit in judgment.

To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunal for themselves in any specific case by a submission to arbitration, yet the power is guarded by the most cautious rules. A contract that the parties will submit confers no power upon the arbitrator; and even where there is an actual submission, it may be revoked at any time. The law allows the party up to the last moment to ascertain whether there is not some covert bias or prejudice on the part of the arbitrator chosen.

It would hardly accord with this scrupulous care to secure fairness in such cases that parties should be held legally bound by the sort of engagement that exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuation.

Upon all these grounds, therefore, and especially upon the ground that the complaint does not show that the defendants have ever assented to be bound by the provisions of the constitution of the Grand Lodge of Northern New York, as the same is set forth in the complaint, I am of the opinion that the complaint is insufficient, and that the judgment of the supreme court should be affirmed.

SHANKLAND, J., delivered an opinion, affirming substantially the same doctrines as Mr. Justice Selden. He also maintained that the judgment of the supreme court should be affirmed, on the ground of defect of parties. He held that the act of April 7, 1849, authorizing joint-stock companies or associations of seven or more shareholders to sue in the name of the president or treasurer, as modified by the act of 1851, extending its provisions to any company or association "of not less than seven persons who are owners of or have an interest in any property, right of action, or demand jointly or in common," etc., did not apply to private voluntary partnerships or associa-

Digitized by Google

tions not organized in pursuance of any statute. Such associations, he said, must still sue and be sued as before, and all the members must be joined as parties, except in certain cases not necessary to be mentioned. The complainant in the present action showing that there were other members of this association interested equally with the plaintiff in this action, the learned judge said they ought to have been made parties.

BROWN, J., also delivered an opinion, in which, after stating that the plaintiff must make out title under the decree of the grand lodge of Odd-Fellows, referred to by Mr. Justice Selden, or must fail in the action, he went on to declare, in substance, that while the by-laws and regulations of voluntary associations, such as the one at bar, were all very well so long as the members did not object to them, they could not have the force of law, or affect rights of property against the will of the owners. When orders or decrees like the one relied on by the plaintiff here were attempted to be enforced to deprive owners of their property, he said that courts of justice had duties in the premises of which the plaintiff seemed to have but an indifferent conception, and that they could not be "called upon to aid in enforcing the decrees of these self-created judicatories." "The confiscation and forfeiture of property," said he, "is an act of sovereign power; and the aid of this or any other court will not be rendered to enforce such proceedings, or to recognize legal or supposed legal rights founded upon them." He therefore concurred with Selden, J.

VALIDITY OF CONSTITUTION, BY-LAWS, AND PROCEEDINGS OF VOLUNTARY CHARITABLE ASSOCIATIONS.—It has puzzled the courts considerably to determine just what view should be taken of voluntary or unincorporated societies, and what effect should be given to their articles of association, rules, and proceedings. In a case where the members of an unincorporated Masonic lodge filed a bill to compel the delivery of certain lodge property wrongfully detained by the defendant, Lord Eldon was at first doubtful as to the propriety of taking judicial cognizance of the rules of such associations: *Lloyd* v. *Loaring*, 6 Ves. 773. "I am alarmed," said he, "at the notion that these voluntary societies are to be permitted to state all their laws, forms, and constitutions upon the record, and then to tell the court they are individuals. Then what sort of a partnership is this?—for it is now admitted to be a partnership. The bill states that they subsist under a charter granted by persons who are now dead; and therefore, if this charter cannot be produced, the society is gone. Upon principles of policy, the courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters." In a subsequent opinion in the same case his lordship again expressed his doubts upon this point. Referring to another case in which he had been of counsel, and in which the nature of voluntary associations had been somewhat considered, he said: "I had great doubt whether a voluntary association for the best purpose is to meet without the authority of a corporation, and make laws and statutes which have no authority, and then call upon this court to administer all the moral justice that may arise upon the disputes among these, in a sense, unauthorized bodies. It is singular that this court should sit upon the concerns of an association which in law has no existence; and in that case that this court should be ancillary to their agreements as to their toasts," etc.

The courts do, however, "sit upon the concerns" of these associations, and in proper cases enforce rights and liabilities growing out of their laws and regulations. Of late years, indeed, cases arising upon the construction of the rules of such organizations, and defining their powers and the obligations and

Digitized by Google

privileges of their members, are growing more and more frequent, owing to the astonishing multiplication of benevolent orders, mutual-benefit societies, and the like, particularly in the United States. The result is, that the courts are getting clearer and more satisfactory views of the nature of such organizations. In this note we propose to consider how far the constitution, by-laws, etc., of voluntary associations, particularly of those of a charitable nature, are to be deemed valid and binding upon the members, and susceptible of enforcement by the courts.

THAT MEMBERS OF VOLUNTARY ASSOCIATIONS, CHARITABLE OR OTHERWISE, ARE BOUND BY THEIR CONSTITUTIONS, by-laws, rules, etc., within certain limits, is beyond question, although the cases differ somewhat as to what those limits are. In some of the cases it is stated, in general terms, that the constitution and by-laws of such associations are a law to the members: *Thompson* v. *Adams*, 7 Week. Not. Cas. 281; *Moxey's Appeal*, 9 Id. 441; *Grosvenor* v. *United Soc.*, 118 Mass. 90. A more accurate statement of the doctrine is that they are valid and binding when not in contravention of the law of the land or of public policy, but not otherwise: *Hyde* v. *Woods*, 2 Saw. 655; S. C., 94 U. S. 523; *White* v. *Brownell*, 2 Daly, 329; *Ebbinghousen* v. *Worth Club*, 4 Abb. N. C. 300, 301, note; *Leech* v. *Harris*, 2 Brewst. 571; *Venable* v. *Baptist Church*, 25 Kan. 177; *State* v. *Williams*, 75 N. C. 134; *Innes* v. *Wylie*, 1 Car. & Kir. 262. And, as we conceive, there is no difference in this regard between the constitution and the by-laws. They both stand on the same footing, except so far as they are distinguished by the association itself in requiring greater solemnities and formalities in changing one than in changing the other. No provision in either is binding unless it be in accordance with the law of the land and with public policy. In *Dawkins* v. *Antrobus*, L. R. 17 Ch. Div. 615, it is said, also, that a rule of such a society, to be valid and binding, must be consonant with natural justice. It is assumed, also, in some cases, that the laws of voluntary associations, to be binding on the members, must be reasonable: *Fritz* v. *Muck*, 66 How. Pr. 74. But it is generally laid down that such laws are binding, whether they are reasonable or not, upon members who have assented to them: Hirschl on Fraternities, 63; note to *Fisher* v. *Keane*, 27 Moak's Eng. 595; Boone on Corp., sec. 335; *Elsas* v. *Alford*, 1 City Ct. (N. Y.) 123. No doubt a person joining a society, knowing its rules to be unreasonable, should be deemed to have assented thereto, and ought to be bound thereby; but, as Mr. Hirschl remarks, it would be otherwise if an unreasonable by-law should be enacted against such member's consent after he had joined the society and had acquired pecuniary rights therein. It would seem that he ought to be protected against such subsequent enactment in the same way that a member of a corporation is protected against unreasonable by-laws. The validity and binding effect of the constitution or a by-law or other proceeding of a voluntary association, as respects its members, rest upon assent actual or implied. The relation between the members of such associations is one of contract, and the articles of association and by-laws constitute the terms of the agreement: *Protchett* v. *Schaeffer*, 11 Phila. 166; see also *Brine* v. *Board of Trade*, 2 Am. L. Rec. 268. The members having agreed to those terms are bound by them, as already stated, if they do not conflict with law or public policy: *Hyde* v. *Woods*, 2 Saw. 655; *Leech* v. *Harris*, 2 Brewst. 571. The doctrine is thus stated in a case involving the validity of a rule of an unincorporated board of brokers, in *White* v. *Brownell*, 2 Daly, 329, by Van Vorst, J., in the court below: "As this association is not organized in pursuance of any statute, nor the terms of membership fixed by the principle of the common law, it follows that the agreement

Digitized by Google

which the members make among themselves on the subject must establish and determine the rights of the parties on the subject. The constitution of the association, and its laws agreed upon by the members, contain all the stipulations of the parties, and is the law which should govern. The members have established a law for themselves. . . . . The very existence of this body depends upon the faithful observance of its organic law by all its members. The court must regard the constitution and laws of this board as the contract by which all the members are bound. The court cannot make any other contract for the parties than they have solemnly made for themselves. It is not the province of courts of law to make contracts for parties. It may explain, interpret, enforce, and in some instances, where contracts are hard and unconscionable, relieve from them." In the same case Daly, J., affirming the decision of Van Vorst, J., says: "Individuals who form themselves together into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land; and those who become members of the body are presumed to know them, to have assented to them, and they are bound by them: *Innes* v. *Wylie*, 1 Car. & Kir. 262; *Brancker* v. *Roberts*, 7 Jur., N. S., 1185; *Hopkinson* v. *Marquis of Exeter*, L. R. 5 Eq. 63."

Great emphasis is laid in many of the cases, as in the principal case, upon the necessity of the personal assent of a member of a voluntary society to its constitution and by-laws before he can be held bound thereby. Thus in *Heath* v. *New York Gold Exchange*, 38 How. Pr. 169, S. C., 7 Abb. Pr., N. S., 255, it is laid down, citing the principal case, that "before the constitution and laws of such an association can have any binding force whatever upon a member thereof, which will be recognized and enforced by the courts, it must appear that such member personally assented to their provisions." See also *Leech* v. *Harris*, 2 Brewst. 571. Of course, this does not mean that actual, personal, and express assent to the specific by-law or article in question by the member to be affected is necessary to render it binding upon him. Such a doctrine would deprive the rules and regulations of voluntary associations of much of their efficiency, and indeed, would take from them the character of laws. The cohesive power of such associations would be thereby destroyed. How could a society of any kind endure if each member could pick out for himself the provisions in its constitution or by-laws by which he is willing to be bound, and reject all the rest, and still insist upon the rights of a member? If this is what is meant when it is said that any particular provision must be shown to have received the personal assent of a member, in order to bind him, then the rules of such societies are ridiculous shams. The true rule is that laid down in *White* v. *Brownell*, 2 Daly, 329, that when a member joins a society of this kind he is presumed to know and assent to its rules. If he wishes to dissent from an existing rule lawfully adopted, and to escape being bound by it, he must procure its repeal or withdraw from the society. If, knowing what the rule is, he remains in the society, he is bound, however loudly he may protest against such rule. If each member is to be a law unto himself, there can, as already suggested, be no association. The majority must control in determining what the laws of the society shall be, and the minority must submit, or cease membership. Membership and obedience to the rules are reciprocally the consideration for each other, and a member cannot insist upon having the one without rendering the other. And when it is said that a rule of such an association is binding, all that is ordinarily meant is that the members must obey it, or submit to the penalties prescribed for its violation, culminating in temporary or permanent ex-

Digitized by Google

clusion from the privileges of membership. Beyond this, we do not know that it has ever been pretended that any society could go; as by enforcing the payment of fines or penalties by action or other legal proceeding. If it should be attempted, it would no doubt fail. It would be contrary to public policy to allow societies which, as a body, have no legal *status*, and owe no allegiance to the law, to make use of its machinery to collect penalties, etc., assessed by their own tribunals. The way in which the courts are usually called upon to enforce the regulations of such an association against a disobedient member is by sustaining the action of the association in suspending or expelling, by refusing to reinstate him. To this extent the courts may properly lend their aid to enforce obligations voluntarily assumed, by not interfering with the action of these self-constituted bodies.

As members of such associations are bound by the constitution and by-laws to which they assent by becoming members, so they are bound by amendments and additions thereto subsequently adopted in accordance with existing rules, even though they vote against the changes so made: *McDowell* v. *Ackley*, 93 Pa. St. 277. So in the case of incorporated societies: *McCabe* v. *Father Matthew etc. Society*, 24 Hun, 149. A voluntary religious society may enact a by-law prescribing the conditions of membership and of forfeiture thereof, and may make it apply to existing as well as to subsequent members: *Taylor* v. *Edson*, 4 Cush. 522. It has been held that an amendment to a by-law of an Odd-Fellows' lodge, respecting "sick benefits," if regularly adopted, applies to members who are sick at the time of its adoption: *Poultney* v. *Bachman*, 31 Hun, 49. But an amendment after the death of a member of a benevolent association, reducing the amount of the "death benefit" payable to his widow, does not apply to such member; but the right becomes vested at the death: *Gundlach* v. *Germania etc. Association*, 49 How. Pr. 190. But in *Fugure* v. *Mutual Society of St. Josephs*, 46 Vt. 362, an amendment after the death of a member of a benefit society to the rules of the society, limiting the amount of benefits payable to widows of deceased members, was held to apply to the widow of such member. The ground upon which the decision was put was, that unless this were the rule such a society might, in times of great sickness and frequent deaths, become unable to pay. "It must be seen at once," says Mr. Hirschl, "that this decision is not sound. Of course, there was a clause in the constitution allowing changes in the by-laws, and this power is, express or implied, in every constitution; would it follow, therefore, that any society which finds that it has made improvident contracts, and cannot meet its death losses, can simply pass by-laws, and thus reduce its debts on its policies from one thousand to five hundred dollars, or any other sum? While this may be done as to members still living, it is most certainly true that it cannot be done as to the representatives of deceased members, whose rights become vested and fixed at the time of the decease:" Hirschl on Fraternities, 61, 62. The power of amendment must in any case be exercised in accordance with the existing law of the society to be binding. A new constitution adopted by a society is not valid as to members not assenting thereto, if not adopted in accordance with the provisions of the existing constitution: *Hochreiter's Appeal*, 93 Pa. St. 479. But in *Richardson* v. *Society*, 58 N. H. 187, which was a case of an incorporated society, it was held that a by-law requiring a two-thirds vote to alter or amend the by-laws might be repealed at any regular meeting by a majority vote, since the by-law itself was passed by a majority, and a majority at one meeting could not thus tie the hands of a majority at any subsequent meeting. We cannot think that this is correct reasoning. If it is, then a majority of any society,

Digitized by Google

corporate or incorporate, may at any meeting disregard any by-law with perfect impunity. That is to say, the by-laws of a society are never binding on a majority. We think a person joining a society upon the faith of a provision in its by-laws or other rules, prohibiting amendments except by a two-thirds vote, has a right to insist that this stipulation shall be kept. If it should be disobeyed or disregarded to his injury, and the case were one admitting of legal redress, we have no doubt that the courts would give relief.

EXAMPLES OF VALID AND INVALID LAWS OF SUCH ASSOCIATIONS.—In accordance with the rule already stated, that the laws of a voluntary association must not be contrary to the law of the land or to public policy in order to be binding, a by-law of an unincorporated benevolent association named the "Good Samaritans," authorizing the mock hanging of members as a part of the ceremony of expulsion, was declared invalid, because the mock hanging was an assault, and therefore unlawful: *State* v. *Williams*, 75 N. C. 134. So a by-law of a society, whether incorporated or not, compelling members to join in a "strike," is void, as against public policy: *People* v. *New York Benevolent Soc.*, 3 Hun, 361. But it seems that a rule of an association of workmen forbidding members to teach their trade to others without the consent of the association will not render the association illegal: *Snow* v. *Wheeler*, 113 Mass. 179.

There is some question as to whether or not provisions for the arbitration of disputes between members, in the constitution or by-laws of voluntary or incorporated societies, are binding and can be enforced by expulsion for disobedience, or otherwise. Such provisions are common in the case of boards of trade, stock exchanges, chambers of commerce, and the like: Bisb. & Sim. on Produce Exchanges, secs. 28 et seq., 72. The provision is, usually, that all disputes between members of the board or exchange may, on the application of one or both the parties, be referred to a standing committee of the body, who are authorized to hear and determine the same, and that in case of a refusal to abide the award of the committee, a member may be suspended or expelled. Such provisions in the constitutions of these exchanges are of great utility in suppressing litigation and promoting honorable dealing. They are held binding in *White* v. *Brownell*, 2 Daly, 329; S. C., 4 Abb. Pr., N. S., 162; *Singerly's Adm'r* v. *Johnson*, 3 Week. Not. Cas. 541; *Thompson* v. *Adams*, 12 Phila. 486. So in the case of a mutual insurance association, in *Scott* v. *Avery*, 5 H. L. 811. But in *Leech* v. *Harris*, 2 Brewst. 571, it was held that an unincorporated board of brokers could not by its rules require the arbitration of differences between members, at least as to transactions outside the business of the board. And in *Heath* v. *New York Gold Exchange*, 38 How. Pr. 168, S. C., 7 Abb. Pr., N. S., 255, it was said that such a provision in the constitution of a voluntary gold exchange, even if personally assented to, was no more than a revocable agreement to submit to an award. In *State* v. *Union Merchants' Exchange*, 2 Mo. App. 96, in a case of an incorporated exchange, a provision requiring members to submit their business controversies to the arbitration of the arbitration committee, on pain of expulsion, was held unreasonable and void. The ground upon which such provisions are sometimes condemned is, that they oust the courts of their jurisdiction. So far at least as unincorporated societies are concerned, we have no doubt of the validity of provisions of this nature, nor of the power of expulsion for disobedience. Conceding that such a provision, when assented to, is a mere revocable agreement to submit to arbitration, the only way in which it can be revoked is by withdrawing from the society. And in the case of corporations, also, the weight of authority and the better reason seem

Digitized by Google

to us to be in favor of the doctrine that such regulations are valid and binding, at least so far as to be enforceable by expulsion.

A provision in the constitution or by-laws of a stock exchange, or the like, that the seat of an insolvent or deceased member shall be sold, and the proceeds distributed first among the creditors of the decedent or insolvent within the exchange, is valid, and the residue only is assets under a bankrupt or insolvent law: *Hyde* v. *Woods*, 2 Saw. 655; S. C., 94 U. S. 523; *Thompson* v. *Adams*, 12 Phila. 484; S. C. in supreme court, 7 Week. Not. Cas. 281. So a provision that the seat may be sold on failure of the owner to comply with any contract within a specified period: *Moxey's Appeal*, 9 Week. Not. Cas. 441.

That the constitutions and by-laws of grand lodges of the numerous orders of our day are binding upon the members of subordinate lodges is, as a general rule, settled, because by reference and adoption they are made parts of the laws of the subordinate bodies: *Chamberlain* v. *Lincoln*, 129 Mass. 70; *Altmann* v. *Benz*, 27 N. J. Eq. 331; *Osceola Tribe* v. *Schmidt*, 57 Md. 98; *Hall* v. *Supreme Lodge*, 24 Fed. Rep. 450; this, too, whether they are incorporated or not. When they are incorporated, they are independent corporations, and an incorporated grand lodge derives and can derive no power from its charter to make by-laws for a distinct corporation. It is because the members of the subordinate bodies agree to be bound by the grand bodies that they are bound. As stated in the principal case, assent is the foundation upon which the obligation to obey reposes. A grand lodge incorporated in one state cannot, however, it seems, be subjected nor subject itself to the control of a supreme lodge incorporated in another state: *Lamphere* v. *Grand Lodge*, 11 N. W. Rep. 268; S. C., 47 Mich. 429. The particular question presented in the principal case, as to whether or not members of a subordinate lodge, unincorporated, can by their assent give effect to and make binding upon themselves a constitutional provision authorizing the grand lodge to adjudge the lodge property forfeited for insubordination so as to divest the title, does not seem to have arisen in any other case. The case that comes nearest it is *Altmann* v. *Benz*, 27 N. J. Eq. 331. In that case the majority of an unincorporated subordinate lodge withdrew from the jurisdiction of the grand lodge, surrendered their charter, and formed a new lodge. The grand lodge reissued the charter to the loyal minority in the old lodge, and it was held that they could recover the lodge property from the rebellious majority. There, however, the majority divested themselves of their interest in the property by withdrawing, and it remained in the faithful minority. It was not vested in them by the grand lodge. In *Chamberlain* v. *Lincoln*, 129 Mass. 70, the case did not go far enough to raise the question of the power of the grand lodge to make a binding adjudiction of forfeiture of property. The majority of a Good Templars' lodge in that case refused to pay the grand lodge tax, and the minority withdrew, paid the tax, had new officers installed, and claiming to be the original lodge, sued for the lodge property. The court denied relief, because the grand lodge had not declared the charter forfeited, and the means of redress within the order had not been exhausted.

VALIDITY OF ADJUDICATIONS AND OTHER PROCEEDINGS OF VOLUNTARY ASSOCIATIONS.—There is no doubt that the decisions of a voluntary association, honestly and fairly made in accordance with its rules, and not contrary to the law of the land or to public policy, are binding upon its members, and will not be interfered with by the courts: *White* v. *Brownell*, 2 Daly, 329; *Consitt* v. *Reformed etc. Church*, 54 N. Y. 551; *Harrison* v. *Hoyle*, 24 Ohio St. 254; *Leech* v. *Harris*, 2 Brewst. 571; *Osceola Tribe* v. *Schmidt*, 57 Md. 98;

Digitized by Google

Dawkins v. *Antrobus*, L. R. 17 Ch. Div. 630. The courts will not constitute themselves appellate tribunals in such cases to revise the decisions of these self-constituted judicatories. Says Brett, L. J., in *Dawkins* v. *Antrobus*, *supra*, which was a case of a club decision, which it was sought to review: "I think we ought to take great care that this court does not by successive decisions usurp an authority in these cases for which there is no color in point of law. In my opinion, there is some danger that the courts will undertake to act as courts of appeal against the decisions of members of clubs, whereas the court has no right or authority whatever to sit in appeal upon them at all. The only question which a court can properly consider is whether the members of the club, under such circumstances, have acted *ultra vires* or not, and it seems to me the only questions which a court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club; in other words, whether the rules of a club are contrary to natural justice; secondly, whether a person who has not condoned the departure from them has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one of those charges can be made out by those who come before the court, the court has no power to interfere with what has been done."

A member of a voluntary society, charitable or otherwise, who is aggrieved by any action of the society, must exhaust his means of redress within the society before applying to the courts: *Poultney* v. *Bachman*, 31 Hun, 49; *Lafond* v. *Deems*, 81 N. Y. 507; S. C., 8 Abb. N. C. 344; Hirschl on Fraternities, 49.

The power of unincorporated societies, as well as of corporations, as to expelling members, and the validity of sentences of expulsion, are fully considered in the note to *Hiss* v. *Bartlett*, 63 Am. Dec. 776. Little, if anything, need be said here upon the subject. If a member of an unincorporated society is expelled in accordance with its rules and the law of the land, and if the proceedings are taken upon due notice, and are fairly conducted, the courts can give no redress: *White* v. *Brownell*, 2 Daly, 329; *Innes* v. *Wylie*, 1 Car. & Kir. 262; *Lambert* v. *Addison*, 46 L. T., N. S., 20; otherwise he may have an injunction or other appropriate remedy: *Thomas* v. *Ellmaker*, 1 Pars. Sel. Cas. 98: *Gorman* v. *Russell*, 14 Cal. 531; *Labouchere* v. *Wharncliffe*, L. R. 13 Ch. Div. 346; *Fisher* v. *Keane*, 11 Id. 353; and cases cited in note to *Hiss* v. *Bartlett*, *supra*. But if the association is one having no property, and no property right is affected, and no personal injury inflicted, it seems that a member, however summarily or unjustly expelled, has no redress whatever: *Rigby* v. *Connol*, 28 W. R. 650; *Sale* v. *First Regular Baptist Church*, 62 Iowa, 26; S. C., 49 Am. Rep. 136. In *Rigby* v. *Connol*, *supra*, Sir George Jessel, master of the rolls, says: "What is the jurisdiction of the court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed in any court of this country, at least in any of the queen's courts, to decide upon the rights of persons to associate together when the association possesses no property. Persons may, and many persons do, associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period; and if eleven of them refuse to associate with the twelfth any longer, I am not aware of any jurisdiction in any court

Digitized by Google

to interfere. Or a number of scientific men may agree in the same way to meet at any place; but if the association has no property, and takes no subscription from its members, I cannot imagine that any court of justice could interfere with such an association if some of the members declined to associate with some of the others."

POWER OF VOLUNTARY CHARITABLE ASSOCIATIONS, ETC., TO BIND MEMBERS BY CONTRACTS.—It is not our purpose to discuss this subject in this note further than to state a few general principles. The foundation of any power in the majority of a voluntary association to bind the members by contracting debts must be sought for in the law of agency. If the rules of the association do not authorize the incurring of debts, then no member is liable for a debt contracted unless he gave his consent beforehand, or ratified the act afterwards; but if he did either, then he is liable: *McCartee* v. *Chambers*, 22 Am. Dec. 556; *Newell* v. *Borden*, 128 Mass. 31; *Volger* v. *Ray*, 131 Id. 439; *Ridgely* v. *Dobson*, 3 Watts & S. 118; *Ash* v. *Guie*, 79 Pa. St. 493; S. C., 39 Am. Rep. 816; *Ferris* v. *Thaw*, 72 Mo. 446; *Sizer* v. *Daniels*, 66 Barb. 429; *Park* v. *Spaulding*, 10 Hun, 128; *Delauney* v. *Strickland*, 2 Stark. 416; *In re St. James Club*, 13 Eng. L. & Eq. 595; *Flemyng* v. *Hector*, 2 Mee. & W. 172; *Todd* v. *Emly*, 7 Id. 427; S. C., 8 Id. 505; *Caldicott* v. *Griffiths*, 8 Exch. 904. If, however, the constitution, by-laws, or rules authorize debts to be contracted on behalf of the society, either expressly or impliedly, all the members will be liable for debts contracted, whether they directly concur in it or not. The rules are a sufficient authority, and each member must be presumed to assent to them: See *Cockerell* v. *Aucompte*, 2 Com. B., N. S., 439.

ACTIONS BY AND AGAINST UNINCORPORATED SOCIETIES: See the note to *Phippe* v. *Jones*, 49 Am. Dec. 711, discussing this subject.

THE PRINCIPAL CASE IS CITED in *De Witt* v. *Chandler*, 11 Abb. Pr. 471; *Bridenbecker* v. *Hoard*, 32 How. Pr. 297; and *Waller* v. *Thomas*, 42 Id. 338, as not deciding the question discussed by Shankland, J., respecting the true construction of the acts authorizing voluntary associations to sue or be sued by the name of the president or treasurer. In *Connitt* v. *Reformed etc. Church*, 4 Lans. 344, S. C., 54 N. Y. 564, the case is distinguished as relating only to a question of property rights, and as not affecting the validity of the decisions of ecclesiastical tribunals upon matters within their cognizance.

FARMERS' AND MECHANICS' BANK v. BUTCHERS' AND DROVERS' BANK.

[16 NEW YORK, 125.]

BANK CERTIFYING CHECK AS "GOOD" creates a new and binding obligation on the part of the bank, towards a *bona fide* holder of the check for value, to hold sufficient funds of the drawer to meet the check.

TELLER'S CERTIFICATION OF NEGOTIABLE CHECK, WHERE DRAWER HAS NO FUNDS, for his accommodation, though in excess of the teller's authority, is nevertheless binding on the bank in favor of a *bona fide* holder, where the teller has been in the habit of certifying checks to the knowledge of the officers of the bank.

Digitized by Google

APPEAL from a judgment of the New York superior court, in favor of plaintiff, in an action against a bank on certified checks. It appeared that a depositor with the defendant bank entered into a fraudulent arrangement with the teller of the bank, pursuant to which the teller, in violation of his instructions and his duty, certified the five checks in question as "good," although the depositor had not at the time the corresponding sum on deposit. But the plaintiff bank received the checks without notice of the fraud, and held them in good faith and for value. The decisions below were in favor of the right of the plaintiff, under these circumstances, to recover (4 Duer, 219), and the defendants appealed.

John H. Reynolds, for the appellants.

Henry A. Cram, for the respondents.

By Court, SELDEN, J. The jury in this case have found, upon sufficient evidence and under proper instructions from the court, that the plaintiffs were holders, for value, of the checks in question. Each of these checks, if duly certified, imposes upon the bank an obligation to retain the amount for which the check is drawn, and which, by the certificate, it admits it has in hand to the credit of the drawer to meet the check when presented, and to pay the same to the holder on demand. This obligation is substantially the same as that assumed by the acceptor of an ordinary bill of exchange; and the certificates in this case, if authorized, may with propriety be regarded as virtual acceptances of bills, and the bank as liable, if at all, as acceptor.

The first ground upon which this liability is resisted is based, not upon any want of authority in the particular agent by whom the checks were certified, but upon a want of power in the bank to bind itself by the contract sought to be enforced. It is insisted that the bank was not authorized by its charter to engage in transactions purely fictitious, having no connection with its legitimate business, or to pledge its credit for the mere accommodation of third persons.

The defendant is a banking corporation organized under the general banking law of this state; and it is, I think, a sound position, that such a corporation exceeds its powers when it becomes the mere surety for another, upon a contract in which it has no interest, or lends its credit in any form for the exclusive benefit of other parties. Such a contract is *ultra vires*, and cannot be enforced against the bank by any person cognizant of the facts. But it by no means follows, when the unauthorized

Digitized by Google

contract is in the form of a negotiable instrument, that the bank can avail itself of the defense, as against one who, without notice, has become the holder of the paper for value. This question appears to have arisen in the case of *Stoney* v. *American Life Insurance Company*, 11 Paige, 635, and the decision of the court upon the point is thus stated by the reporter: "A negotiable security of a corporation which, upon its face, appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the corporation, and in violation of the laws of the state where it was actually issued."

There is a *dictum* of the chancellor to the same effect in the case of *Safford* v. *Wyckoff*, 4 Hill, 442, where the defense set up was that the act of the bank in issuing the bill upon which the action was brought was *ultra vires*. The chancellor there says: "A bill, or any other negotiable security, which is not upon its face illegal and unauthorized, is valid in the hands of a *bona fide* holder without notice, who has paid a valuable consideration therefor, except in those cases in which the security is made void by statute." So in the case of *Bank of Genesee* v. *Patchin Bank*, 13 N. Y. 309, recently decided by this court, a similar doctrine is distinctly asserted by Denio, J., although the point was not passed upon by the court.

I have no hesitation in concurring with these learned judges in the principles thus asserted, and am not aware that a contrary opinion has ever been judicially expressed. A citizen who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is upon its face in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, such as the purpose or object for which it was issued, to hold that the person taking the paper must inquire as to such extraneous fact, of the existence of which he is in no way apprised, would obviously conflict with the whole policy of the law in regard to negotiable paper. I pass, therefore, to the consideration of that branch of the defense which rests upon the want of authority in Peck, the teller, to bind the bank.

In the case of *Mussey* v. *Eagle Bank*, 9 Met. 306, the supreme court of Massachusetts held not only that such a teller had no original inherent power to certify checks, but that a general cus-

Digitized by Google

tom to that effect among banks would conflict with the public interests, and would be bad. I am not entirely satisfied with the reasoning of the court in that case. The act of certifying a check is simply answering the supposed inquiry of one about to take the check, whether the bank has funds of the drawer to meet it; and no other officer or agent of the bank would seem to be so competent to give the answer as the paying teller. His duties impose upon him the necessity of knowing the state of every depositor's account. He is charged with all he pays out, and if he pays a check without funds in hand, he is responsible to the bank for the amount. His knowledge exceeds that of the book-keeper, because, to the information obtained from the latter, he adds a knowledge whether any deposits have been made or checks paid since the last entry in the books. No doubt the cashier, by virtue of his general powers, and his presumed knowledge of all the affairs of the bank, would be competent to answer the question, but he could only do so by first inquiring of the book-keeper and teller. Why should the applicant be compelled to seek the information through this circuitous channel, instead of going directly to the ultimate source of knowledge on the subject? The teller is put in the place of the cashier, to perform a portion of his duties. His appointment is virtually a division of the office of cashier; and that branch of the office which the teller fills embraces those duties which particularly require a knowledge of the state of the accounts of the depositors. Why, then, should he not be the organ of communication on that subject?

But it is unnecessary in the present case to decide this question, as it clearly appears not only that the teller, Peck, was in the habit of certifying the checks of customers, with the knowledge of the officers of the bank, but that he was furnished with a book for the express purpose of keeping a memorandum of such checks. His authority to certify, therefore, in a proper case, cannot be disputed. But it is insisted that his power extended only to cases where the bank had funds in hand, he having been expressly prohibited from certifying in the absence of funds, and hence that the bank is not bound.

It may be doubted whether such a prohibition adds anything to the restrictions which would otherwise exist upon the powers of the agent. A teller acting under a general power to certify checks would be guilty of an excess of authority, and a clear violation of duty, if he certified without funds.

The powers of the cashier himself, or other principal financial

Digitized by Google

officer of the bank, would no doubt be subject to the same limitation. To certify a check when the bank has no funds to meet it is to make a false representation; and neither the incidental power of the cashier, nor a general power conferred upon any other officer, could be construed to authorize that. Hence, if a bank is holden in any case upon a certificate of its cashier that a check is good, when it has no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representations, notwithstanding it is false and unauthorized.

It would seem, therefore, that the defense insisted upon here would have been equally available if the checks in question had been certified by the cashier himself. It might then have been urged, with truth, that the cashier had violated his duty and exceeded the proper limit of his powers in making the certificate; and if the argument be sound, that the principal is in no case bound, unless the act of the agent is within the powers either actually or apparently conferred upon him, the bank would not be holden in such a case. It is no more within the apparent power of a cashier to certify that the bank has funds, when it has none, than it is within that of a teller expressly authorized to certify only when the bank has funds. Every person would be bound to take notice of the limitation imposed by law upon the powers of the cashier, or other general agents, no less than of that which is in terms imposed upon the powers of the teller as special agent. Hence it cannot be pretended that a person who should take and pay value for a check, with knowledge that the bank had no funds of the drawer to meet it, would acquire any valid claim against the bank, although such check was certified by the cashier himself. He would be presumed to know that it was contrary to the duty of the cashier to certify without funds, and this knowledge would have the same effect as that which every one who should take a check certified by the teller would be presumed to have of any express restriction upon his powers.

It will be seen that, if these views are correct, the present case does not turn in any degree upon the rules applicable to special agencies, but that the question would have been precisely the same if the check had been certified by the cashier or other principal financial officer of the bank. As they may, however, admit of doubt, I shall treat the case as one of an agency specially restricted, and shall simply inquire whether a *bona fide* holder for value, of a negotiable check, certified by a special

Digitized by Google

agent whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds.

This is a complex question, depending partly upon the law of principal and agent, and partly upon that of negotiable or commercial paper. The defense assumes that principals are bound only by the authorized acts of their agents, and admits of no qualification of this general rule, except where the agent has been apparently clothed with an authority beyond that actually conferred. But this proposition is too broad to be sustained. Principals have been repeatedly held responsible for the false representations of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different. In *Hern* v. *Nichols*, 1 Salk. 289, the leading case on the subject, where an agent authorized to sell a quantity of silk had made certain fraudulent representations by which the purchaser was deceived, the principal was held liable. Lord Holt there said: "Seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a confidence in the deceiver should be a loser, than a stranger." The principle of this case has never, I think, been overruled, but, on the contrary, has been repeatedly approved and confirmed. It will be found directly applicable to the present case. The certificate of the teller is a positive representation that the bank has funds to meet the check. If that representation is false, who ought to bear the loss?

The reasoning of Lord Holt, in the case of *Hern* v. *Nichols*, *supra*, applies here with peculiar force. The bank selects its teller and places him in a position of great responsibility. The trust and confidence thus reposed in him by the bank leads others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be held responsible? It is worthy of consideration that the fact misrepresented in this case is not only one peculiarly within the knowledge of the agent, but one with which he is made acquainted by means of the position in which he is placed by the bank, and which it is his especial province and duty to know, and which could scarcely be definitely ascertained except by application to him. These circumstances

Digitized by Google

would seem to bring the case decidedly within the principles adopted in *Hern* v. *Nichols*, *supra*, and in the subsequent decisions based upon that case.

This conclusion is in no respect in conflict with that doctrine of the law of agency which makes it the duty of all persons dealing with a special agent to ascertain the extent of his powers. It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective and unauthorized. To discover that, he must not only have notice of the limitations upon the powers of the teller, but of the extrinsic fact that the bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend. One who deals with an agent has no right to confide in the representation of the agent as to the extent of his powers. If, therefore, a person, knowing that the bank has no funds of the drawer, should take a certified check, upon the representation of the cashier or other officer by whom the certificate was made, that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact, whether the bank has funds or not, the case is different. That is a fact which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowing. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge; and he already has his written representation upon the face of the check. If, therefore, one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case.

It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it. The familiar case of the giving of a negotiable partnership note by one of the partners, for his own

Digitized by Google

individual benefit, affords an apt illustration of this rule. Each of the partners is the agent of the partnership, as to all matters within the scope of the partnership business, and can bind the firm by making, indorsing, and accepting bills and notes in such business; but he has no more authority than a mere stranger to execute such paper in his own business, or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given; but when negotiated to a *bona fide* holder, the firm is precluded from questioning the authority of the partner, and is effectually bound. The cases in this state by which this doctrine is illustrated and established are numerous and uniform: *Livingston* v. *Hastie*, 2 Cai. 246; *Lansing* v. *Gaine*, 2 Johns. 300 [3 Am. Dec. 422]; *Laverty* v. *Burr*, 1 Wend. 529; *Williams* v. *Walbridge*, 3 Id. 415; *Boyd* v. *Plumb*, 7 Id. 309; *Gansevoort* v. *Williams*, 14 Id. 133; *Joyce* v. *Williams*, Id. 141; *Wilson* v. *Williams*, Id. 146 [28 Am. Dec. 518]; *Catskill Bank* v. *Stall*, 15 Id. 364; *Stall* v. *Catskill Bank*, 18 Id. 466.

It will be found difficult to distinguish these cases in principle from that now before the court. Every person taking the negotiable note or acceptance of a partnership, executed by one of the partners in the name of the firm, is bound to know the extent of the partner's authority to bind the firm; but this obligation does not extend to the consideration for which the note or acceptance was given. If given for the private debt of one of the partners, or for the accommodation of third persons, all the cases agree that the burden of proving the holder's knowledge of that fact rests upon the partnership. That the execution is by an agent is as apparent upon the face of the paper, in such cases, as in that of a certified check; because a partnership can only act in its partnership name through agents.

The argument resorted to here, therefore, that parties are only bound by the authorized acts of their agents, and that paper issued by an agent without authority is no more obligatory upon the principal than if it had been forged, is just as applicable to partnership notes given by a partner for his individual debts as to these certified checks. The question is not, in such cases, whether the principal is bound by the unauthorized act of the agent, but whether he is estopped, by the representation of the agent, from disputing facts which show that the act was authorized. There is no analogy between these partnership cases, or the case before the court, and cases where the paper is forged.

Digitized by Google

The fact of the agency, and the trust and confidence reposed by the principal in the agent, create a broad line of distinction between them; and it is this trust and confidence which constitute the foundation of the liability, and which justify the party dealing with the agent in relying upon his representation in respect to facts especially within the agent's knowledge. The giving of a note in the partnership name by one of the partners is a virtual representation that it is given in the partnership business, and if negotiable, this representation is deemed in law to have been made to every subsequent *bona fide* holder of the note. *State of Illinois* v. *Delafield*, 8 Paige, 527, S. C. in error, *Delafield* v. *State of Illinois*, 2 Hill (N. Y.), 159, is another illustration of the same principle. An agent of that state was authorized to dispose of certain bonds, but was not to sell them below par or on credit. He sold them to Delafield on time and at a sacrifice. The state filed a bill against Delafield for relief, and applied to the court of chancery for an injunction to restrain the defendant from negotiating the bonds, on the ground that if negotiated the state would be liable to pay them. The defendant's counsel insisted that if the bonds were void in the hands of Delafield, they would be equally so in the hands of any person to whom he might transfer them. The chancellor, nevertheless, granted the injunction, saying that if the securities should pass into the hands of a *bona fide* holder, the state would be equitably and legally bound to pay them. On appeal to the court for the correction of errors, the decision of the chancellor was affirmed by a nearly unanimous vote.

It would be difficult, I think, to discover any valid distinction in principle between this case and the one we are considering. The purchaser of the bonds from Delafield would, equally with Delafield himself, be presumed to know the limits of the authority conferred upon the agent; but it must have been held that he would not be bound to inquire as to the extrinsic facts attending the sale or negotiation of the bonds.

The principle is well stated in the following proposition, submitted to and approved by the court, in the case of *North River Bank* v. *Aymar*, 3 Hill (N. Y.), 262: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde;* the apparent authority is the real au-

Digitized by Google

thority." The opinion of Mr. Justice Nelson, who dissented from the majority of the court in this case, cannot be reconciled with the principle maintained by the same judge in *Boyd* v. *Plumb*, 7 Id. 309, and *Gansevoort* v. *Williams*, 14 Id. 133. The cases are strictly parallel. In that of Aymar, the power of the attorney was limited to the giving of notes for the use of the principal; in the others, the authority of the partner was limited to the execution of paper for the use and benefit of the partnership; in both, the plaintiffs were regarded by the judge as equally cognizant of the limitations of the power; and yet, in the cases of *Boyd* v. *Plumb*, *supra*, and *Gansevoort* v. *Williams*, *supra*, he held that the burden rested upon the defendants to prove notice to the plaintiff that the paper was not given in the business of the partnership; while in the case of Aymar, he held that the plaintiffs were presumed to know that the notes were not given for the benefit of the principal, and that the burden of proving the contrary rested upon them. These two positions are diametrically opposed, and cannot be made to harmonize; that taken in *Boyd* v. *Plumb*, *supra*, and *Gansevoort* v. *Williams*, *supra*, accords with many other cases in this state, and with all the English cases on the subject.

It is true that the decision in the case of the *North River Bank* v. *Aymar*, 3 Hill (N. Y.), 262, was reversed in the court of errors; but the opinions pronounced in that court have never been published, and consequently the views there expressed upon the point in question are unknown. Under these circumstances, the principal reason against the reconsideration of a question, which has been passed upon by the court of last resort, viz., that the public needs a fixed and definite rule upon which it can rely in the transaction of business, loses most of its force. The opinion of the supreme court, which is published at large in the reports, is more likely to be taken as the rule than that of the court of errors, to which attention is rarely directed. The question, therefore, should, I think, be considered as still open for examination; and I have little hesitation in holding that it was properly decided by the supreme court.

It is supposed that the cases of *Attwood* v. *Munnings*, 7 Barn. & Cress. 278, and *Alexander* v. *McKenzie*, 6 Man. G. & S. 766, are in conflict with the doctrine here advanced; but upon a careful scrutiny of the first of these cases, it will be seen that, if the point we are examining was involved, it received no consideration from the court. The general principle laid down in that case is in perfect accordance with the views here expressed.

Digitized by Google

It is, simply, that where an agent accepts a bill in a form which imports that he acts by virtue of a special power, any person taking the bill is bound to inquire into and is chargeable with knowledge of the terms of the power. This is not denied. But the question is, whether after inquiring into the terms of the power, and ascertaining, so far as can be done by comparison, that the act of the agent is within the power, he is chargeable, without proof, with a knowledge of extrinsic facts which show the act to be unauthorized.

This question, which is the only one which arises here, was not decided, or even adverted to, in *Attwood* v. *Munnings*, *supra*. The report of that case shows that the plaintiffs neglected even to call for the production of the power, to which they were expressly referred by the terms of the acceptance; and for this culpable negligence, they are held responsible by the court. Justice Bailey says: "A person taking such a bill ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority."

It seems to have been taken for granted that if the plaintiffs had informed themselves as to the terms of the power, they would of course have ascertained the object for which the bill was drawn, and the relation existing between the drawer and the defendant. Indeed, for aught that appears in the report of the case, it may have been shown upon the trial that they were actually apprised of these facts. The case, therefore, is no authority, except for the undeniable proposition that one who deals with an agent, knowing that he acts by virtue of a special power, is bound to inquire into and ascertain the precise terms of such power.

The case of *Alexander* v. *McKenzie*, 6 Man. G. & S., has even less bearing upon the point. The report of the case, which is very imperfect, does not show the terms of the special power nor the nature of its limitations. All that the case decides is, that the words "per procuration," affixed to an indorsement or acceptance by an agent, import that the agent acts by virtue of a special power, and are sufficient to charge any one who takes the bill with knowledge of the precise terms of such power. The plaintiff in this case, as in that of *Attwood* v. *Munnings*, 7 Barn. & Cress. 278, had neglected to call for the production of the power, and no attempt was made to show that the indorsement corresponded with its terms. The plaintiff relied mainly

Digitized by Google

upon the fact that the bank had paid two other bills indorsed in the same manner. The case, taken as a whole, is a somewhat obscure assertion of the same principle which was adopted in *Atwood* v. *Munnings*, *supra*, viz., that one who takes a bill so indorsed is bound to require the production of the special power, and to ascertain by comparison that the bill and indorsement correspond in all respects with its terms. The cases of *Grant* v. *Norway*, 10 Com. B. 665, 70 Eng. Com. L., *Coleman* v. *Riches*, 29 Eng. L. & Eq. 323, and *Mechanics' Bank* v. *New York and New Haven R. R. Co.*, 13 N. Y. 599, are plainly distinguishable from the present case. In neither of those cases was the document upon which the question arose negotiable. It was sought there to make the principal responsible for a false representation of the agent, not to the person to whom the representation was made, but to one with whom the agent had no dealings, and to whom he had made no representation. Upon a careful examination, it very plainly, I think, appears that this was the real obstacle to a recovery in each of these cases. When Sergeant Crowder, counsel for the plaintiffs in *Grant* v. *Norway*, *supra*, cited the case of *Hern* v. *Nichols*, 1 Salk. 289, and invoked the doctrine there laid down by Lord Holt, Justice Cresswell replied: "There the factor entered into a contract with the plaintiff for his employer. Here you are a step further off. You say your agent, with whom I made no contract, has enabled a man, with whom I did contract, to cheat me."

This remark presents, in my judgment, the turning-point of the case, and the only obstacle to the plaintiff's recovery; viz., the want of any privity of contract between the plaintiff and the agent. This obstacle was precisely that which the negotiability of the instrument, if established, would have removed; because the maker of a negotiable instrument is deemed in law to enter into a contract with every one to whom it is afterwards negotiated; and where the instrument is made by an agent, it is in this way only that privity of contract can be established between such agent and the subsequent holders, without which the principal can never be held responsible for the false representations of the agent. Hence it is that we find the counsel for the plaintiffs in the cases of *Grant* v. *Norway*, *supra*, and *Mechanics' Bank* v. *New York and New Haven R. R. Co.*, *supra*, contending so strenuously for the negotiability of the documents in question in those cases.

That the want of privity of contract between the agent and the party seeking to hold the principal responsible constituted

Digitized by Google

the real difficulty in those cases, is also apparent from the report in the case of *Coleman* v. *Riches*, *supra*, which belongs to the same class. There Bond, the agent of Riches, had given a false receipt, not to the plaintiff, but to Lewis, and Lewis had exhibited this receipt to the plaintiff and obtained money upon it. The difficulty in the case was to show the relation between the parties to have been such that the misrepresentation by Bond to the agent might properly be considered as made by him to the plaintiff. To establish this, the counsel for the plaintiff relied upon a course of dealing which, as he alleged, was known to the defendant. To this the chief justice answered: "I cannot see how the knowledge by Riches of the course of business according to which Coleman paid on the production of the receipt would make the showing of the receipt by Lewis, even in Bond's presence, a representation by Riches" (*i. e.*, by the agent of Riches); and Justice Williams adds: "Suppose Riches himself has given the fraudulent receipt, would that have constituted a representation by Riches to Coleman?" Upon the same argument being afterwards repeated, Justice Cresswell said: "There is the vice of the argument; I do not find any evidence of such course of dealing between the plaintiff and the defendant. The course of dealing proved was that which existed between the plaintiff and the vendors, and not between the plaintiff and defendant."

It seems impossible to mistake the purport of these remarks. They show that the difficulty in the way of a recovery, in this case, was that no privity of contract was established between Riches, or his agent, Bond, and the plaintiffs, by means of which the misrepresentations made by Bond could be considered as made to the plaintiffs. Had the receipt been a negotiable instrument, a privity would have been established.

I entertain no doubt that had the stock certificates in question in the case of *Mechanics' Bank* v. *New York and New Haven R. R. Co.*, 13 N. Y. 597, been held to be negotiable, the plaintiffs would have prevailed; and such I understand to be the opinion of two of my associates who took part in the decision of that case.

The judgment of the supreme court should be affirmed.

DENIO, C. J., and BROWN, J., delivered opinions concurring in result and general reasoning with the preceding. Both agreed with Selden, J., in approving the decision in *North River Bank* v. *Aymar*, 3 Hill (N. Y.), 262, and regarding it as good author-

Digitized by Google

ity, notwithstanding the reversal of the judgment in that case by the late court of errors.

COMSTOCK, J., delivered a dissenting opinion.

Judgment affirmed.

CERTIFICATION OF CHECK BY BANK is equivalent to an acceptance of a bill for that amount: *Barnes* v. *Ontario Bank*, 19 N. Y. 159; *Meads* v. *Merchants' Bank*, 25 Id. 146; *Claflin* v. *Farmers' etc. Bank*, Id. 297; *Nolan* v. *Bank of New York etc. Association*, 67 Barb. 33. It is a contract payable on demand, and is obligatory until paid, or barred by the statute of limitations: *Nolan* v. *Bank of New York etc. Association*, *supra*. A certificate of deposit is also a contract of the same description: *Barnes* v. *Ontario Bank*, *supra*, all citing the principal case. See, as to certificates of deposit, *O'Neill* v. *Bradford*, 42 Am. Dec. 574, and note discussing the subject; see also *Leavitt* v. *Palmer*, 51 Id. 333; *Payne* v. *Clark*, 59 Id. 333; *Welton* v. *Adams*, 60 Id. 579. The certification of a check binds the bank to hold the amount of it out of the drawer's funds for payment: *Stevens* v. *Corn Exchange Bank*, 3 Hun, 151; S. C., 5 Thomp. & C. 287. The theory of the law is that when such certificate is made, the amount of it is charged to the account of the drawer in the bank, since all well-regulated banks adopt this practice for their own protection; and the reasons for it are so strong that the law presumes that they all do so: *First National Bank* v. *Leach*, 52 N. Y. 352. But certifying a check imports merely that the signature is genuine, and that it is good for the amount for which it is drawn, and not for any amount to which it may be changed by subsequent alteration: *National Bank of Commerce* v. *National Mechanics' Banking Association*, 46 How. Pr. 378; S. C., 3 Jones & S. 287. No greater effect can be given to such certification than to the acceptance of a bill, and it is held that it does not import the correctness of the amount of it; as where a check was certified after alteration of the amount: *Marine National Bank* v. *National City Bank*, 4 Id. 477. Since the certification imports a guaranty of the genuineness of the check, if the check is a forged one the bank is liable to a *bona fide* holder receiving it in due course of business: *Hagen* v. *Bowery National Bank*, 6 Lans. 492. The principal case is cited with approval in each of the foregoing cases.

LIABILITY OF BANK FOR UNAUTHORIZED CERTIFICATION OF CHECK.—A bank is liable upon the certification of a check by its teller within the apparent scope of his authority, if the certificate is genuine, whether the particular act was authorized or not: *Continental Bank* v. *National Bank*, 50 N. Y. 581. So, in case of a certificate by the teller that the maker of a note payable at the bank has sufficient funds there to pay it, for the teller is the proper officer to make such certificate: *Irving Bank* v. *Wetherold*, 36 Id. 337. So where a bank has placed its cashier in a position which implies inherent authority to certify checks, those dealing with the bank have a right to assume that he possesses that authority, and the bank is liable on his certificate in a particular case to a *bona fide* holder, though the certificate was not warranted because of some extrinsic fact: *Cook* v. *State National Bank*, 52 Id. 115. But where the cashier, having general authority only to certify checks on or after the day when they are made payable, certifies a post-dated check by an indorsement dated on a day prior to the date of the check, the bank is not bound thereby, because the holder is notified by the paper itself that the cashier has exceeded his authority: *Clarke National*

Digitized by Google

Bank v. *Bank of Albion*, 52 Barb. 597. Where the president of a bank having a general authority to certify checks certified his own and those of another having no funds, the bank is liable: *Claflin* v. *Farmers' etc. Bank*, 36 Id. 546. The principal case is cited and approved in all these cases. In the latter case it is said that "the legal principles respecting the subject of agency, as applicable to the certification of checks, their character and negotiability, and the protection to which *bona fide* holders are entitled, are fully considered" in the principal case, "and are controlling." In *Bank of New York* v. *Bank of Ohio*, 29 N. Y. 632, the case is cited to the point that a bank is "liable to a *bona fide* holder, upon a certificate of its officer, although such certificate was false, upon the ground that the officer so certifying was authorized to do similar acts for the bank, and the holder was justified in relying thereon." In *People* v. *Contracting Board*, 27 Id. 384, it is said, *per* Selden, J., dissenting, citing the principal case, that where a statute requires a contractor to furnish a certificate of deposit "in cash" as security, it is immaterial whether it is in credit or in cash if it constitutes a sufficient consideration for the certificate, and that "perhaps" even that is immaterial.

PRINCIPAL'S LIABILITY FOR AGENT'S ACTS IN EXCESS OF AUTHORITY OR INSTRUCTIONS GENERALLY: See *Florance* v. *Adams*, 38 Am. Dec. 226; *Baring* v. *Peirce*, 40 Id. 534; *Snow* v. *Warner*, 43 Id. 417; *Bryant* v. *Moore*, 45 Id. 96; *Brown* v. *Johnson*, 51 Id. 118; *Goodloe* v. *Godley*, Id. 159; *Towle* v. *Leavitt*, 55 Id. 195; *Keener* v. *Harrod*, 56 Id. 706; *McCoy* v. *McKowen*, 59 Id. 264; *Drumright* v. *Philpot*, 60 Id. 738, and notes. See particularly, as to the principal's liability for the agent's frauds or torts, *Moir* v. *Hopkins*, 63 Id. 312; *Henderson* v. *San Antonio etc. R. R. Co.*, 67 Id. 675, and cases cited in the notes thereto. To the point that the apparent authority of an agent is the real authority as to all persons dealing in good faith with him, whenever the particular act is within the terms of the power, and that the party is not bound to inquire as to facts *aliunde* limiting the authority, the principal case is cited as approving *North River Bank* v. *Aymar*, 3 Hill (N. Y), 262, in *Marsh* v. *Gilbert*, 4 Thomp. & C. 262; S. C., 2 Hun, 61; *Westfield Bank* v. *Coonen*, 37 N. Y. 322. So where the act is apparently within the power, the principal is bound by the agent's representations as to facts within his peculiar knowledge essential to the exercise of the power: *Gould* v. *Sterling*, 23 Id. 463. The case is distinguished on that point, and the doctrine is held not to apply where the agent makes representations outside of a defined authority, in *Eaton* v. *Delaware etc. R. R. Co.*, 57 Id. 393. In *Griswold* v. *Haven*, 25 Id. 597, the case is referred to generally as discussing the question of a principal's liability for the representations and acts of his agent. In the same case, at page 601, it is said, *per* Selden, J., that a principal's liability for the fraud of his agent rests on the ground that in employing such agent he is under obligation to pay some heed to the diligence, skill, integrity, and fitness of the agent, and the principal case is commented on and explained as having been explicitly based on this ground, and as sustainable on no other. In *People* v. *Bostwick*, 43 Barb. 25, it is held that, under the doctrine of the principal case as to the liability of a principal for his agent's acts, where several sureties sign a bond and deliver it to one obligor to procure the signature of another surety, they are liable only for acts of such obligor which they have authorized. In *First National Bank* v. *Morgan*, 6 Hun, 347, and *Exchange Bank* v. *Monteath*, 26 N. Y. 507, 508, the case is cited with others as authority for the doctrine that negotiable paper made or indorsed by a partner in the firm name, but for a private purpose or for the accommodation of another, is binding on the firm in the hands of a *bona fide* holder. A party

Digitized by Google

taking a note made or indorsed by an agent is bound to look to the agent's power and its legal effect, and to see that the authority is not exceeded, as a general rule: *Greenwood* v. *Spring*, 54 Barb. 381, also citing the principal case. It is cited to the point that where an indorsement by an agent is within his apparent but not actual authority, and the agent represented that it was within the power, a *bona fide* holder will be protected, in *Rothschild* v. *Schuberth*, 8 Bosw. 294; but the rule was held not to apply there, because there was no such question in the case.

LIABILITY OF CORPORATION FOR UNAUTHORIZED ACTS OR TORTS OF AGENTS: See *Burrill* v. *Nahant Bank*, 35 Am. Dec. 395; *Merchants' Bank* v. *Central Bank*, 44 Id. 665; *Bank of Alabama* v. *Comegys*, 46 Id. 278; *Catlin* v. *Gunter*, 62 Id. 120; *Jones* v. *Western Vt. R. R. Co.*, 65 Id. 206; *Henderson* v. *San Antonio etc. R. R. Co.*, 67 Id. 675, and cases cited in the notes thereto. The principal case is cited in all the following decisions as an authority for the various propositions stated. There are many cases in which a corporation is held liable for the unauthorized acts of its agents, where the person seeking to enforce the liability is in the position of a *bona fide* holder of an obligation purporting to be that of the corporation, having paid value for it without notice of any excess of authority in making or transferring it: *Booth* v. *Farmer's etc. Bank*, 4 Lans. 306. Hence, a negotiable obligation of a corporation purporting on its face to be valid is so in the hands of a *bona fide* holder, though in fact not duly issued: *Madison etc. R. R. Co.* v. *Norwich Savings Society*, 24 Ind. 461. A bank is liable for the act of its cashier, who has a general authority to draw drafts, in drawing a particular draft for a customer and failing to apply the amount as directed by the customer, particularly where the action was taken with the president's knowledge: *Reynolds* v. *Kenyon*, 43 Barb. 600. An accommodation indorsement by an officer of a corporation having a general authority to indorse, either express or implied, is binding upon the corporation in favor of a *bona fide* holder taking it under circumstances warranting the belief that it is business paper, although the officer has no authority to indorse for accommodation: *Mechanics' Banking Association* v. *New York etc. Lead Co.*, 20 How. Pr. 510; S. C., 23 Id. 80; S. C., 35 N. Y. 506; *Bank of Genesee* v. *Patchin Bank*, 19 N. Y. 319; *Bank of Auburn* v. *Putnam*, 1 Abb. App. Dec. 85; S. C., 3 Keyes, 343; *Houghton* v. *First National Bank*, 26 Wis. 669. As where the corporation has previously recognized similar indorsements in favor of the same holder: *Bank of Auburn* v. *Putnam*, *supra*. But a corporation is not liable on an accommodation indorsement, unless the note is discounted in good faith on the express or implied representation of the corporation that it is business paper, and the principal case is not in conflict with this: *Bridgeport City Bank* v. *Empire Stone Dressing Co.*, 30 Barb. 424; S. C., 19 How. Pr. 52. A bank is not liable, it seems, on an indorsement by its cashier as "cashier," the name of the bank not being used, and there being no evidence of any authority to indorse, except to facilitate collections: *Bank etc. of New York* v. *Farmers' etc. Bank of Ohio*, 36 Barb. 334. Generally, a party taking a note indorsed by an agent of a corporation, in order to bind the corporation, must show the indorsement to have been the agent's real or apparent authority, and that it was taken *bona fide* and for value: *Marine Bank* v. *Clements*, 3 Bosw. 605. But a uniform practice of an insurance company for several months to have notes negotiated by it indorsed by its president is competent evidence of authority for a particular indorsement: S. C. in court of appeals, 31 N. Y. 45. And generally, where there is no authority for a particular act of an agent of a corporation which is called in question, proof of a general or particular usage including it

Digitized by Google

is sufficient, as respects persons dealing with the agent in good faith without notice: *Pope* v. *Bank of Albion*, 57 Id. 131. See generally, as to the authorization of agents of corporations by implication, *Ryan* v. *Dunlap*, 63 Am. Dec. 334, and cases cited in the note thereto. The doctrine of estoppel may give effect to the acts of the officers of a corporation as against the corporation, as in other cases of principal and agent: *First National Bank* v. *Ocean National Bank*, 60 N. Y. 293. As a general rule, the authority of an officer of a corporation to bind it by a particular contract need not be shown by express resolution, but the acts, statements, and representations of the officer himself in the course of his duty and relating thereto are competent evidence: *Lee* v. *Pittsburgh etc. Coal Co.*, 56 How. Pr. 378. Where an act is within the terms of the authority of the officers of a corporation, but depends upon the performance of certain conditions precedent within the peculiar knowledge of such officers, their representations as to performance bind the corporation; as in case of town bonds authorized by statute to be issued upon compliance with certain prerequisites represented by the officers to have been complied with, when such is not the fact, the bonds having come into the hands of *bona fide* holders: *Gould* v. *Venice*, 29 Barb. 451; *Gould* v. *Sterling*, 23 N. Y. 463. To the point that a corporation, as well as an individual, may do wrong through its agents, the principal case is cited in *Booth* v. *Farmers' etc. Bank*, 50 N. Y. 401.

In a case which long occupied the attention of the courts of New York, respecting the liability of a corporation for the issuance of false certificates of stock, growing out of the same transaction as *Mechanics' Bank* v. *New York R. R. Co.*, 13 N. Y. 599, referred to in the opinion of Selden, J., *supra*, the principal case was distinguished by the judges who delivered opinions at the various stages of the cause, on the ground of the want of negotiability of such certificates, and also because the act of issuing the certificates was not within the real or apparent scope of the authority of the agent: *New York etc. R. R. Co.* v. *Schuyler*, 17 How. Pr. 465; S. C., 8 Abb. Pr. 241; S. C., 38 Barb. 552; S. C., 34 N. Y. 61. In the same case in 38 Barb. 546, the dissenting opinion of Comstock, J., in the principal case is referred to as laying down the same doctrines as were expressed by the same learned judge in *Mechanics' Bank* v. *New York etc. R. R. Co.*, 13 N. Y. 599. In *Seizer* v. *Mali*, 32 Barb. 79, it is held, citing the principal case, that the *bona fide* holder of a false certificate of stock who obtained it from a third person, and not from the agent issuing it, cannot recover against the officers of the corporation because of want of privity. The case is distinguished on this point also in *Cross* v. *Sackett*, 2 Bosw. 658. So it is distinguished, *per* Peabody, J., dissenting, in *Caneaux* v. *Mali*, 25 Barb. 592, as not affecting the question of the personal liability of an agent of a corporation for an unauthorized issuance of stock.

DAVIS v. GORTON.

[16 NEW YORK, 255.]

STATUTE OF LIMITATIONS WILL BAR SUIT FOR WAGES FOR SERVICES RENDERED THROUGH SERIES OF YEARS without any express agreement as to time of payment, upon a presumption that the hiring was from year to year, and the wages became due yearly; rather than that no right of action accrued until the end of the service.

Digitized by Google

APPEAL from a judgment for plaintiff in an action for wages. The facts appear in the opinion.

S. T. Fairchild, for the appellant.

C. B. Sedgwick, for the respondent.

By Court, JOHNSON, J. The recovery has been had in this case upon the ground of work, labor, and services performed at the request of the intestate, whom the defendant represents by the plaintiff and by his wife. The referees have found that no time was fixed for the termination of the employment nor for the payment therefor, and that the services in question were rendered under a general employment and retainer, and that they were continued without interruption from their commencement to their termination, a period of over thirteen years. Under these circumstances, the question is presented whether the referees have correctly decided that as matter of law the statute of limitations did not begin to run until the termination of the service.

The referees have not found that these services were performed upon a contract that they should be paid for after Moore's death, in case he did not provide by will for the compensation of the parties who rendered them, but they are placed upon the mere ground of services to be paid for at their value, without any express agreement as to the time or measure of compensation or the term of employment. The law will not, I think, intend, in respect to a permanent and continuous employment, an agreement, as to compensation, so unusual in its character, and so little conducive to the interests of either party to it, as that the payment of any compensation shall be postponed until the termination of the employment. The case strongly resembles those of the hiring of clerks, servants in husbandry, and other similar employments, in which, to avoid the inconvenience above alluded to, and to give each party the benefit of all the seasons during the year, an indefinite hiring is taken to be a hiring for a year, or from year to year, the compensation payable at the same time: *Rex* v. *Macclesfield*, 3 T. R. 76; *Baxter* v. *Nurse*, 1 Car. & Kir. 10. This rule is at least as favorable to the claim of these parties as the facts call for, and the referees therefore erred in their decision upon the point in question. It may be that even monthly payments would be more in accordance with the usual terms of such employments.

SHANKLAND, J., dissented; all the other judges concurred.

Judgment reversed and new trial ordered.

Digitized by Google

STATUTE OF LIMITATIONS, RUNNING OF, IN CASE OF ACCOUNTS FOR LABOR, BOARD, AND THE LIKE, EXTENDING THROUGH LONG PERIOD.—The principal case is followed on this point in *Nicholl* v. *Larkin*, 2 Redf. 238, a similar case. So in *Butler* v. *Kirby*, 53 Wis. 192, which was a much stronger case, there being an express employment from month to month. The same principle was applied in *Thompson* v. *Reed*, 48 Ill. 122, and *In re Teyn*, 2 Redf. 309, to accounts for board running through a series of years; and to an account for the use of property for a long period in *Rider* v. *Union Rubber Co.*, 5 Bosw. 98; S. C., 28 N. Y. 385. The case is cited also in *Turner* v. *Martin*, 4 Robt. 664. As to the operation of the statute in cases of extended accounts generally, see *Union Bank* v. *Knapp*, 15 Am. Dec. 181; *Sickles* v. *Mather*, 32 Id. 521; *Hodge* v. *Manley*, 60 Id. 253.

McKYRING v. BULL.

[16 NEW YORK, 297.]

PAYMENT, COMPLETE OR PARTIAL, MUST BE PLEADED, BEING "NEW MATTER CONSTITUTING DEFENSE," under the New York code of procedure, sec. 149, and it cannot be shown (either in bar or mitigation of recovery) under a general denial.

APPEAL from a judgment of the superior court of Buffalo, in favor of plaintiff in an action for wages. The defendant, on the trial, offered evidence of payment, first in bar, then in mitigation, which was excluded because there was no plea of payment, the answer being a general denial only. This ruling was sustained by the full court, and defendant appealed.

Nicholas Hill, for the appellant.

F. J. Fithian, for the respondent.

By Court, SELDEN, J. Although the code of procedure has abrogated the common-law system of pleading with all its technical rules, yet in one respect the new system which it has introduced bears a close analogy to that for which it has been substituted. The general denial allowed by the code corresponds very nearly with the general issue in actions of *assumpsit* and of debt on simple contract at common law. The decisions upon the subject, therefore, in the English courts, although not obligatory as precedents since the changes introduced by the code, will nevertheless be found to throw much light upon the question presented here.

While the general issue, both in *assumpsit* and debt, was in theory what the general denial allowed by the code is in fact, viz., a simple traverse of the material allegations of the declaration or complaint, yet from the different phraseology adopted

Digitized by Google

in the two forms of action, a very different result was produced. The declaration, in debt, averred an existing indebtedness, and this amount was traversed by the plea of *nil debet* in the present tense; hence nothing could be excluded which tended to prove that there was no subsisting debt when the suit was commenced. In *assumpsit*, on the contrary, both the averment in the declaration and the traverse in the plea were in the past instead of the present tense, and related to a time anterior to the commencement of the suit. Under *non assumpsit*, therefore, so long as the rule of pleading which excludes all proof not strictly within the issue was adhered to, no evidence could be received except such as would tend to show that the defendant never made the promise. That this was the view taken of these pleas in the earlier cases is clear. In an anonymous case before Lord Holt, *Anonymous*, 1 Salk. 278, it was adjudged "that in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense." Again, in *Draper* v. *Glassop*, 1 Ld. Raym. 153, the same judge said: "If the defendant pleads *non assumpsit*, he cannot give in evidence the statute of limitations, because the *assumpsit* goes to the *præter tense*, but upon *nil debet* the statute is good evidence, because the issue is joined *per verba de præsenti*."

We find, however, that a practice afterwards grew up, and came at last to be firmly established, of allowing, under the plea of *non assumpsit*, evidence of various defenses, which admitted all the essential facts stated in the declaration, but avoided their effect by matter subsequent, such as payment, accord and satisfaction, arbitrament, release, etc. The history and progress of this anomaly is easily traced. The first departure from principle was in relation to the general issue in actions of *indebitatus assumpsit*. In these actions, the promise alleged being a mere legal implication arising upon the facts stated, a traverse of the promise was of course equivalent to a traverse of the allegations upon which it is predicated. Those allegations were regarded as, in substance, the same as in an action of debt upon simple contract; and hence the courts concluded that a plea which put them in issue should have the same effect as the plea of *nil debet*. That this was the reasoning originally resorted to is plain from some of the older cases on the subject. In *Beckford* v. *Clarke*, 1 Sid. 236, which was an action of *assumpsit* brought upon a special promise to secure goods from perils, those of the sea excepted, the court of king's bench held that in *assumpsit* in fact,

Digitized by Google

upon *non assumpsit* pleaded, a release could not be given in evidence as a defense, but on *assumpsit* in law it might. So in the case of *Fits* v. *Freestone*, 1 Mod. 210, it was held that "in an action grounded upon a promise in law, payment before the action brought is allowed to be given in evidence upon *non assumpsit*, but when the action is grounded upon a special promise, then payment, or any other legal discharge, must be pleaded."

But notwithstanding the distinction adverted to in these cases, the admission of the evidence, even in actions of *indebitatus assumpsit*, was a plain departure from the issue upon *non assumpsit*, which was, in terms, that the defendant had not promised; a departure, however, supposed to be justified as a sacrifice of form to substance. But the courts, having already sacrificed substance to form by allowing an action of debt to be converted into *assumpsit* by the addition of a mere fictitious promise, had imposed upon themselves the necessity of adhering to this form. By disregarding it, a manifest incongruity in pleading was produced. Tested by the language of the record, there was no difference in the issue formed by the plea of *non assumpsit*, whether the promise was express or implied. The courts therefore lost sight, after a time, of the distinction upon which special defenses were originally admitted in actions of *indebitatus assumpsit* alone, and looking only at the record, took another stride, and admitted evidence of payment, release, arbitrament, etc., under *non assumpsit*, without regard to the nature of the promise.

To justify this, a new theory was necessary, and we find it broached by an early writer: Gilb. C. P. 63. It was, that the gist of the action of *assumpsit* was the fraud or deceit practiced by the defendant in not performing his promise, and that this was put in issue by the plea of *non assumpsit*. Hence any evidence showing that there was no existing obligation at the commencement of the suit, and consequently no fraud which was injurious to the plaintiff, would support the plea. The same reasoning is also adopted by a later writer upon pleading: Lawes on Pl. 520, 521. It is, however, manifestly false and illogical. Fraud or deceit never constituted the gist of the action. On the contrary, it has ever been held that fraud need not be alleged, and if alleged, need not be proved. All the other theories, invented to account for the anomaly, were equally fallacious.

These errors proved, in their consequences, subversive of some of the main objects of pleading. They lead to surprises upon

Digitized by Google

the trial, or to an unnecessary extent of preparation. The courts, however, found it impossible to retrace their steps, or to remedy this and other defects in the system of pleading, without authority from parliament. This authority was at length conferred by the act of 3 & 4 Wm. IV., c. 42, sec. 1; and the judges in Hilary term thereafter adopted a series of rules, one of which was to correct the errors which have been adverted to: 2 Cromp. & M. 10. The first rule adopted under the head of *assumpsit* provided, in substance, that the plea of *non assumpsit* should operate, where the promise was express, as a denial of the promise, and where it was implied, of the matters of fact upon which the promise was founded.

The object of this rule was to restore pleading in *assumpsit* to its original logical simplicity. It was obviously intended as a mere correction of previous judicial errors. It interprets the plea of *non assumpsit* strictly according to its terms, and thus plainly indicates that the courts had erred in departing from those terms. That this was the view of the judges is shown by the different course taken in regard to the plea of *nil debet*. As this plea, construed according to its terms, included every possible defense within the issue which it formed, the judges did not attempt to change the import of those terms, but abrogated the plea. Rule 2, under the head of "Covenant and Debt," provides that "the plea of *nil debet* shall not be allowed in any action;" and rule 3 substitutes the plea of *nunquam indebitatus* in its place. Thus the whole practice, which had continued for centuries, of receiving evidence of payment and other special defenses under the plea of *nil debet* and *non assumpsit*, was swept away.

There are several inferences to be drawn from this brief review which have a direct bearing upon our new and uniform system of pleading in this state. The first is, that no argument in favor of allowing payment, or any other matter in confession and avoidance, to be given in evidence under a general denial, can be deduced from the former practice in that respect, as this practice has been abandoned in England, not only as productive of serious inconvenience, but as a violation of all sound rules of interpretation.

A second inference is, that in regard to pleading it is indispensable to adhere to strict logical precision in the interpretation of language. The anomaly which has been referred to was wholly produced by the slight deviation from such precision in the action of *indebitatus assumpsit* which has been pointed out.

Digitized by Google

But the most important inference to be deduced from the historical sketch just given consists in the admonition to adhere rigidly to that rule of pleading which permits a traverse of facts only, and not of legal conclusions; and this brings us to the pivot upon which the point under consideration must necessarily turn. The counsel for the defendant insists that as the answer controverts every allegation of the complaint, it puts in issue the allegations with which it concludes, viz., that there was due to the plaintiff, at the commencement of the suit, over and above all payments, etc., the sum of one hundred and thirty-four dollars. But this allegation is a mere legal concluclusion from the facts previously stated. Its nature is not changed by the addition of the words "over and above all payments." No new fact is thereby alleged. The plaintiff voluntarily limits his demand to a sum less than that to which, under the facts averred, he would be entitled.

Were courts to allow allegations of this sort to be traversed, they would fall into the same difficulty which existed in regard to the plea of *nil debet*, and which led the judges in England to abolish that plea. It would be impossible under such a rule, in a great variety of cases, to exclude any defense whatever, if offered under an answer containing a general denial. In England, as we have seen, after centuries of experience, it has been found most conducive to justice to require the parties virtually to apprise each other of the precise grounds upon which they intend to rely; and the system of pleading prescribed by the code appears to have been conceived in the same spirit. It was evidently designed to require of parties, in all cases, a plain and distinct statement of the facts which they intend to prove; and any rule which would enable defendants, in a large class of cases, to evade this requirement, would be inconsistent with this design.

The case of *Van Gieson* v. *Van Gieson*, 12 Barb. 520, subsequently affirmed in this court, contains nothing in opposition to the doctrine here advanced. That case simply decided that where the complaint contained an averment of non-payment, a plea of payment formed a complete issue. That payment having been denied in the complaint, it was unnecessary to repeat that denial in a reply. My conclusion, therefore, is, that neither payment nor any other defense which confesses and avoids the cause of action can in any case be given in evidence as a defense under an answer containing simply a general denial of the allegations of the complaint.

Digitized by Google

The next question is whether evidence of payment, either in whole or in part, is admissible in mitigation of damages. As the code contains no express rule on the subject of mitigation, except in regard to a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By those principles, defendants in actions sounding in damages were permitted to give in evidence, in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but in many cases facts showing that the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation that if properly pleaded it would have constituted a complete defense.

Thus in *Smithies* v. *Harrison*, 1 Ld. Raym. 727, the truth of the charge was received in mitigation in an action of slander, although not pleaded. Again, in the case of *Abbot* v. *Chapman*, 2 Lev. 81, which was an action of *assumpsit*, the defendant having given in evidence a release, Lord Holt said that "he should have pleaded *exoneravit*, but that the evidence was admissible in mitigation of damages." So, too, in the modern case of *Nicholl* v. *Williams*, 2 Mee. & W. 758, which was *assumpsit* for use and occupation, the defendant, having pleaded payment to part of the demand and *non assumpsit* to the residue, was permitted upon the trial to prove payment in full; but it was held that the evidence could only go in mitigation, and that the plaintiff was entitled to judgment for nominal damages.

It is obvious that this practice was open to serious objections. It enabled defendants to avail themselves of their defenses for all substantial purposes, without giving any notice to the plaintiff. Its unjust operation in the action of slander was observed at an early day, and an attempt was made in the case of *Underwood* v. *Parks*, 2 Stra. 1200, to correct the evil, so far as that action was concerned. But in regard to payment, release, etc., so long as they were received in evidence, under the general issue in bar, no objection could be made to allowing them in mitigation. As soon, however, as this practice was abrogated by the rules of Hilary term, 4 Wm. IV., the question as to the admissibility of payment in mitigation at once arose.

In *Lediard* v. *Boucher*, 7 Car. & P. 1, Lord Denman admitted evidence of part payment under the general issue, on the ground that the rule of Hilary term meant "a complete payment, which is an answer to the action, and not a partial payment, which merely goes to the amount of the damages;" and in *Shirley* v. *Jacobs*, 7 Id. 8, the court of common pleas held that pay-

Digitized by Google

ment in full might be received in mitigation. Tindal, C. J., says: "I take the meaning of the rule to be this, that 'payment' is used to denote that which is intended as an answer to the action. In the present case, the evidence was not offered with that view; it was only offered in reduction of the damages."

These decisions soon led to the adoption of the rule of Trinity term, 1 Victoria, by which it is provided that "payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar:" 4 Mee. & W. 4. A question may arise whether by the word "payment," as used in this rule, payment in full only is meant, or whether it includes partial payment also. The latter, however, must, I apprehend, be its true construction. It would be found as impossible to discriminate between partial payment and payment in full, when offered in mitigation, as it was between proof of the truth of the charge and evidence tending to prove it true in the action of slander, after the rule adopted in *Underwood* v. *Parks*, 2 Stra. 1200. Payments may be made at different times and in different sums, the evidence in regard to some of which may be conclusive, and as to others doubtful; so that in many cases it would not be known whether the proof would establish complete or only partial payments, without first taking the verdict of the jury.

The rule of Trinity term, 1 Victoria, therefore, must be construed to exclude evidence not only of complete but of partial payment in mitigation without plea. Such a rule does not lead to the embarrassment which followed the rule of *Underwood* v. *Parks*, *supra*. That rule, in effect, excluded all evidence in mitigation unless pleaded, and there was no way in which it could be pleaded. In regard to payment, there is no such difficulty, as that may be pleaded to a part as well as to the whole of a demand. It is not essential to the validity of a plea that it should answer the whole of a declaration or complaint, or of any single count. It is sufficient if it is an answer to so much as it professes to answer: *Greene* v. *Jones*, 1 Saund. 299 a, note *b*; *Barnes* v. *Hunt*, 11 East, 451; *Nicholl* v. *Williams*, 2 Mee. & W. 758.

It has, however, been supposed that a defense could not be interposed to part of a single count, except where such count was capable of a definite division into distinct and independent parts. But some of the modern English cases, and especially the case of *Henry* v. *Earle*, 8 Mee. & W. 228, would seem to show that it is not now so regarded in England, at least so far

Digitized by Google

as the plea of payment is concerned; and that that plea may be interposed in an action of debt, to any portion of an entire demand. This consequence, indeed, would seem necessarily to follow from the new rules of 4 Wm. IV., and 1 Victoria, even if it was otherwise before. The matter is now placed, therefore, in the English courts, upon a footing of perfect justice. If the demand for which an action is brought has once existed, and the defendant relies upon its having been reduced by payments, he must appear and plead. It is to be determined in this case whether we have kept up with those courts in our measures of reform.

The rules of Hilary term, 4 Wm. IV., and the system of pleading prescribed by the code, have, in one respect, a common object, viz., to prevent parties from surprising each other, by proof of which their pleadings give no notice. Those rules, according to the construction put upon them by the courts, were found inadequate, as far as proving payment in mitigation is concerned, to accomplish the end in view; and it became necessary to adopt the rule of Trinity term, 1 Victoria, to remedy the defect. If the provisions of the code are to receive in this respect a construction similar to that given to the rules of Hilary term, then an additional provision will be required to place our practice upon the same basis of justice and convenience with that in England.

But is such a construction necessary? Section 149 of the code provides that the answer of a defendant must contain: 1. A general or specific denial of the material allegations of the complaint; and 2. A statement of any new matter constituting a defense or counter-claim.

The language here used is imperative—"must contain." It is not left optional with a defendant whether he will plead new matter or not; but all such matter, if it constitute a "defense or counter-claim," must be pleaded; and this is in entire accordance with the general principles of pleading.

The word "defense," as here used, must include partial as well as complete defenses; otherwise, it would be no longer possible to plead payment in part of the plaintiff's demand, except in connection with a denial of the residue; since section 153 provides that "the plaintiff may, in all cases, demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defense." Such a restriction would be not only contrary to the general spirit of the code in regard to pleading, but would obviously conflict with section 244, sub-

Digitized by Google

division 5, which provides that "where the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim," etc. The words "expressly, or by not denying," were, it is true, inserted by amendment since the issue in this case was joined; but they do not change the meaning of the sentence.

The question to be determined, then, is whether these provisions are limited in their operation to cases where the defendant seeks to avail himself of new matter strictly as a defense, either in full or *pro tanto*, or whether they extend to the use of such matter in mitigation. Were there nothing in the code to indicate the intention of the legislature on this subject, we might feel constrained to follow the construction put by the English courts upon the rules of Hilary term; although it is evident, from the subsequent adoption of the rule of Trinity term, 1 Victoria, that this construction did not accomplish all that was intended. But section 246 provides that in all actions founded upon contract, brought for the recovery of money only, in which the complaint is sworn to, if the defendant fails to answer, the plaintiff is entitled absolutely to judgment for the amount mentioned in the summons, without any assessment of damages. It is plain that, in this class of actions, defendants who have paid part only of the plaintiff's demand must appear and plead such part payment, or they will lose the benefit of it altogether. The provisions of section 385 afford no adequate remedy in such cases, because the offer to allow judgment for a part does not relieve the defendant from the necessity of controverting the residue by answer.

Section 246 could never have been adopted, therefore, without an intention on the part of the legislature that section 149 should be so construed as to require defendants, at least in this class of actions, to set up part payment by answer; and it is difficult to suppose that they intended the section to receive one construction in one class of actions and a different one in another.

My conclusion therefore is, that section 149 should be so construed as to require the defendants in all cases to plead any new matter constituting either an entire or partial defense, and to prohibit them from giving such matter in evidence upon the assessment of damages when not set up in the answer. Not only payment, therefore, in whole or in part, but release, accord and satisfaction, arbitrament, etc., which may still, for aught I see, be made available in England in miti-

Digitized by Google

gation of damages without plea, must here be pleaded. In this respect, our new system of pleadings under the code is more symmetrical than that prescribed by the recent rules adopted by the English judges.

The judgment of the superior court of Buffalo should be affirmed.

Shankland, J., delivered an opinion to the same effect.

Comstock, Brown, and Bowen, JJ., concurred.

Paige, J., expressed no opinion.

Denio, C. J., and Johnson, J., dissented.

Judgment affirmed.

Payment must be Pleaded, and cannot be given in evidence under the general issue: *Hubler* v. *Pullen*, 68 Am. Dec. 620, and cases cited in the note thereto. To the same point the principal case is cited in *Bassett* v. *Lederer*, 1 Hun, 282; *Kissam* v. *Roberts*, 6 Bosw. 165. So, in case of partial payment: *Harter* v. *Crill*, 33 Barb. 284; *Wehle* v. *Haviland*, 42 How. Pr. 407. So evidence of an extinguishment of a cause of action, total or partial, in any other mode, as by recovery against another company in an action on an insurance policy, is inadmissible, unless pleaded: *Moorell* v. *Irving Fire Ins. Co.*, 33 N. Y. 443. But the doctrine of the principal case does not apply to exclude evidence of payment not pleaded in an action to recover for services where their value or extent is not stated, but there is an allegation of an indebtedness "for the balance remaining due after sundry payments made by the defendant: *Quin* v. *Lloyd*, 41 Id. 352.

What Defenses are or are not Admissible unless Specially Pleaded, Generally: See *Dorrance* v. *Scott*, 31 Am. Dec. 509; *Berry* v. *Gillis*, 43 Id. 584; *Whitney* v. *Clarendon*, 46 Id. 150; *Stockton* v. *Frey*, 45 Id. 138; *Jones* v. *Weathersbee*, 51 Id. 653; *Cook* v. *Field*, 36 Id. 436; *Reynolds* v. *Stansbury*, 55 Id. 459; *Falconer* v. *Smith*, Id. 611; *Brewer* v. *Harris*, 41 Id. 587; *Winne* v. *Elderkin*, 52 Id. 159; *Young* v. *Rummell*, 38 Id. 594; *Stearns* v. *Marsh*, 47 Id. 248; *Caldwell* v. *Walters*, 55 Id. 592; *Connersville* v. *Wadleigh*, 41 Id. 214; *McIntire* v. *Preston*, 48 Id. 321; *Woodward* v. *Harbin*, 37 Id. 753; *Nicholay* v. *Kay*, 43 Id. 680; *Yeates* v. *Reed*, 32 Id. 43; *Wann* v. *McNulty*, 43 Id. 58; *Hart* v. *Reed*, 35 Id. 179; *Henry* v. *Sargeant*, 40 Id. 146; *Chanes* v. *Commissioners*, 35 Id. 131; *Hunter* v. *Hatton*, 45 Id. 117; *Cummings* v. *Coleman*, 62 Id. 402; *Babcock* v. *Trice*, 68 Id. 560, and notes thereto. The principal case is cited to the following points relating to this subject: New matter, constituting a defense, must be specially pleaded under the code of New York and similar codes, and is not admissible under general denials: *Curran* v. *Curran*, 40 Ind. 484; *Button* v. *McCauley*, 38 Barb. 415; *St. Johns* v. *Skinner*, 44 How. Pr. 200. Whatever new matter constitutes a defense by way of confession and avoidance is within this rule: *Roe* v. *Angevine*, 7 Hun, 680; *Taylor* v. *Richards*, 9 Bosw. 680; *Bellinger* v. *Craigue*, 31 Barb. 537; *Wehle* v. *Haviland*, 42 How. Pr. 407. So, whether the defense is total or partial: *Foland* v. *Johnson*, 16 Abb. Pr. 239; *Maretzek* v. *Cauldwell*, 19 Id. 40; S. C., 2 Robt. 720; *Cummings* v. *Morris*, 3 Bosw. 573; *Loosey* v. *Orser*, 4 Id. 403; *Wehle* v. *Butler*, 43 How. Pr. 16; S. C., 12 Abb. Pr., N. S., 149; S. C., 3 Jones & S. 12. See *Mulry* v. *Mohawk etc. Ins. Co.*, 66 Am. Dec. 380.

Digitized by Google

The design of the code is to require of parties in all cases a plain and distinct statement of the facts which they intend to prove: *Ramsay* v. *Erie R. Co.*, 7 Abb. P., N. S., 180; S. C., 38 How. Pr. 215. Hence it requires the defendant, by his pleading, to apprise the plaintiff of the defense on which he relies: *Babb* v. *Mackey*, 10 Wis. 377. Among the defenses required thus to be specially pleaded, under the rule of the principal case, aside from that of payment referred to under the first head in this note, are the following: Failure of consideration, total or partial: *Clough* v. *Murray*, 19 Abb. Pr. 98; title in another in an action for the wrongful taking of goods: *Kissam* v. *Roberts*, 6 Bosw. 165; adverse possession: *American Co.* v. *Bradford*, 27 Cal. 367; counter-claim: *Stoddard* v. *Treadwell*, 26 Id. 306; recoupment of damages for breach by plaintiff of the contract sued on: *Krom* v. *Levy*, 47 How. Pr. 105; S. C., 1 Hun, 175; usury: *Scott* v. *Johnson*, 5 Bosw. 224; *Williams* v. *Birch*, 6 Id. 307; illegality of the contract sued on, though fair on its face: *Schruyer* v. *Mayor etc. of New York*, 7 Jones & S. 3; *O'Toole* v. *Garvin*, 1 Hun, 94; that there was a special contract limiting the liability of a telegraph company in an action for not sending a dispatch: *Baldwin* v. *United States T. Co.*, 1 Lans. 135; so that there was a special contract which the plaintiff broke to the defendant's injury in an action for goods sold: *Manning* v. *Winter*, 7 Hun, 485, *per* Gilbert, J., dissenting; that a broker suing for compensation for making a sale broke his implied contract by acting also as agent for the purchaser: *Duryee* v. *Lester*, 75 N. Y. 444. So a conductor, sued for an assault upon a passenger, cannot under a general denial prove the regulations of the company, and that they were reasonable, and that he acted in accordance with them: *Pier* v. *Finch*, 29 Barb. 171. So in an action for a breach of promise of marriage it has been held that, under the general denials, evidence of the plaintiff's lewd, immoral, or dissipated character or habits is inadmissible in bar, though it may be admissible in mitigation: *Button* v. *McCauley*, 1 Abb. App. Dec. 284; S. C., 5 Abb. Pr., N. S., 32; *Kniffen* v. *McConnell*, 30 N. Y. 290. In *Wehle* v. *Butler*, 12 Abb. Pr., N. S., 149, S. C., 3 Jones & S. 12, S. C., 43 How. Pr. 16, it was held that in an action for the conversion of goods, evidence of a subsequent valid sale of them on an execution in favor of the defendants and against the plaintiff was inadmissible in mitigation under a general denial, and that the doctrine of the principal case was "fully applicable." In *Maretzek* v. *Cauldwell*, 19 Abb. Pr. 40, S. C., 2 Robt. 720, the doctrine of the principal case that partial defenses must be pleaded in an action on a contract is admitted, but it is said that the authorities are against pleading mitigating circumstances except in actions of tort. But in *Beckett* v. *Lawrence*, 7 Abb. Pr., N. S., 406, the citation of the principal case in *Foland* v. *Johnson*, 16 Abb. Pr. 235, is quoted, and it is said to be established by the latter case that mitigating circumstances may be set up in the answer in an action for a malicious wrong. So it is held that in libel mitigating circumstances may be set up in the answer: *Bennett* v. *Matthews*, 64 Barb. 414.

Though it is true that new matter constituting a defense by way of confession and avoidance must be pleaded under the code, it is not so as to defenses going to negative the plaintiff's original cause of action, or to disprove what he would be required to prove in order to recover: *Schaus* v. *Manhattan Gas-light Co.*, 14 Abb. Pr., N. S., 373; S. C., 45 How. Pr. 482; S. C., 4 Jones & S. 263. Evidence of an attorney's negligence and unskillfulness in a matter in which he was employed has been held admissible under a general denial in an action for his fee in that matter: *Buttrick* v. *Gilman*, 22 Wis. 359, distinguishing the principal case. So it is held, also distinguishing the case,

Digitized by Google

that evidence that a note was altered after execution is admissible under a denial of its execution: *Boomer* v. *Koon*, 6 Hun, 647; and that in an action against a bailee for not paying over money deposited with him for the plaintiff, evidence that it was not the money of the depositor, but that of his employers, was admissible without being specially pleaded: *McKay* v. *Draper*, 27 N. Y. 266.

In accordance with the doctrine of the principal case, it is held in *Fetrow* v. *Wiseman*, 40 Ind. 158, that when infancy is pleaded in an action on a contract, a ratification after majority is not available for the plaintiff unless pleaded in the reply. In *Bank of Cooperstown* v. *Corlies*, 1 Abb. Pr., N. S., 418, the principal case is cited to the point that denials under the code are a substitute for the general issue under the old system. In *Marsh* v. *Ellsworth*, 1 Sweeney, 58, S. C., 36 How. Pr. 536, it is cited to the point that a mere legal conclusion alleged in a complaint is not admitted by a demurrer.

TERRY *v.* CHANDLER.

[16 NEW YORK, 354.]

PAROL AGREEMENT DETERMINING BOUNDARY can be valid only when made between owners of lands which adjoin. Where a claimant of lands divided by a ditch alleged a parol agreement between himself and the apparent owner of lands on both sides of the ditch that the ditch should be the division line, but showed no title to either portion of the lands: *Held*, that such agreement was inoperative.

APPEAL from a judgment in favor of defendant in an action for lands. The facts appear in the opinion. The appeal was submitted on printed arguments.

Charles Monell, for the appellant.

J. W. Gott, for the respondent.

By Court, BROWN, J. This action is brought to recover nine acres of land in the town of Warwick, county of Orange, of which a certain ditch is the southern boundary, by the description in the complaint. The answer admits the possession of the defendant, denies the plaintiff's title, and alleges that the defendant became seised of an estate in fee therein on or about the twenty-eighth day of January, 1848. The cause was tried at the Orange circuit, and in conformity with the provisions of section 261 of the code, the jury found certain facts, upon the effect of which the plaintiff's right to recover depends: 1. That in the year 1848 the plaintiff and the defendant made a parol agreement that the ditch referred to in the complaint, and which is the southern boundary of the lands in controversy, should be the division line of lands claimed by the defendant

Digitized by Google

and other lands adjoining the same lying on the north side of the ditch; and 2. That at the time the agreement was made the plaintiff was in the possession, and he and his grantors had been in possession since the year 1822, under deeds of conveyance, and claiming to be the owners of the land on both sides of the ditch, embracing the lands described in the complaint, of which the defendant, at the time of making the agreement, also claimed to be the owner; that after the making of the agreement the defendant entered into the possession of the lands in dispute, and has ever since continued in possession, and made valuable improvements thereon, by clearing a portion of the same of brush and bogs. Upon this verdict judgment was given for the plaintiff, which was affirmed at the general term. It does not appear that the defendant had any title to the lands on either side of the ditch, except such as he derived under the parol agreement; and at the time it was made he does not appear to have had the title of a naked possession, for the jury find affirmatively that the plaintiff then had the actual title and the actual possession on both sides of the pretended line. For more than twenty-five years he and his grantors had been in the possession, claiming title under deeds of conveyance. Such an agreement cannot be otherwise than wholly inoperative and void. It is within the statute of frauds; for if effect is given to it, its operation will be to vest in the defendant the title to the nine acres of land, without the writing required by the statute. This is not the case of a disputed boundary line, which the parties might adjust and establish by parol; because there can be no disputed boundary where there are no adjoining lands of different owners. The validity and legal force of parol agreements and submissions to settle disputed boundary lines was long resisted, upon the ground that, in effect, they passed the title to real property without the solemnities required by the statute. The courts however held, upon very substantial reasons, that such agreements and submissions did not effect the title. If they were confined to the sole object of ascertaining the true line of separation, they give effect to the title which the parties to such agreements really had, and left the statute of frauds in full force. Neither their purpose nor their effect was to pass real property from one person to another, but simply to ascertain the line to which their respective lands extended. The boundary of A was also that of B, which was often undefined, obscure, and uncertain; and when the agreement proposed and resulted in nothing more than to establish and mark where that boun-

Digitized by Google

dary was, the provisions of the statute of frauds were not invaded. It was never thought that the judgments of the courts in actions of ejectment, where the subject was a question of boundary, divested the title of one person and vested it in another; and yet the parol agreement, the submission, and the award under it, effect the same identical object and perform the same office as the judgment of a competent court. Both ascertain, by the means at their command, where the true line is, and establish it for all future time.

In *Jackson* v. *Dysling*, 2 Cai. 198, Mr. Justice Spencer says: "An agreement by parol to a settlement of a boundary line appears to be effectual, and not liable to any objection on the score of the statute of frauds and perjuries;" and Thompson, J., in the same case, observes that "the submission to two surveyors, and their decision thereupon, cannot be considered as extending to the title of the land, or to have the operation of a conveyance. The submission was of a mere matter of fact to ascertain where the line would run on actual survey." In *Robertson* v. *McNiel*, 12 Wend. 578, Mr. Justice Sutherland reasons in this wise: "The only question between the parties was as to the division line between those lots, and that fact they agreed should be decided by arbitrators. It had no bearing whatever upon the abstract question of title, no more than the testimony of a witness showing the particular location of the deed according to its courses and distances. It is well settled that upon the strength of such an award the party in whose favor it is made may recover in the action of ejectment." It is to be observed that to make these parol agreements and submissions effectual for any purpose, the parties to them must maintain towards each other the relation of adjoining owners. It is absurd to suppose that a parol agreement to establish a boundary, where one of the contracting parties is an owner and the other has neither the title nor the possession, can be of any avail. It is difficult to comprehend how such an agreement could have any operation at all. But if it could, it would be to impart to a person without title and without possession some interest in real property. In all the cases where these agreements have been upheld and enforced in the courts, it has been upon the ground that the parties to them were owners, and their lands adjoined upon the disputed and uncertain boundary. This is an indispensable prerequisite, without which the agreements could not have been sustained.

The case of *Adams* v. *Rockwell*, 16 Wend. 285, was a question

Digitized by Google

of disputed boundary, and greatly litigated. It was finally decided in the late court of errors, where the chancellor laid down the following rule: "Where there can be no real doubt as to how the premises should be located according to certain known boundaries described in the deed, to establish a practical location different therefrom, there must be either a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the statute in relation to real estate, or the erroneous line must have been agreed upon between the parties claiming the land on both sides thereof. Or the party whose right is to be thus barred must have looked silently on and seen the other party do acts or subject himself to expenses in relation to the land on the opposite side of the line, which would be an injury to him, and which he would not have done if the line had not been so located; in which case, perhaps, a grant might be presumed within the twenty years." In the more recent case of *Clark* v. *Wethey*, 19 Id. 320, it was held that nothing short of an adverse possession for a length of time sufficient to bar an entry would be effectual to establish a line different from that given in the deed; with this qualification, that when the monuments mentioned in the deed can no longer be found, the acts or agreements of the parties may be resorted to as secondary evidence to supply the hiatus created by the absence of the monuments. So in *Clark* v. *Baird*, 9 N. Y. 183, it was also held that parol declarations and agreements, intended to establish a line different from that given in the deed, "would, if effectual, amount either to a conveyance of lands by parol, in case the declarations were subsequent to the deed, or else, if they were prior to or contemporary with its delivery, such declarations of the intended effect of the language of the deed, if effectual, would violate the rule which forbids parol evidence to alter a written contract." The learned judge who delivered the opinion says, in conclusion: "That upon principle, where the description in the deed designates a piece of land as that conveyed, the description cannot be departed from by parol evidence of intent or of acquiescence in another boundary, unless such an adverse possession be shown as is in itself a bar to an ejectment."

In the present action, if the parol agreement of 1848 could be held valid, its effect would be to take from the true owner and vest in the defendant a lot of nine acres of land lying north of the ditch, to which he shows no manner of title or claim, and no relation which would authorize him to negotiate or contract in regard to the boundary line.

Digitized by Google

The improvements put upon the land in cutting brush and removing bogs are not of a character to estop the plaintiff from asserting his title.

The judgment of the supreme court should be affirmed.

All the judges were for affirmance, being of opinion that the parol agreement to locate the boundary line did not of itself affect the true title to the disputed premises, and being also of opinion that there were no facts in the case which equitably estopped the plaintiff from asserting his title.

Judgment affirmed.

ESTABLISHMENT OF BOUNDARIES BY PAROL AGREEMENT OR ACQUIESCENCE: See *Brewer* v. *Boston etc. R. R. Co.*, 39 Am. Dec. 694; *Crowell* v. *Maughs*, 43 Id. 62; *Riley* v. *Griffin*, 60 Id. 726; *Carroway* v. *Chancey*, 64 Id. 577; *George* v. *Thomas*, 67 Id. 612, and cases collected in the notes thereto. To the point that where there is an honest dispute as to a boundary line between coterminous proprietors they may fix the line by parol or by arbitration, but that if the land at that point confessedly belongs to one of them it cannot be vested in the other by any parol arrangement, the principal case is cited and approved in *Vosburgh* v. *Teator*, 32 N. Y. 565. So in *Smith* v. *Hamilton*, 20 Mich. 438, the case is cited as pointing out the true distinction between those parol agreements respecting boundaries which are deemed valid and those which are not. Campbell, C. J., delivering the opinion in that case, said: "It has been very generally held that when there has been an honest difficulty in determining the lines between two neighboring proprietors, and they have actually agreed, by parol, upon a certain boundary as the true one, and have occupied accordingly with visible monuments or divisions, the agreement long acquiesced in shall not be disturbed, although the time has not been sufficient to establish an adverse possession. Where the transaction has not been such as to amount merely to an honest attempt to determine a doubtful line, the authorities have not permitted an agreement to stand which would operate as a violation of the statute of frauds. But where the parties have only tried to find the true boundary, it has been held that the statute was not infringed, and the line was fixed by acquiescence." So in *Raynor* v. *Timerson*, 51 Barb. 530, the case is cited to the point that possession and claim of title under an erroneous location of a boundary line for a period short of twenty years is not sufficient to establish title as against a valid paper title, unless the location is made, and possession under it continued under such circumstances as to estop the party having the paper title from asserting his claim against such occupant. A party cannot make title to land by the parol admission of his adversary: *Walker* v. *Dunspaugh*, 20 N. Y. 173; and where the description in a deed is definite and certain, it is very doubtful, to say the least of it, whether a mere agreement for locating the line will bar a party from claiming according to a description in his deed: *Wood* v. *Lafayette*, 68 N. Y. 190; both citing the principal case. It is cited also in *Miner* v. *Mayor etc. of New York*, as approving the case of *Adams* v. *Rockwell*, 16 Wend. 285.

In the case of *Baldwin* v. *Brown*, 16 N. Y. 359, decided at the same term as the principal case, it was held that a practical location of a boundary line and long acquiescence therein by coterminous proprietors are conclusive, even though it be by mistake, not upon the notion that they are evidence of a

Digitized by Google

parol agreement establishing the line, but because they are themselves evidence that the location is correct, and are so conclusive as to preclude evidence to the contrary. Selden, J., who delivered the leading opinion, said he apprehended that the counsel for the appellant in that case was in error in assuming that the doctrine of establishment of boundaries by long acquiescence is based upon the idea of any agreement, either express or implied. "It is true," he says, "that several of the cases make this suggestion, and speak of the long acquiescence of the parties as affording evidence of such an agreement. It is difficult, however, to support the rule upon such a basis. If acquiescence for a great number of years in erroneous location is obligatory upon the parties merely as evidence of a previous parol agreement, then it must follow that any other proof establishing such an agreement would be equally conclusive upon them. If it is the agreement which binds, the nature of the proof is of course immaterial. Hence, upon this theory, a deed may be made to convey land, not at all described in it, by means of a mere parol agreement, adopting boundaries entirely different from those mentioned in the deed. There are several *dicta* which go, perhaps, to that extent, but no adjudged case. On the contrary, whenever the question has directly arisen, it has been held otherwise;" citing *Jackson* v. *Douglas*, 8 Johns. 367, and *Stuyvesant* v. *Dunham*, 9 Id. 61. "It seems impossible," he continues, "to hold that a mere parol agreement, adopting a line different from that described in the deed, is obligatory, without violating the statute of frauds, both in its letter and spirit. It is said in some of the cases, by way of sustaining the doctrine, that the agreement does not transfer the title, but simply determines the boundaries of the land described—a distinction the soundness of which may well be doubted. The supposition of such an agreement, in cases of long acquiescence in an established line, is, as I apprehend, entirely superfluous. The acquiescence in such cases affords ground not merely for an inference of fact, to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. Unless the acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance. The rule seems to have been adopted as a rule of repose, with a view to the quieting of titles, and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years. In all cases in which practical locations have been confirmed upon evidence of this kind, the acquiescence has continued for a long period, rarely less than twenty years;" citing *Jackson* v. *Bowen*, 1 Cai. 358; *Jackson* v. *Dysling*, 2 Id. 198; *Jackson* v. *Vedder*, 3 Johns. 8; *Jackson* v. *Dieffendorf*, Id. 269; *Jackson* v. *McCall*, 10 Id. 377; S. C., 6 Am. Dec. 343. "If," says he, "the only effect of acquiescence is to prove a previous parol agreement, there must be many cases where such acquiescence for a few years only, attended by other corroborating circumstances, would afford evidence as strong as acquiescence alone for a much longer period; and yet no such case has ever arisen." After referring to *Kip* v. *Norton*, 12 Wend. 127, S. C., 27 Am. Dec. 120, and *Adams* v. *Rockwell*, 16 Wend. 285, as instances of periods of acquiescence held insufficient, the learned judge continues: "There may be cases in which an express agreement recognizing an erroneous boundary will conclude a party; as where the other party, acting upon the faith of such agreement, has made expensive improvements, the benefit of which will be lost to him if the line is disturbed. Such cases, if they exist at all, rest upon a different principle, viz., that of estoppel *in pais*, and have no bearing on the question under discussion." This

Digitized by Google

reasoning seems to be at variance with some of the remarks made by Mr. Justice Brown in the principal case. He certainly lays it down that parol agreements settling disputed boundaries are in some cases valid. He puts it upon the ground that the agreement in such a case does not operate to transfer the title, but merely to ascertain the location of the line. This is the very distinction "the soundness of which," Judge Selden says, "may well be doubted." Certainly, if the line agreed on is not in fact the true line, and the agreement be held to control, it does "operate to transfer the title" of part of the land of one to the other. If, on the other hand, the line agreed on can be proved to be the true line, then the agreement has no effect, any more than an agreement that each proprietor shall own his own land. The result would seem to be that the agreement either operates to transfer title or it has no operation at all.

Taking the two decisions together, it would seem that a parol agreement settling a boundary, in any case, to be valid must be followed by long acquiescence, or by acts upon the faith of it which would constitute an estoppel *in pais*.

BAGLEY *v.* PEDDIE.

[16 NEW YORK, 469.]

QUESTION WHETHER SUM IS LIQUIDATED DAMAGES OR PENALTY which is stipulated to be paid upon breach of a contract is one of intention, and the language of the contract is not conclusive.

RULES FOR DETERMINING WHEN STIPULATED SUM IS PENALTY and when liquidated damages, in a contract, stated and discussed *per* Shankland, J.

SUM DENOMINATED "LIQUIDATED DAMAGES" IN CONTRACT will nevertheless be construed to be a penalty if other parts of the instrument furnish reason even to doubt as to the intention of the parties; but where the covenants for breach of which the sum is to be paid are all of them for the performance of other acts than the payment of money, and the damages for a breach would be wholly uncertain and incapable of ascertainment except by conjecture, the sum will be deemed liquidated damages.

SUM DENOMINATED "LIQUIDATED DAMAGES" IN BOND OF EMPLOYEE, stipulated to be paid upon a breach of the covenants of a contemporaneous agreement, to the effect that the obligor will serve the obligee faithfully and diligently for a specified term in his trade, perform his orders, keep the secrets of the trade, and not disclose any improvements, discoveries, or inventions by the obligee, etc., will be construed as "liquidated damages," and not as a penalty.

APPEAL from a judgment of nonsuit in the superior court of New York city, in an action upon a bond given by the defendant Peddie, with a surety, conditioned for the faithful performance by the said Peddie of the covenants and agreements in a certain contract recited in the bond. The contract contained covenants to the effect that Peddie would diligently serve the plaintiff according to the best of his ability in the trade of gold-pen making for four years, perform his orders from time to time, keep

Digitized by Google

the secrets relating to the business, not disclose any improvement, discovery of the plaintiff therein, be just, true, and faithful to him, not wrongfully detain, embezzle, or purloin any money, etc., and keep just, true, and faithful accounts. In the bond the obligors acknowledge themselves bound "in the sum of three thousand dollars as liquidated damages, and not by way of penalty," or otherwise. The plaintiff sued for this sum as liquidated damages, and the question was whether it was so or not. The court below held that it was not, and nonsuited the plaintiff, who appealed.

John H. Reynolds, for the appellant.

David P. Hall, for the respondent.

By Court, SHANKLAND, J. The principal question to be settled in this case is, whether the parties have so contracted as to have fixed the amount of damages to be recovered of the defendants, in case of non-performance by Charles B. Peddie. Although the courts have uniformly conceded to parties the right to fix the amount of damages in advance of the breach of the contract, and at any sum, however disproportioned to the real damages, they shall see fit, and have likewise conceded that it is a question of intention, to be derived from the scope and tenor of the agreement, yet, when the judicial mind has acted upon this class of cases, it is evident how repugnant it has been to enforce them according to the plainly expressed language of the contracting parties. Hence have sprung up a series of artificial rules peculiar to contracts of this character, which, while they ostensibly profess to comply with the fundamental canons of construction appertaining to the legal science, contrive to contravene them by artificial distinctions and limitations. I will repeat some of the rules found in the books: 1. The language of the agreement is not conclusive, and the effort of the court is to learn the intent of the parties; hence the term "liquidated damages" is not sufficient to control the construction, if the court can discover in the other parts of the instrument reason even to doubt as to the intention of the parties; 2. Where the word "penalty" is used, it is generally conclusive against its being held liquidated damages, however strong the language of other parts of the instrument in favor of such construction; 3. If the sum stipulated is to be paid on the non-payment of a less sum which is certain in amount (or, as some judges say, can be easily ascertained by a jury), and made payable by the same instrument, then it will be treated as a penalty; 4. When the agreement is in the alternative to do an

Digitized by Google

act or pay a given sum of money, the court will hold the party failing to have had his election, and compel him to pay the money; 5. If the sum be evidently fixed to evade the usury laws, or any other statutory laws, or to cloak oppression, the court will relieve by treating it as a penalty; 6. If, independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated if they are so denominated in the instrument; 7. If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects.

The language of the instrument declared on is clear and distinct in denominating the three thousand dollars liquidated damages, and expressly negatives the idea of its being inserted as a penalty. This occurs in that part of the bond where the penal sum is usually inserted, and the same language denominating it liquidated damages is repeated at the close of the condition of the bond. The word "penalty" is not used in the instrument, nor any other word of a similar import. The language of the instrument is unambiguous; and, according to the usual rules of construction, the duty of interpretation is not imposed upon the court. But the rules applied to such agreements are peculiar, and it is necessary to see whether the case falls within any of the rules above given, which will enable us to declare the sum denominated liquidated damages, and not a penalty, a mere penalty nevertheless.

The court below thought some of the covenants such that the damages for their breach could be readily ascertained by a jury; for instance, the covenant against wrongfully detaining the plaintiff's moneys or property, and that requiring Peddie to give a true account of the things committed to his management.

I propose to look into those cases where it has been held that where the damages are certain the sum mentioned as liquidated damages may be held as a penalty only, in order to see whether they were as uncertain as in this case.

Spear v. *Smith*, 1 Denio, 464, was on an agreement to arbitrate. By the submission, the defendant agreed to give up to the plaintiff the possession of certain property, and the arbitrators were to decide what damages either party was to have in consequence of the non-fulfillment of the contract concerning it and other matters. The submission contained the following

Digitized by Google

clause: "I, the said Moses Smith, agree to pay to said W. M. Spear the sum of one hundred dollars, as the ascertained and liquidated damages, if I shall refuse to abide the arbitrator's decision; and I, the said William M. Spear, agree to pay the like sum to said Smith, as ascertained and liquidated damages, if I shall refuse to abide such decision." The arbitrators awarded that the defendant should pay the plaintiff ten dollars and forty cents by a specified day, which he failed to pay, and he also failed to give possession of the property in pursuance of the agreement. The supreme court held that the sum to be paid was fixed by the arbitrators with interest, and being thus easily ascertained, the one hundred dollars must be regarded as a penalty.

Kemble v. *Farren*, 6 Bing. 141, was an action by the manager against an actor for a violation of an agreement to perform at Covent Garden for four years. The plaintiff agreed to pay defendant three pounds six shillings and eightpence every night the theater should be open, and a benefit night during each season. The agreement contained a clause that if either of the parties should neglect or refuse to fulfill the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other one thousand pounds liquidated damages, and not a penalty or penal sum, or in the nature thereof. The breach was the defendant's refusal to act during the second season; and one question was, whether this was a case of liquidated damages, and it was held not to be, because the agreed damages applied to a breach of the agreement to pay a certain sum (three pounds six shillings and eightpence a day to defendant), as well as to covenants where the damages were uncertain; therefore, as it could not be considered otherwise than as a penalty, as to such fixed sum it must also be construed in the same way in respect to those covenants of which the breach would result in uncertain damages; and it was likewise in this respect in the case of *Astley* v. *Weldon*, 2 Bos. & Pul. 346.

The case of *Davies* v. *Penton*, 6 Barn. & Cress. 216, seems to have been decided not to be a case of liquidated damages, on two grounds: 1. Because the words "penalty" and "liquidated damages" were both used, and therefore brought the case within the second rule above mentioned; and 2. Because the greater sum was inserted to secure the payment of a less fixed sum agreed to be paid in the same instrument. The above cases will serve to illustrate the kind of certainty as to the sum to be paid as damages for breach of an agreement in order to hold the larger sum agreed to be paid on such breach a mere penalty.

Digitized by Google

They are cases where the lesser sum is named specifically in the instrument itself, or depends on the award of arbitrators. These and similar cases are the cases of certain damages to which the courts allude in the third rule.

We will now contrast with the above cases those falling within the sixth rule, where the damages are uncertain. *Dakin* v. *Williams*, 17 Wend. 447, was a case where the defendant sold the plaintiff a printing-press and the good-will of the business for three thousand five hundred dollars, and the defendant agreed not to carry on the business in the county of Oneida, and fixed and liquidated three thousand dollars as the damages if he violated that provision. This was held to liquidate the damages, because the real damage was uncertain, and the intent of the parties clear to fix the damages. So in *Knapp* v. *Mallby*, 13 Id. 587, it was held that the damages for not assigning a lease to the plaintiff were of uncertain character, and would support an agreement for liquidated damages. So in *Price* v. *Green*, 16 Mee. & W. 346, it was held that where the defendant agreed not to carry on the business of perfumery in London, the damages were uncertain within the rule. So in *Galsworthy* v. *Strutt*, 1 Exch. 659, where one attorney agreed with another not to carry on the business of an attorney within fifty miles, nor interfere with or solicit the clients of the late copartnership, it was held a case of uncertain damages.

The case at bar seems to me to fall within the sixth rule, the damages being wholly uncertain and depending entirely on proof *aliunde* the instrument declared on.

The plaintiff was a gold-pen manufacturer, and would probably have to intrust those whom he took into his employ with the secrets of his trade and the materials used therein; and it would be difficult to prove the actual damage he would sustain by their leaving his employ, revealing the secret to others, or embezzling his materials. It was to guard against these contingencies that he required the defendant to give the bond in suit, with stipulated damages, in order to supersede proof in case of breach of any of its provisions. From the nature of the employment, it would be difficult to prove how much money the person employed would or might detain, or how much of the materials he might refuse to give an account of. The damages to result from a breach of any of the stipulations of the agreement being uncertain and conjectural, I hold the case one of liquidated damages, and the judgment should therefore be reversed, and a new trial awarded in the court below.

Digitized by Google

PAIGE, J. The condition of the bond of the defendants in this case required the defendant, Charles B. Peddie, to do several acts specified in an agreement accompanying the bond, the damages for the non-performance of some of which could not be measured by any exact pecuniary standard, but as to others the damages were certain, and could be easily ascertained by a jury; and the bond declares that if the defendant, Charles B. Peddie, should violate any of the covenants in the agreement mentioned, the defendants should pay three thousand dollars liquidated damages. This is a case, therefore, where, within the authorities, the sum stipulated to be paid as damages must be considered as a penalty, and not as liquidated damages. The law on this subject, in my opinion, is correctly laid down by Judge Sandford in the court below: *Bagley* v. *Peddie*, 5 Sandf. 192.

The judgment should be affirmed.

BOWEN, J., concurred in this opinion; COMSTOCK, J., expressed no opinion; all the others concurred with SHANKLAND, J.

Judgment reversed and new trial ordered.

WHETHER SUM IS LIQUIDATED DAMAGES OR PENALTY which is stipulated to be paid in case of non-performance of a contract, see *California S. N. Co.* v. *Wright*, 65 Am. Dec. 511; *Gower* v. *Carter*, 66 Id. 71; *Foley* v. *McKeegan*, Id. 107, and the notes thereto. The principal case is cited, and its doctrines approved and applied on this point, in *Manice* v. *Brady*, 15 Abb. Pr. 176; *Staples* v. *Parker*, 41 Barb. 652; *Shute* v. *Hamilton*, 3 Daly, 467; *Colwell* v. *Foulks*, 36 How. Pr. 321; S. C., *sub nom. Colwell* v. *Lawrence*, 38 N. Y. 75; *Kemp* v. *Knickerbocker Ice Co.*, 51 How. Pr. 37; S. C., 69 N. Y. 58; *Giles* v. *Spaulding*, 5 Hun, 459; *Little* v. *Banks*, 20 Id. 147; *Ward* v. *Jewett*, 4 Robt. 719; and is distinguished in *Salters* v. *Ralph*, 15 Abb. Pr. 275.

GRIFFIN v. COLVER.

[16 NEW YORK, 489.]

DAMAGES RECOVERABLE FOR BREACH OF CONTRACT INCLUDE PROFITS which the plaintiff certainly would have realized but for defendant's default; though speculative or contingent profits are not recoverable.

RECOUPMENT OF DAMAGES IN ACTION FOR PRICE OF ENGINE, FOR DELAY in not furnishing it by a stipulated time, should be estimated by the value of the use of the engine during the period of delay, not by the profits which would have been realized from running it in connection with the machinery it was intended to drive.

APPEAL from a judgment for plaintiff in an action for damages for breach of contract, reported below, 22 Barb. 587. The suit

Digitized by Google

was brought for the agreed price of a steam-engine constructed by plaintiff for defendants, under an agreement which bound the plaintiff to furnish it within a stipulated time. One ground of defense was that there was a delay in furnishing the engine, and that during the period between the day when it should have been furnished and when it was actually received the defendants lost the use, and the profits they would have realized on the use, of the machinery which, as plaintiff knew, the engine was intended to drive. They claimed to recoup damages for this loss; and the proper measure of such damages was the principal question.

John Churchill, for the appellants.

D. Coats, for the respondent.

By Court, SELDEN, J. The only point made by the appellants is, that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not.

Hence, in an action for the breach of a contract to transport goods, the difference between the price at the point where the goods are and that to which they were to be transported is taken as the measure of damages; and in an action against a vendor for not delivering the chattels sold, the vendee is allowed the

Digitized by Google

market price upon the day fixed for the delivery. Although this, in both cases, amounts to an allowance of profits, yet, as those profits do not depend upon any contingency, their recovery is permitted. It is regarded as certain that the goods would have been worth the established market price at the place and on the day when and where they should have been delivered.

On the other hand, in cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The principal reason for the difference between these cases and that of the failure to transport goods upon land is, that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contingencies affecting the length of the voyage render every calculation of profits speculative and unsafe.

There is also an additional reason, viz., the difficulty of obtaining reliable evidence as to the state of the markets in foreign ports; that these are the true reasons is shown by the language of Mr. Justice Story in the case of *Schooner Lively*, 1 Gall. 315, which was a case of illegal capture. He says: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages, upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures, and not upon facts."

Similar language is used in the cases of *Amiable Nancy*, 3 Wheat. 546, and *L'Amistad de Rues*, 5 Id. 385. Indeed, it is clear that whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of *Blanchard* v. *Ely*, 21 Wend. 342 [34 Am. Dec. 250], must have proceeded upon this ground,

Digitized by Google

and can, as I apprehend, be supported upon no other. It is true that Judge Cowen, in giving his opinion, quotes from Pothier the following rule of the civil law, viz.: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and not such as may have been accidently occasioned thereby in respect to his own [other] affairs." But this rule had no application to the case then before the court. It applies only to cases where, by reason of special circumstances having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from such breach; as where a party is prevented by the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from performing some act in relation to his own business not necessarily connected with the agreement. An instance of the latter kind is where a canon of the church, by reason of the non-delivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes.

In such cases, the damages sustained are disallowed, not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract. Hence the objection is removed if it is shown that the contract was entered into for the express purpose of enabling the party to fulfill his collateral agreement, or perform the act supposed: Sedgwick on Damages, c. 3.

In *Blanchard* v. *Ely*, *supra*, the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct; and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. It is clear, therefore, that the rule of Pothier had nothing to do with the case. Those damages must then have been disallowed, because they consisted of profits depending, not as in the case of a contract to transport goods, upon a mere question of market value, but upon the fluctuations of travel and of trade, and many other contingencies. The citation by Judge Cowen, of the maritime cases to which I have referred,

Digitized by Google

tends to confirm this view. This case, therefore, is a direct authority in support of the doctrine that whenever the profits claimed depend upon contingencies of the character referred to, they are not recoverable.

The case of *Masterton* v. *Mayor etc. of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38], decides nothing in opposition to this doctrine. It simply goes to support the other branch of the rule, viz., that profits are allowed where they do not depend upon the chances of trade, but upon the market value of goods, the price of labor, the cost of transportation, and other questions of the like nature, which can be rendered reasonably certain by evidence.

From these authories and principles, it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery, had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits.

But it by no means follows that no allowance could be made to the defendants for the loss of the use of their machinery. It is an error to suppose that "the law does not aim at complete compensation for the injury sustained," but "seeks rather to divide than satisfy the loss:" Sedgwick on Damages, c. 3. The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

The familiar rules on the subject are all subordinate to these; for instance: that the damages must flow directly and naturally from the breach of contract is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary, result of the breach; and yet, if in their nature uncertain, they must be rejected, as in the case of *Blanchard* v. *Ely*, 21 Wend. 342 [34

Digitized by Google

Am. Dec. 250], where the loss of the trips was the direct and necessary consequence of the plaintiff's failure to perform. So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but, for some special circumstances, collateral to the contract itself, or foreign to its apparent object, they cannot be recovered; as in the case of the loss by the clergyman of his tithes by reason of the failure to deliver the horse.

Cases not unfrequently occur in which both these conditions are fulfilled, where it is certain that some loss has been sustained or damage incurred, and that such loss or damage is the direct, immediate, and natural consequence of the breach of contract, but where the amount of the damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts that mode of estimating the damages which is most definite and certain. The case of *Freeman* v. *Clute*, 3 Barb. 424, is a case of this class, and affords an apt illustration of the rule. That case was identical in many of its features with the present. The contract there was to construct a steam-engine to be used in the process of manufacturing oil, and damages were claimed for delay in furnishing it. It was insisted in that case, as in this, that the damages were to be estimated by ascertaining the amount of business which could have been done by the use of the engine, and the profits that would have thence accrued. This claim was rejected by Mr. Justice Harris, before whom the cause was tried, upon the precise ground taken here. But he nevertheless held that compensation was to be allowed for the "loss of the use of the plaintiff's mill and other machinery." He did not, it is true, specify in terms the mode in which the value of such use was to be estimated; but as he had previously rejected the probable profits of the business as the measure of such value, no other appropriate *data* would seemed to have remained but the fair rent or hire of the mill and machinery; and such, I have no doubt, was the meaning of the judge. Thus understood, the decision in that case, and the reasoning upon which it was based, were, I think, entirely accurate.

Had the defendants in the case of *Blanchard* v. *Ely*, *supra*, taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but

Digitized by Google

the immediate and necessary result of the breach of the plaintiff's contract.

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, etc., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits, just as the ordinary rate of interest is, upon the whole, a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property, and to an average of profits arrived at by very extended observation, and so accurate are the results of experience in this respect that rents are rendered nearly if not quite as certain as the market value of commodities at a particular time and place.

The proper rule for estimating this portion of the damages in the present case was to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of the business; and this is the rule which I understand the referee to have adopted. There is no error in the allowances made by the referee. The judgment should therefore be affirmed.

All the judges concurred.

Judgment affirmed.

DAMAGES MUST BE NATURAL AND PROXIMATE CONSEQUENCES of an act or omission, to be recoverable: *Patch* v. *Covington*, 66 Am. Dec. 186; *Worcester* v. *Great Falls Mfg. Co.*, Id. 217, and cases cited in the notes thereto. To the point that in case of a breach of a contract, where there is no bad faith or fraud, the damages to be recovered or recouped, as the case may be, must flow directly and naturally and in the due course of things from such breach, and must be such as the parties, at the time of entering into the contract, may reasonably be supposed to have contemplated as the probable consequences of a breach, and must also be capable of being established with reasonable certainty, the principal case is cited in *City of Brooklyn* v. *Brooklyn etc. R. R. Co.*, 57 Barb. 502; S. C., 8 Abb. Pr., N. S., 367; *Mack* v. *Patchin*, 29 How. Pr. 30; *Flynn* v. *Hatton*, 43 Id. 348; *Smith* v. *Pettee*, 7 Hun, 335; *Baldwin* v. *United States Tel. Co.*, 1 Lans. 137; S. C. in court of appeals, 45

Digitized by Google

N. Y. 750; *Hamilton* v. *McPherson*, 28 N. Y. 76; *Milton* v. *Hudson River Steamboat Co.*, 37 Id. 214; *Cassidy* v. *Le Fevre*, 45 Id. 567; *Ward* v. *New York etc. R. R. Co.*, 47 Id. 32; *Neary* v. *Bostwick*, 2 Hilt. 517; *Bowas* v. *Pioneer Tow Line*, 2 Saw. 30; *Benton* v. *Fay*, 64 Ill. 420. They must not be speculative, consequential, or remote: *Flynn* v. *Hatton*, 43 How. Pr. 348; *Hamilton* v. *McPherson*, 28 N. Y. 76; see also the cases cited in the next section of this note. And further, the damages must not have proceeded from the injured party's own neglect, inattention, or mismanagement: *Smith* v. *Pettee*, 7 Hun, 335; *Milton* v. *Hudson River Steamboat Co.*, 37 N. Y. 214.

LOSS OF PROFITS AS DAMAGES: See *Masterton* v. *Mayor of Brooklyn*, 42 Am. Dec. 38; *Goodloe* v. *Rogers*, 61 Id. 205; *Cannon* v. *Folsom*, 63 Id. 474; *Coweta Falls Mfg. Co.* v. *Rogers*, 65 Id. 603; *Worcester* v. *Great Falls Mfg. Co.*, 66 Id. 217; *Cooper* v. *Young*, 68 Id. 502, and cases cited in the notes thereto. The "broad general rule" laid down in the principal case, that a party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, subject to the conditions and limitations mentioned by Mr. Justice Selden, has been approved and adopted in many cases: *Fairfield* v. *Jeffreys*, 68 Ind. 582; *Albert* v. *Bleecker St. etc. R. R. Co.*, 2 Daly, 394; *Sternfels* v. *Clark*, 2 Hun, 124; S. C., 4 Thomp. & C. 397; *Schutt* v. *Baker*, 9 Hun, 557; *Lowenstein* v. *Chappel*, 30 Barb. 243; *Landsberger* v. *Magnetic Tel. Co.*, 32 Id. 532; *Passinger* v. *Thorburn*, 35 Id. 24; S. C. in court of appeals, 34 N. Y. 635; *Pumpelly* v. *Phelps*, 40 Id. 60; *Devlin* v. *Mayor etc. of New York*, 63 Id. 25; S. C., 50 How. Pr. 18; *Starbird* v. *Barrons*, 38 N. Y. 238; *White* v. *Miller*, 71 Id. 133. But in order to enable the injured party to recover for loss of profits in such a case, it must appear that the profits were reasonably certain to have been realized by performance, and that they must have been in the contemplation of the parties when they made the contract, and not speculative or contingent profits, and the loss of them must appear to have resulted proximately and naturally from the breach, in accordance with the doctrine of the cases cited in the preceding paragraph of this note: *Western etc. Road Co.* v. *Cox*, 39 Ind. 261; *Academy of Music* v. *Hackett*, 2 Hilt. 234; *Pollett* v. *Long*, 58 Barb. 35; *Heinemann* v. *Heard*, 2 Hun, 332; S. C., 4 Thomp. & C. 668; S. C. in court of appeals, 50 N. Y. 37; *Van Ness* v. *Fisher*, 2 Lans. 239; *Passinger* v. *Thorburn*, 34 N. Y. 635; affirming S. C., 35 Barb. 24; *Krom* v. *Levy*, 48 N. Y. 680; *Wehle* v. *Haviland*, 6 Id. 451; *Taylor* v. *Bradley*, 4 Abb. App. Dec. 366; *Scott* v. *Rogers*, Id. 161, note. The measure of damages is, in general, the difference between the cost of performing the contract and what would have been earned by performance: *Devlin* v. *Mayor etc. of New York*, 63 N. Y. 25; S. C., 50 How. Pr. 18. It is settled that where a manufacturer contracts to set up a machine or engine of a stipulated kind in a certain time, the measure of damages for a breach is the difference in value between the machine delivered and the machine contracted for, with damages for the delay in delivery, but it is said that this rule does not apply to a breach of warranty of a machine by a vendor not the manufacturer: *Booher* v. *Goldsborough*, 44 Ind. 503. The loss of the value of the use of property through breach of a contract to construct, erect, or repair it is undoubtedly a legitimate element in the damages for the breach, but, in consonance with what is said above, the loss must be such as to be fairly supposed to have been contemplated by the parties, and not a mere conjectural loss of profits. Thus, in an action against a manufacturer of a defectively constructed engine, for damages caused to other machinery by its explosion, the measure of damages is not the difference between what might have been earned with the machinery stopped by the acci-

Digitized by Google

dent, and what was earned without it, but the value of the rent or hire of the machinery while idle: *Cassidy* v. *Le Fevre*, 45 N. Y. 567. So in case of a breach of contract for the erection of a building within a certain time, where there is a delay in its completion, the value of the use while the owner is deprived of the use of the building is the measure of damages: *Wagner* v. *Corkhill*, 40 Barb. 175, 179. Where a lessee of a mill is deprived of its use by a breach of the lessor's contract to repair, or by the direct act of the lessor in stopping the mill, the loss of profits while the mill is idle is recoverable as damages: *Hinckley* v. *Beckwith*, 13 Wis. 34; *Jolly* v. *Single*, 16 Id. 292. So a lessee of a hotel is entitled to compensation for the loss of the use of rooms therein rendered untenantable by a breach of the lessor's covenant to repair: *Myers* v. *Burns*, 35 N. Y. 273. For a failure to repair a chartered vessel in a reasonable time, pursuant to a contract therefor, the measure of damages for the loss of the use of the vessel while idle is not what she might earn each day, but the value of the use or the rent of the vessel under the charter for the time of its idleness: *Rogers* v. *Beard*, 36 Barb. 37; S. C., 20 How. Pr. 102. In *Mitchell* v. *Cornell*, 12 Jones & S. 404, it was held that for a breach of a contract for the charter of a steamer, the measure of damages was: 1. The market value of the charter for the unexpired term, if it had any market value; or 2. The difference, if any, required to be paid for another equally good boat, with compensation for the time and trouble of procuring such boat; or 3. The difference between the charter price and the market value, if any, of the use of the vessel for excursions, etc., for the unexpired term.

In an action against a carrier for the non-delivery of goods in a reasonable time, where the market value of the goods fell in the mean time, it was held, under the doctrine of the principal case, that the measure of damages was the difference between the value at the time and place of delivery and the value at the time and place where they should have been delivered: *Ward* v. *New York Central R. R. Co.*, 47 N. Y. 32. See, on that point, *Cooper* v. *Young*, 68 Am. Dec. 502; *Galena etc. R. R. Co.* v. *Rae*, Id. 574, and notes. So where through a mistake of a telegraph company in transmitting a dispatch whereby a quantity of salt, for which there was no order and no market, was sent by the plaintiff's agent in New York to his agent in Chicago and was there sold at a loss, it was held that the measure of damages in an action against the telegraph company was the difference between the market value of the salt in New York and the price for which it sold, together with the cost of transportation: *Leonard* v. *New York etc. Tel. Co.*, 41 N. Y. 568. See the case of *Baldwin* v. *United States Tel. Co.*, cited *infra*.

For a breach of a contract to sell and deliver to the plaintiff, a market-gardener, "Bristol cabbage" seed, where the seed turned out, after planting, not to be of that kind, it was determined that the measure of damages was the difference between the value of the actual crop and the value that it would have had if it had been "Bristol cabbage:" *Passinger* v. *Thorburn*, 34 N. Y. 635; affirming S. C., 35 Barb. 24. A similar rule was applied where hop roots were sold for cultivation and turned out to be largely of an unproductive variety: *Schutt* v. *Baker*, 9 Hun, 557. In an action for a breach of a contract to sell and deliver goods to be resold in another market, evidence of the market value at the place of resale, and of the cost of transportation thither, is no doubt competent upon the question of damages: *Rice* v. *Manley*, 66 N. Y. 88. For breach of a warranty of articles thus purchased for resale at another place, to the knowledge of the vendor, the measure of damages is held to be the difference between the cost price, with the freight added, and the value when delivered, with the profits reasonably to be expected from a resale: *Thorne* v. *McVeagh*, 75 Ill. 84.

Digitized by Google

Generally, for breach of a contract to deliver, in a specified time, an article to be used for a certain purpose, known to the party who contracts to deliver it, the value of its use for that purpose for the period of non-delivery, having in view the hazards and chances of business, is proper to be considered in estimating the damages: *Benton* v. *Fay*, 64 Ill. 421; *Sternfels* v. *Clark*, 2 Hun, 124; S. C., 4 Thomp. & C. 397. But the fact that it is designed for such purpose must have been communicated to the vendor or party contracting to sell or deliver the article: *Illinois etc. R. R. Co.* v. *Cobb*, 64 Ill. 141; *Benton* v. *Fay*, Id. 420. Where the damage resulting from non-delivery of a telegram consists in the loss of the profits of a sale depending upon information contained in the telegram, if the fact that the information was wanted for that purpose is not communicated to the company, such loss is not a proper element in the recovery: *Baldwin* v. *United States Tel. Co.*, 45 N. Y. 750; reversing S. C., 1 Lans. 137. In *Kemp* v. *Knickerbocker Ice Co.*, 51 How. Pr. 41–43, it was held, commenting on the principal case, that in an action by a retail dealer in ice against a wholesale dealer, for the non-delivery of a quantity of ice according to contract, the retail price of the ice was not to be considered in estimating the damages, but that the measure of damages was the difference between the market price (wholesale) and the contract price, because ice was an article which the retail dealer could have procured at the market price at any time. Where the plaintiff is prevented by a breach of contract of sale from performing a subcontract with another in contemplation of the parties at the time, it is held in *Booth* v. *Spuyten Duyvil etc. Co.*, 60 N. Y. 493, that the measure of damages is the difference between the contract price and the subcontract price. But a party is not entitled either to the benefit of a side contract with a third person, or to indemnity against it, in estimating a loss of profits by a breach of contract, where such side contract was not in the contemplation of the parties at the time of entering into the principal contract: *Devlin* v. *Mayor etc. of New York*, 63 Id. 26. See, on that point, *Masterton* v. *Mayor etc. of New York*, 42 Am. Dec. 38.

The following are examples of cases in which the rule that the loss of mere speculative or contingent profits cannot be considered in fixing the damages for a breach of contract has been applied. Thus, for breach of a contract to construct a toll-road in a certain time, the plaintiffs cannot recover for a loss of tolls which they "might have received" if the road had been completed in time: *Western etc. R. Co.* v. *Cox*, 39 Ind. 261. So for breach of a contract to continue a partnership, there can be no recovery for a loss of profits which would "probably" have been realized from the partnership: *Van Ness* v. *Fisher*, 2 Lans. 239. So the loss of anticipated profits from the performances of a celebrated tenor engaged to sing in the plaintiff's theater cannot be considered in estimating the damages caused by the plaintiff's lessor entering and closing the theater: *Academy of Music* v. *Hackett*, 2 Hilt. 234. So it has been held that for a breach of a contract to prepare certain plates for printing the backs of cards, the loss of the use of the plates for several months for that purpose could not be considered, being too remote: *Krom* v. *Levy*, 48 N. Y. 680. In all the foregoing decisions the principal case is cited and its doctrine applied or the case distinguished.

That loss of profits or of the value of the use of property, if not speculative or contingent, where the owner is wrongfully deprived of its use, may be considered in estimating the damages in tort as well for breach of contract, in certain cases, is held in a number of decisions, citing *Griffin* v. *Colver*: *Price* v. *Keyes*, 1 Hun, 191; *Pollett* v. *Long*, 58 Barb. 35; *Schile* v. *Brokhahus*, 80 N. Y. 620; *The Mayflower*, 1 Bro. Adm. 388.

Digitized by Google

CASES IN EQUITY

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

GAUSE *v.* PERKINS.

[3 JONES'S EQUITY, 177.]

EQUITY DOES NOT EXTEND ITS JURISDICTION TO OFFENSES against the public. This general rule appears to be without exception.

EQUITY DOES NOT EXTEND ITS JURISDICTION TO CIVIL TRESPASSERS except that jurisdiction will be assumed to prevent torts or injuries to property by injunction where plaintiff's title is admitted or established by legal adjudication, and where the threatened injury will cause irreparable damage.

EQUITY WILL TAKE JURISDICTION OF SUBJECT-MATTER OF ACTION TO PREVENT INJURY, ETC., when a bill has been filed setting out that an action has been, or is about to be, instituted for the purpose of establishing title; but without assuming to decide the question of title.

IRREPARABLE INJURY MEANS THAT WHICH CANNOT BE REPAIRED, retrieved, put back again, atoned for. It is an injury of such a peculiar nature that compensation in money cannot atone for it; and if the party liable in damages be insolvent, and therefore unable to atone for the injury, it will be considered irreparable.

CULTIVATION OF PINE-TREES FOR TURPENTINE, OR CUTTING DOWN OF OAK-TREES FOR STAVES, or cypress-trees for shingles, is not destruction, in North Carolina, and will not be deemed an irreparable injury, unless there be an averment of defendant's insolvency.

BILL ALLEGING THAT TRESPASSER IS ABOUT TO COMMIT IRREPARABLE INJURY by boxing and working turpentine trees, and by cutting timber and making staves on land fit only to be cultivated for these products, will, unless there be an averment of defendant's insolvency, be dismissed on motion.

INJUNCTION, with a prayer for an account. Plaintiff alleged in his bill that he was the owner in fee-simple of the land in question; that for several years he had been in possession of a part of

Digitized by Google

it by building, fencing, and cultivating such part continually up to the date of his bill; that the most of the land was fit for little else than the production of turpentine, staves, and timber; that defendant in 1852, by his agents and servants, and against plaintiff's will, entered upon the premises and boxed some twenty-five thousand trees for procuring turpentine, and had carried on the business of making turpentine on this land, and carrying it off and selling the same in large quantities; that he was overworking said trees, and that in a few years they would be worn out, useless, and unfit for making turpentine; that he was, at the time of the filing of said bill, engaged in committing other waste, spoil, and destruction upon the land mentioned, and was thus doing an irreparable injury to the said land, and would render the same utterly useless and valueless unless he was restrained by injunction, etc. It also charged that the defendant had no interest or title in the land, or any part of it; that the plaintiff had instituted an action at law for the trespasses above mentioned, and that the same was still pending, but that no amount of damages he might recover at law would compensate him for the injury threatened to his property. Defendant denied that plaintiff had title to any part of the land used by him, and claimed it as his own property by a valid title. He denied that the process of cultivation, as cultivated by him, was calculated to irreparably injure the land, but that he was pursuing the business in a prudent manner. He furthermore averred that he was entirely solvent, and worth more than the whole value of the land claimed by the plaintiff, so that there would be no difficulty in obtaining remuneration at law for whatever plaintiff might recover from defendant by way of damages. Defendant's motion to dismiss the bill for want of equity was refused, and defendant appealed.

Strange, for the plaintiff.

London and Moore, for the defendant.

By Court, PEARSON, J. The general rule is, equity does not extend its jurisdiction either to offenses against the public or to civil trespasses. In reference to the former, no exception has ever been made; but in reference to the latter, an exception has been allowed after much hesitation, and jurisdiction assumed for the prevention of torts or injuries to property, by means of the writ of injunction, under certain restrictions; namely, two conditions must concur in order to give jurisdiction: the plaintiff's title must be admitted, or be established by a legal adjudication,

Digitized by Google

and the threatened injury must be of such a nature as will cause irreparable damage.

The ground of the first restriction is obvious; a court of equity cannot pass upon the legal title; to do so would convert a bill in equity into an action of ejectment. It is not necessary, however, that the legal title should be established before the aid of a court of equity is asked for, because the injury may be committed before a trial at law can be had; and when the bill sets out that an action has been or is about to be instituted for the purpose of establishing the title, equity will exert its power of injunction in aid of the action at law, by taking care of the subject-matter of the action, but without assuming jurisdiction to decide the question of title: *Irwin* v. *Davidson*, 3 Ired. Eq. 316.

The ground of the second restriction is equally obvious. If a court of equity interfered to prevent an alleged trespasser from doing ordinary acts of ownership, such as cultivating the land, clearing and opening new fields, etc., a bill for an injunction would accompany a declaration in ejectment almost as a matter of course, causing not only much private loss, but great detriment to the public. Fields already cleared would lie idle, woodland that in a country like ours ought to be cut down and cultivated, would stand wild and unproductive, and the valuable products of our forests would no longer swell the tide of trade.

In the application of this restriction, much difficulty occurs in defining what injury is irreparable. The word means that which cannot be repaired, retrieved, put back again, atoned for. The most absolute and positive instance of it is the cutting down "ornamental trees," such as the noble oaks in our state-house grove. "A tree that is cut down cannot be made to grow again." But the meaning of the word "irreparable," pointed at by this example, is not that which has been adopted by the courts either in England or in this state. Grass that is cut down cannot be made to grow again; but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that compensation in money cannot atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable.

In England, analogies drawn from the doctrine of destructive waste are resorted to for the purpose of aiding in the applica-

Digitized by Google

tion of the rule. It is there held that if an alleged trespasser is about to pull down the dwelling-house, an injunction will lie without an averment that he is insolvent; for although with money enough as good or a better house can be built, still it involves a matter of feeling—there is an attachment to the house in which our ancestors lived. This feeling is certainly not as vivid in this country as it is in England. How far our courts will follow their decisions is not now for consideration. There may be a distinction between pulling down a house merely for destruction and doing so for the purpose of improvement. So it is there held that if an alleged trespasser is about to work a mine, an injunction will lie without an averment of insolvency, because it is destruction, and takes away the substance of the land, and there is no mode of ascertaining the value, or the quantity of the copper, tin, or other mineral that is extracted from the bowels of the earth. Our courts have shown a disposition not to interfere, unless there be an averment of insolvency. In *Falls* v. *McAffee*, 2 Ired. L. 239, it is suggested that instead of an injunction the proper course was to appoint a receiver, so as not to stop the working of a gold mine; for that was alike "opposed by public policy and private justice." This suggestion is adopted in *Deep River Gold Mining Co.* v. *Fox*, 4 Ired. Eq. 61; in which case, as well as in *Irwin* v. *Davidson*, 3 Id. 316, there is an averment of insolvency. The subject of working mines is, however, not now under consideration.

So it is there held that if an alleged trespasser is about to cut down timber trees as distinguished from ornamental trees, an injunction will lie without an averment of insolvency; because it is destruction, and takes away the substance of the land, and would be waste if committed by a particular tenant. Our question is, how far the English doctrine is applicable here in regard to clearing the land, cutting timber for shingles and staves, and working trees for turpentine.

The analogy taken from the doctrine of destructive waste fails; for it is settled with us that a widow or other tenant for life may clear a reasonable quantity of land, and is not confined to the use of timber as housebote, firebote, haybote, but may sell or otherwise dispose of the wood on the land so cleared. So the widow may cultivate the pine-trees in her dower land, for the purpose of getting turpentine, and if dower is assigned on land fit for nothing but to afford staves and shingles, it is difficult to conceive what other use she can make of it.

Putting this analogy out of the way, the naked question is,

Digitized by Google

In the present condition of our country, does the cultivation of pine-trees for turpentine, or the cutting down of oak-trees for staves, or cypress-trees for shingles, cause an irreparable injury —one which cannot be compensated for in damages? The very purpose for which these trees are used by the owners of land is to get from them turpentine, staves, and shingles for sale. It follows, therefore, as a matter of course, that if the owner of the land recovers from a trespasser the full value of the trees that are used for these purposes, he thereby receives compensation for the injury, and it cannot in any sense of the word be deemed irreparable. So that private justice and public policy, which calls for a full development of the resources of the country, alike forbid the interference of a court of equity, except in cases where, from the insolvency of the alleged trespasser, the compensation in money cannot be had. Accordingly, in *Lloyd* v. *Heath*, Busb. Eq. 41, the bill avers the insolvency of the defendant, and it is treated of in the opinion as a necessary part of the plaintiff's equity. So in the other cases in reference to timber, and in the gold-mining cases, this averment is always made as a necessary part of the plaintiff's equity. Indeed, in *Thompson* v. *Williams*, 1 Jones Eq. 178, it is said that an injunction against clearing and opening land, as is usual among farmers, would not be sustained, although there is an averment of insolvency. "If in such a case a defendant can be enjoined, we see no good reason why, in every case where he is a poor man, possessed only of the land for which he is contending, he may not be stopped by an injunction from opening and clearing the ground."

In our case, the injury, against which the plaintiff asks for the protection of an injunction, consists in the cultivation of trees in procuring turpentine and in getting staves for barrels. It is not necessary to decide whether the cultivation of turpentine, and, as an incident thereto, the getting of staves and hoop-poles for the barrels necessary to put it in, is not such an ordinary use of it, in the course of agriculture, as does not come within the jurisdiction assumed by the courts of equity in reference to the prevention of civil trespasses, even although there be an averment of insolvency, for the bill does not make that averment, and on that account is fatally defective. The bill contains a general allegation that the acts complained of will be productive of irreparable injury, but the allegation must be attended with such a statement of facts as enables the court to see that such would be the result: *Bogey* v. *Shute*, 1 Jones Eq.

Digitized by Google

180. As instances where there is such a statement of facts as enables the court to see that the damage will be irreparable, and where an averment of insolvency is not necessary, we may refer to *Purnel* v. *Daniel*, 8 Ired. Eq. 9; *Troy* v. *Norment*, 2 Jones Eq. 318. The injuries complained of in these cases were in their natures destructive. But ours is a new country; our policy is to subdue the forest and develop its resources, and we decide that to work trees for turpentine, or to cut down trees for staves, is not destruction, and the court cannot see that the injury will be irreparable, unless there be an averment of the insolvency of the defendant.

Upon the coming in of the answer, a motion was made to dissolve the injunction, which was allowed. Afterwards, at a subsequent term, a motion was made to dismiss the bill, which was disallowed, and the defendant appealed to this court. We have seen that, upon the plaintiff's own showing, he had no equity. After the answer came in, alleging the defendant's solvency, and the consequent dissolution of the injunction, there was an additional ground for dismissing the bill. It could only then be held over as an original bill for discovery, and on account of the turpentine and staves which the defendant had disposed of; in other words, as a bill for an account against a trespasser. This would certainly be a bill of the "first impression." Where equity has jurisdiction to prevent a wrong by injunction, if there has been loss before the injunction is sued, the court will direct an account of the profit that the defendant has made, as incident to the jurisdiction assumed for the purpose of injunction, so as to prevent circuity and expense. After a plaintiff has established his right to come into one court for an injunction, he will not be required to resort to an action in another court to recover his damages. But the equity for the account is strictly incident to the injunction, and therefore, if an injunction is refused, an account cannot be given, but the plaintiff must resort to a court of law: Adams's Eq. 219.

The motion in the court below to dismiss the bill ought to have been allowed.

Decree accordingly.

INJUNCTIONS IN CASES OF TRESPASS WERE NOT GRANTED UNDER ANCIENT DOCTRINES OF COURT OF CHANCERY. Parties were left to their legal remedy: *Burnley* v. *Cook*, 65 Am. Dec. 79; but the more liberal practice now prevails of allowing them, where the trespass presents a case of destruction or irreparable mischief: Id.; *Bird* v. *Wilmington etc. R. R. Co.*, 64 Id. 739; *White* v. *Flannigain*, 54 Id. 668, and notes 681. Injunction may be granted to pre-

Digitized by Google

vent threatened trespass and waste where the defendant is insolvent, and the injury to the complainant's property would be otherwise irreparable: *Lyon* v. *Hunt*, 46 Id. 216; *Bracken* v. *Preston*, 44 Id. 412. Each case must be considered with reference to the nature, character, and condition of the property to be protected, where an injunction is asked to restrain trespass for destroying such property: *Shipley* v. *Ritter*, 61 Id. 371.

THE PRINCIPAL CASE WAS CITED in *Parker* v. *Parker*, 82 N. C. 168, that an injunction will not issue to restrain every civil trespass, and it was there held that it ought not to issue to prevent the working of mines. It was approved in *McCormick* v. *Nixon*, 83 Id. 115, and cited to the point that where plaintiff, claiming the ownership of certain land, brings an action to recover the same, and, as auxiliary to the main relief, seeks to enjoin the defendant in possession from cutting timber and turpentine trees thereon for building and fencing, he must show the defendant's insolvency, or that he is unable to respond in damages for such injury; otherwise his injunction will not be continued to the hearing. And in *Nesbitt* v. *Turrentine*, Id. 538, it was cited to the point that where the complaint alleges title in the plaintiffs and the wrongful withholding by the defendants, their tenants, the alleged and admitted insolvency of such defendants makes a case for the appointment of a receiver to collect and hold rents, as directed in the order made.

VASS *v.* FREEMAN.

[3 JONES'S EQUITY, 221.]

WHERE DEATH OF LEGATEE IS SPOKEN OF AS UNCERTAIN EVENT, whether in case of survivorship or in that of a bequest to one person with a limitation over, it can be so only in reference to some other event, and the death of the testator must of necessity be assumed as the event referred to, when no other is mentioned in the will.

WHERE PROPERTY IS BEQUEATHED TO TWO OR MORE PERSONS IMMEDIATELY AS TENANTS IN COMMON, with a remainder over to the survivors, the survivorship will, unless the contrary appear, relate to the time of the testator's death, and those surviving him will take absolutely. *Aliter*, if it appear that the testator referred to a survivorship among the legatees.

SPECIAL CIRCUMSTANCES WILL PREVENT APPLICATION OF GENERAL RULE, which, in immediate bequests, refers the contingent terms in which the death of the legatee is spoken of to the event of the testator's death; particularly when such special circumstances are attended by words indicating that the testator referred to a survivorship to take place between legatees after his death.

APPLICATION OF RULE SHOWING THAT SPECIAL CIRCUMSTANCES AND EXPRESS WORDS IN WILL REFER TO SURVIVORSHIP BETWEEN LEGATEES AFTER TESTATOR'S DEATH.—Where the testator gave a joint estate for life to his mother and sister with an absolute estate to the survivor, expressed a belief that he would soon die, that these two objects of his bounty would survive him, appointed them his executrixes, gave them minute instructions as to the management of the estate and selection of agents, advised as to their place of residence, and cautioned them

Digitized by Google

against imposition, it was held that the testator meant to give the property to the survivor of the two who should become so by the death of one of them after his death.

LEGATEES MAY STILL HOLD BY JOINT TENANCY IN NORTH CAROLINA, though the incident of survivorship was abolished by the act of 1784: See 1 R. S., c. 43, sec. 2; Rev. Code, c. 43, sec. 2.

BILL to recover a legacy bequeathed to Amanda G. Freeman in the will of William G. Freeman. The terms of the bequest, and other facts of the will, may be found interspersed through the opinion. Both of the appointed executrixes, Mrs. Harriet Freeman and Amanda G. Freeman, qualified, and undertook to administer the estate. Amanda, the sister mentioned in the will, intermarried with the plaintiff, and died about a year afterwards, and the plaintiff took out letters of administration on her estate. Plaintiff contended that by the provisions of said will the limitations over on a death were confined to a period within the life of the testator, and that on his death the interests of the legatees became absolute, and that as the administrator of Amanda he was entitled to the personal estate bequeathed to her, and that by the *jus mariti* he was entitled to hold the same. The prayer of the bill was that defendant, Mrs. Harriet Freeman, as executrix, account and pay the said legacy to him. Defendant's answer did not dispute the facts; but it was therein insisted that the whole estate belonged to defendant, who claimed that of Amanda by survivorship. The cause was heard on bill, answer, and exhibit.

B. F. Moore, for the plaintiff.

Phillips and Green, for the defendant.

By Court, BATTLE, J. When slaves or other personal chattels are bequeathed to two or more persons, immediately, as tenants in common, with a limitation over to the survivors or survivor, if or in case that one or more of them die, it is settled that, unless a contrary intent appear from other parts of the will, those who survive the testator will take absolutely. The rule which thus refers the period of survivorship to the death of the testator was first laid down by Lord Chancellor Cowper, in the case of *Lord Bindon* v. *Earl of Suffolk*, 1 P. Wms. 96, was followed by many cases in England, and has been recognized in this state in the cases, referred to by the plaintiff's counsel, of *Cox* v. *Hogg*, 2 Dev. Eq. 121; *Hilliard* v. *Kearney*, Busb. Eq. 222; and *Biddle* v. *Hoyt*, 1 Jones Eq. 159. The reason of the rule is given by Sir John Leach, vice-chancellor, in *Allen* v.

Digitized by Google

Farthing, reported in 2 Jarman on Wills, 688, 689, "that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) life-time, the language expressing a contingency, and death generally being not a contingent event." If there be any time subsequent to the death of the testator to which the period of survivorship can be referred, as, for instance, the death of a tenant for life, or the time when the property is to be divided, that will be adopted instead of the death of the testator, unless a special intent to the contrary can be found in the will. This was decided by Sir John Leach in *Cripps* v. *Walcott*, 4 Madd. Ch. 11, and has been sustained by many subsequent cases in England and this state: See 2 Jarman on Wills, 648; *Biddle* v. *Hoyt*, *supra*. Analogous to these cases of survivorship are those where bequests are made to a person, with a limitation over in case of his death. The question is, whether the testator uses the words "in case of" in the sense of "at or from," so as to restrain the prior bequest to a life estate with a remainder over, or uses them to substitute another bequest in lieu of the prior one, should that fail by the death of the first legatee in the life-time of the testator. "The difficulty in such cases," says Mr. Jarman, "arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstance, naturally, is the time of its happening; and such time, where the bequest is immediate (*i. e.*, in possession), necessarily is the death of the testator, there being no other period to which the words can be referred." But though it is an established rule that where there is a bequest simply to A, and in case of his death, or if he die, then to B, A will take absolutely upon surviving the testator: *Lowfield* v. *Stoneham*, 2 Stra. 1261; *Trotter* v. *Williams*, Pr. Ch. 78, yet where there is another point of time to which such dying may be referred, as is obviously the case when the bequest is to take effect in possession at a period subsequent to the testator's decease, the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession: See *Hervey* v. *McLaughlin*, 1 Price, 264; *Palin* v. *Hills*, 2 Myl. & K. 470.

Thus it will be seen that, whether in the case of survivorship, or in that of a bequest to one person with a limitation over, where the death of the legatee is spoken of as an uncertain event,

Digitized by Google

it can be so only in reference to some other event, and that the death of the testator must, of necessity, be assumed as the event referred to, when no other is mentioned in the will. But even where there if no subsequent time to which the death of the legatee spoken of as contingent can be referred, and where the bequest is immediate, special circumstances will induce the court to construe it to mean the death of the legatee at any time, and not restrict it to the death of the testator: See *Billings* v. *Sandom*, 1 Bro. C. C. 393; *Nowlan* v. *Nelligan*, Id. 489; and *Lord Douglas* v. *Chalmer*, 2 Ves. jun. 501. In the last-mentioned case a testatrix bequeathed her residuary personal estate for and to the use of her daughter, Frances Lady D., and in the case of her decease, to the use and behoof of her (Lady D.'s) children, share and share alike, to whom her trustees and executors were to account for and pay over and assign the said residue. By a codicil, the testatrix gave a ring to her daughter, Lady D. Lord Loughborough treated the notion that the testatrix intended to provide for the event of Lady D.'s dying in her (the testatrix') life-time, as contrary to the natural import of the words, and the distinction between the expression used and "at or from" her decease as too subtile. He also relied upon the bequest of the ring, as being inconsistent with the supposition of her taking the whole interest in the residue; and he observed that, under the circumstances which had happened, there was no other way by which the bounty of the testatrix could reach the children, but by giving the residue to Lady D. for life, with the remainder to her children. The remarks of Sir William Grant in *Webster* v. *Hale*, 8 Id. 411, upon this case would seem to show that the circumstance of the gift of the ring ought not to have influenced the decision.

From the cases to which we have just referred, it appears clearly that special circumstances will prevent the application of the general rule which in immediate bequests refers the contingent terms in which the death of the legatee is spoken of, to the event of the testator's death. Much more will this be the case when such special circumstances are attended by words indicating certainty in the death of the legatee or one of the legatees.

In such a case there is no necessity to restrict the death of the legatee to that of the testator, a restriction which Sir R. P. Arden, M. R., in *Russell* v. *Long*, 4 Ves. 551, called an unnatural construction, because, as Sir William Grant said in *Brown* v. *Bigg*, 7 Id. 279, the testator generally supposes that

Digitized by Google

the legatee will survive him. The death of the legatee, therefore, where there is a limitation over after an immediate bequest, or where a survivorship is provided for, may be construed to mean, what it is in fact, a certain event without reference to any other event. The intention of the testator will then be carried out by giving effect to the ulterior limitation, or to the survivorship, after the death of the legatee, instead of being defeated by holding the interest of such legatee to be absolute, in case of his being alive at the death of the testator. Applying this rule to the case before us, it gave a joint estate for life to the testator's mother and sister, with an absolute estate to the survivor, and the whole scope of the will proves clearly, as the defendant's counsel contended, that such was the testator's intention. In every part of his will he shows that he expected to die soon, and that both the objects of his bounty would survive him. He gives minute information of the then existing state of his affairs; and being a merchant as well as a slave-owner, he advises his mother and sister (whom he appoints his executrixes) how they shall dispose of his goods and slaves. He selects a professional gentleman whom he directs them to employ; points out the best investment for their money; and suggests one or two places for their choice of a future residence. The terms of the bequest are as follows: "I give and bequeath to my mother and Amanda G. Freeman the whole of my estate jointly, and upon the demise of either, the survivor to have the whole in fee-simple forever." It will be observed that the words of bequest import a joint tenancy, by which the legatees may still hold in North Carolina, though the incident of survivorship was abolished by the act of 1784: 1 R. S., c. 43, sec. 2; Rev. Code, c. 43, sec. 2. There is nothing to indicate the wish or expectation of the testator that his mother and sister would divide the property, and he had the undoubted right to limit the whole absolutely to the longest liver. What is there, then, to prevent his manifest intention from being carried into effect? Only one plausible objection has been or can be urged against it. Had Mrs. Vass (who was the legatee, Amanda G. Freeman) left children, they would, in the event which has happened, of their mother's death before her mother, have been excluded by this construction from any part of the testator's estate. This is admitted to be an important consideration, and would, in a case of doubtful intent, have great weight in restricting the survivorship to the death of the testator. But we think the intention of the testator is expressed in terms too plain to admit of doubt. Besides the circumstances to which

Digitized by Google

we have already adverted, it will be noticed that the death of the legatee is spoken of as a certain event. It is upon her death that the survivorship is to take place. There is no contingency, either expressed or implied, and there is, therefore, no place for the application of the general rule which, in a case of necessity only, refers it to the death of the testator. In addition to this, the testator shows himself that he had no particular wish to provide for anybody except his mother and sister. He expressly excludes the only child of his deceased brother, and he warns his sister against the advances of suitors in terms which shows that he did not wish her to marry, and that he had very little idea of providing for her children. His disposition of his property may not be such as we can approve, but it was his own, and he had the right to give it to whom he pleased, and upon what terms he chose, provided that in doing so he violated no rule of law. We are bound to say that the only fair construction of which the language of the will is susceptible is not opposed by any rule of either the common or statute law, and that it is our duty to give effect to it. The plaintiff, as the administrator of his wife, is not entitled to any part of the testator's property, and his bill must therefore be dismissed.

Bill dismissed.

WORDS OF SURVIVORSHIP IN WILL REFER TO DATE OF TESTATOR'S DEATH, wherever a gift takes effect in possession immediately upon the death, unless some other time is indicated by the will: *Presley* v. *Davis*, 62 Am. Dec. 396. As to when such words will relate to period of division or enjoyment, see Id.

RIGHT OF SURVIVORSHIP IN JOINT DEVISEES.—Where a will makes the devisees joint tenants, and one dies before the testator, the others take his share by right of survivorship: *Ball* v. *Deas*, 49 Am. Dec. 651; *Telfair* v. *Howe*, 55 Id. 637.

IN CASES OF TENANTS IN COMMON, WHERE DEVISE FAILS, or is revoked as to any one or more of them, such share or shares descend to the heir at law: *Telfair* v. *Howe*, 55 Am. Dec. 637. For doctrines concerning legacies given to persons as tenants in common, see *Mowatt* v. *Carow*, 32 Id. 641; *Spruill* v. *Moore*, 49 Id. 428.

THE PRINCIPAL CASE WAS APPROVED in *Garrison* v. *Eborn*, 3 Jones Eq. 231. It was cited in *Burton* v. *Conigland*, 82 N. C. 102, to the point that if there be no intermediate period, and the alternative is either to adopt the time of the testator's death, or the death of the legatee generally, at some time or other whenever it may happen, as the period at which the estate is to become absolute, the former will be adopted unless there be words to forbid it, or some consideration to turn the scale in favor of the latter; and that the same principle is affirmed and applied alike to real and personal estate. But in *Price* v. *Johnson*, 90 Id. 596, the principal case was cited to the point that if there be an intermediate period between the death of the devisor and that of the devisee, to which the contingency can have reference, then that must be adopted.

Digitized by Google

McLEAN v. HARDIN.

[3 JONES'S EQUITY, 294.]

"MOVABLE PROPERTY" ATTENDS PERSON, AND IS THEREFORE CALLED "PERSONAL," as distinguished from fixed or real property.

MOVABLE PROPERTY IS SUBJECT TO LAW OF DOMICILE, although it be in a foreign country.

NOTHING IN LAW OR COMITY OF NATIONS REQUIRES COURTS OF ONE STATE to give effect to the law of another state which is in derogation of the former's laws, and in violation of rights that have vested by force thereof.

RIGHTS OF HUSBAND AND WIFE TO MOVABLE PROPERTY ARE GOVERNED BY LAW OF MATRIMONIAL DOMICILE, no matter where such property happens to be, or how or where it is acquired. Thus, where an intestate's personal property has been distributed in Mississippi, and a slave assigned to a married woman domiciled with her husband in North Carolina, such slave belongs to the husband, according to the laws of the latter state, and is not governed or controlled by the laws of the former.

INJUNCTION to restrain the sale of a slave. The plaintiff, Mrs. E. R. McLean, was the wife of Thomas G. McLean, one of the defendants. They were married in North Carolina, and had ever since their marriage resided in that state. Upon the distribution of the personal estate of plaintiff's mother, who had died intestate in the state of Mississippi, a slave was assigned to Mrs. McLean, and was delivered by the administrator to her husband, the defendant Thomas, who took him to North Carolina. The slave remained in the family about a year, when he was conveyed by the defendant Thomas to the other defendant, Hardin, in trust for the payment of said Thomas's debts. The trustee advertised the slave, and was about to sell him when said injunction issued. Plaintiff claimed the sole and separate property of the slave, under the statute law of Mississippi, free and clear of any control or disposition by her husband, and of all liability for his debts; and insisted that when the slave was taken to North Carolina the same rights and incidents attached to the property in that state as belonged to it in the state of Mississippi. Plaintiff prayed that the trustee be enjoined from pursuing the slave for the debts of her husband; that her rights be declared by the court as above stated; and that a trustee be appointed to hold the property for her use. The trustee answered, and insisted that, as the property was movable, it vested in the husband, and was subject to the laws of North Carolina. The cause was heard on bill and answer.

Digitized by Google

Miller and Graham, for the plaintiff.

Ruffin and McLean, for the defendants.

By Court, PEARSON, J. "Movable property" attends the person, and therefore is called "personal," as distinguished from fixed or real property; and the general principle is, that, no matter where it may happen to be, it is subject to the law of the domicile; and although it be in a foreign county, it is governed by the same rules and laws of transfer and succession as if the owner had it in possession at home: *Moye* v. *May*, 8 Ired. Eq. 134.

The plaintiff and her husband are citizens of this state. They were married here, and have always lived here. As soon, therefore, as the title to the slave in controversy vested in her by the assent of the administrator and delivery by him, although the slave was in Mississippi, the property passed to the husband *jure mariti*, according to the laws of this state, and became his in all respects, in the same way as if the wife had possession of the slave at home. Being movable property, it attended her person, and in contemplation of law was in her possession at home as much as any property she had about the house, without reference to the manner in which her title was acquired, or the place where it happened to be. The statute of Mississippi was not intended, and does not have the effect, to change in any manner the nature and quality of slave property. It remains movable, and the state of Mississippi had no concern in any conceivable manner with this slave after it ceased to belong to one of its citizens and became the property of one of the citizens of North Carolina.

From a perusal of the statute upon which the plaintiff rests her claim to a separate estate, it is apparent that there was no intention to extend its operation beyond the state of Mississippi. It is entitled, "An act for the protection and preservation of the rights and property of married women." What married women? Certainly only those who are citizens of that state. We cannot impute to the law-makers an intention to regulate the right and property of married women in North Carolina, and every other country on the face of the globe. The several provisions of this statute, and those of 1846, which is supplemental thereto, show that it was not the intention to give to it a universal operation, but to confine it to their own citizens, leaving us, and the rest of the world, to regulate the rights of our citizens in our own way.

Digitized by Google

If, however, we could entertain the supposition that such was the intention, then, very clearly, there is nothing in the law or comity of nations that requires the courts of this state to give effect to the law of another state in derogation of its own laws, and in violation of rights that have vested by force thereof. It is settled that in regard to movable property the rights of the parties are governed by the law of the matrimonial domicile, no matter where such property happens to be; or how or where it is acquired. Story, in his Conflict of Laws, secs. 158, 159, after a full investigation, arrives at this conclusion, both upon the reason of the thing and the weight of authority. Kent, in his Commentaries, vol. 2, p. 237, concurs in this conclusion, and we take it to be settled.

Mr. Graham, upon the argument, took this position: Had Mrs. Glass, by will or deed of gift, given the slave for the sole and separate use of the plaintiff, this court would have been bound to give effect to the trust so declared; and he asks, Is not a statute of a sister state, by which a similar trust is declared, entitled to the same respect in this court? And can we refuse to give effect to a statute where it is conceded that we would give effect to a will, or deed of gift, having a like purpose in view?

The analogy wholly fails. Mrs. Glass was the owner of this slave, and as such had a right to annex a condition to her gift, so that the donee must take subject thereto. But the state of Mississippi did not own this slave. It was movable property; "not fixed and real," as a part of the soil of that state; and the state had no further concern with it after it ceased to be the property of one of its citizens. The state of Mississippi does not profess an intention to annex a condition to the gift or transfer of this slave. The operation of the statute was intended to be confined to married women of that state, and has no application to married women of our state, and certainly, if such was the intention, the statute has no effect here, and the rights of the parties are subject to be regulated by the law of the matrimonial domicile.

It will be declared to be the opinion of this court that the plaintiff is not entitled to a separate estate in the slave mentioned in the pleadings, and the bill will be dismissed.

Decree accordingly.

PROPERTY DEFINED: See note to *Tolar* v. *Tolar*, 14 Am. Dec. 576.

MOVABLE PROPERTY IS GOVERNED BY LAW OF DOMICILE: See note to *Bryan* v. *Moore*, 13 Am. Dec. 350; *Holmes* v. *Remsen*, 8 Id. 581.

Digitized by Google

RIGHTS OF MARRIED PERSONS TO MOVABLE PROPERTY ARE GOVERNED BY LEX DOMICILII: See note to *Pritchard* v. *Citizens' Bank*, 28 Am. Dec. 135; note to *Allen* v. *Allen*, 39 Id. 556; *Succession of Alice Packwood*, 41 Id. 341, and note 348; *Murphy* v. *Murphy*, 12 Id. 475. *Lex domicilii* governs the rights to personal property acquired by inheritance: *Hicks* v. *Pope*, 28 Id. 142. The four methods by which the husband's right to the wife's movables is determined are given in *Kneeland* v. *Ensley*, 33 Id. 168.

NO STATE OR COUNTRY WILL ENFORCE LAWS MADE ELSEWHERE, if such enforcement would be in contravention of its own laws, or of rights which have vested under them: *Smith* v. *Godfrey*, 61 Am. Dec. 617, and notes 622; *Mahorner* v. *Hood*, 48 Id. 706, and note 716.

Digitized by Google

CASES AT LAW

IN THE

SUPREME COURT

OF

NORTH CAROLINA

MIZELL *v.* BURNETT.

[4 JONES'S LAW, 249.]

CONTRACT TO SELL "GROWING TREES" is within the statute of frauds, being a contract to sell "land, or some interest therein or concerning the same."

CONTRACT TO SELL GROWING TREES is binding on the vendor if signed by him; it is not necessary that it should also be signed by the vendee.

LETTER IS SUFFICIENT EVIDENCE OF WRITING, or memorandum, of a contract to bind a vendor, and subject him to an action for a breach, if there is no other difficulty in the way of the vendee.

DELAY OF TWENTY DAYS IS UNREASONABLE, and the vendor is not bound, where he agrees to convey timber to the vendee if the latter shall make and deliver notes in payment within a week, or within that time set a day for the consummation of the contract.

RIGHT DEPENDING UPON CONDITION PRECEDENT does not accrue unless the condition is performed, although performance becomes impossible by the act of God.

ASSUMPSIT. Burnett was the owner of a tract of land on which were growing white-oak trees. Mizell and Burnett, about February 1, 1853, entered into an executory contract concerning the sale and purchase of the trees. The latter afterwards addressed the following letter to one L. S. Webb: "Williamston, February 14, 1853. Sir: I sold Solomon Mizell, jun., some oak timber; amount, eight hundred dollars. I was to take such names to the notes inclosed as you would write me were good for the amount. I also send a letter over to Solomon Mizell, jun. Please give it to him (to-day) if he is in town." The letter inclosed bore the same date, was directed to Mizell, and was as follows: "Sir: I received your letter of the tenth inst., and would say in reply, you can have my oak timber on the tract of land known as the

Digitized by Google

Walling tract, on Roanoke river, as per agreement when you were here, for eight hundred dollars, in two notes, twelve and eighteen months from date, with interest from date, with such security as L. S. Webb says is sufficient for the amount. I am unable to get over; but you may consider it a trade, you complying with the above. You can get your notes fixed as above stated; show them to L. S. Webb, and get a letter from him to me, stating that the security is sufficient, and all will be right; then I will give you a right to the timber as per agreement. P. S. I have inclosed the two notes to L. S. Webb for you to fill up. J. H. B. I will be at home Saturday next, or any day this week; or you can write to me what day you will come, and I will be here. (Signed) J. H. B." This letter, together with the notes, were delivered to Mizell within a day or two of the time when written, and he said that the trade was made; that he would either go and deliver the notes to Burnett, after having them signed, or else return them with a letter from Webb. On February 19, 1853, one Wynn offered to buy the timber in controversy, and pay Burnett one thousand dollars therefor. On February 22, 1853, Burnett wrote Webb, in effect, that, not having seen nor heard from Mizell, he presumed that he had abandoned the contract; that he had put Wynn off for some time, that Mizell might write or come, and that he had done neither. This letter was written and received the same day; and twelve days thereafter Mizell called upon Webb with the notes signed, whereupon Webb gave him a letter to Burnett, stating that the notes were good, and at the same time communicated to Mizell the contents of the letter of the twenty-second of February, who gave as reasons for not returning sooner with the notes that his wife was ill, and that there had been a freshet in the river preventing him from going to the residence of Burnett. Mizell then proceeded to visit Burnett, the distance traveled being about twenty-two miles on account of the rise in the river. When he arrived, Burnett took the notes and letter, read them, returned the notes to Mizell, and put the letter in his pocket, and refused to make title to the trees, giving no reason at the time for so doing; but after Mizell left, he put his refusal upon the ground that the notes were not good. He shortly afterwards conveyed the trees to Wynn. Webb swore that the notes were good. Verdict on the foregoing facts in favor of Mizell for two hundred dollars, and interest from the time of the sale to Wynn, the court reserving the questions mentioned in the syllabus *supra*. There was afterwards judgment on the verdict. Burnett appeals.

Digitized by Google

Winston, jun., for the plaintiff.

Heath, for the defendant.

By Court, PEARSON, J. It was properly conceded that a contract to sell "growing trees" is within the statute of frauds, being a contract to sell "land, or some interest in or concerning the same."

We are of opinion, with his honor, that to make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary that it should also be signed by the vendee. The statute provides that the contract shall be signed by the "party to be charged therewith." This answers the purpose, which is to exclude perjury in an action to enforce the contract. In reference to the other party the statute is silent, and there is consequently nothing to justify the construction that he is also required to sign. If the purchaser of land pays the price in cash, taking a bond for title, there is no reason why he should put his signature to the contract. So if he gives a note for the price that is sufficient, although the note makes no reference to the contract. So if the vendor binds himself in writing, and is content to take the verbal promise of the purchaser to pay the price, it is his own fault, and he must blame himself for the folly of getting into a situation where he is bound, but the other party cannot be charged if he chooses to insist upon the statute. Common justice and the general principles of law require that there shall be a mutuality in contracts; that is, if one party is bound, the other ought to be. But there may be exceptions. Although it is a maxim that a contract is never binding unless there be a consideration, yet there is a distinction between a consideration and the mutuality of contracts in reference to the obligation thereof; and the fact that by some other principle of law or the provisions of a statute, one party has it in his power to avoid the obligation, although it suggests a very forcible reason for not entering into a one-sided contract, does not necessarily have the effect of making such contract void as to both parties. One agrees to deliver at a future day a certain article to an infant, in consideration of his promise to pay the price; the contract is not void, although the infant may avoid the obligation on his part if he chooses to protect himself on the ground of infancy. So if one agrees in writing to convey land in consideration of a verbal promise of the other party to pay the price, the contract is binding on the vendor, although the vendee may avoid the obli-

Digitized by Google

gation on his part if he chooses to protect himself under the provisions of the statute. It is not considered in either case that the contract is *nudum pactum* and void for the want of consideration. This is the result of the English decisions in reference to the statute of frauds, and although our statute is not precisely in the same words, yet the substance is the same, the purpose is the same, and the difference in the wording is not such as to justify a difference in the construction: *Laythoarp* v. *Bryant*, 2 Bing. N. C. 744, 29 Eng. Com. L. 469; *Allen* v. *Bennet*, 3 Taunt. 170.

We also agree with his honor, that the letter of the defendant to the plaintiff, dated February 14, 1853, is a sufficient writing or memorandum of the contract to bind the defendant and subject him to an action for a breach, provided there be no other difficulty in the way of the plaintiff; the writing being required only as evidence of the contract, and not to constitute it. This is well settled, both in law and equity: *Jackson* v. *Lowe*, 1 Bing. 9; *Bateman* v. *Phillips*, 15 East, 172; *Laythoarp* v. *Bryant*, *supra*; *Welford* v. *Beazely*, 3 Atk. 503; 1 Vern. 110. According to the view we take of the case, it is not necessary to decide whether the letter of the fourteenth of February, above referred to, is only a proposition to sell, or contains in itself the contract, or is evidence of a contract previously made; for in either view, the plaintiff was required to execute the two notes with approved security, and the only question is, whether he did execute and tender them to the defendant in time to perfect his right of action.

If the plaintiff had tendered the notes on the Saturday referred to, or any day during that week, it is clear that the defendant would have been bound. There is strong ground to support the position that, according to the proper construction of the letter, the plaintiff was required to deliver the two notes during the week, or, at all events, to write during the week and fix on a day—the purpose being not to let the matter stand open and leave him unbound longer than that week. It would seem the defendant wrote this letter reciting the agreement or purpose to bind himself in writing, with the expectation that the plaintiff was also to bind himself during that week. But we put our decision on a broader ground. The plaintiff was certainly required to deliver the notes within a reasonable time, and we think a delay of twenty days was, under the circumstances, unreasonable, and consequently the plaintiff did not, by his tender of the notes, acquire a right of action.

Digitized by Google

What is a reasonable time must, in all cases, depend upon the circumstances. The nature of the transaction may make a delay unreasonable which in a transaction of a different kind would not be so. According to the law merchant, notice of the dishonor of a bill must be by the return mail, for "promptness is the life of trade." So if one offers to take one hundred dollars for his horse, the proposition must be accepted at the time; for nothing else appearing, his object is to sell at that time. So the question may depend upon the condition of the parties. If one is bound and the other is foot-loose, the time must be short, for it would be unreasonable to keep the parties in so unequal a condition for a long time. This is our case. The defendant was bound in writing, the plaintiff was foot-loose. If a storm had destroyed the trees, he was not bound to complete the trade, even after his conversation with Webb, and it was unreasonable to delay twenty days, and then seek to get the advantage of an appreciation in the value of the timber, or of the fact that it was worth more by some two hundred dollars at the time of the contract than the owner supposed.

This delay was the more unreasonable because the defendant earnestly insisted that the business should be closed on the next Saturday, or some day during that week, which ought to have quickened the plaintiff's diligence.

The suggestion that the delay was occasioned by the sickness of the plaintiff's wife and the freshet in the river will not avail. Assuming that she was sick, it does not appear how that made it impossible for him to procure the notes. As to the river being up, that did not prevent the defendant's letter of the twenty-second from reaching its destination, and the plaintiff could have crossed in the same way. Nor did it prevent him from crossing to make the tender. It is true, he went a roundabout way, but his being able to do so repels the idea of an impossibility.

But in the second place, it is familiar learning that a right, depending upon a condition precedent, does not accrue unless the condition be performed, although performance becomes impossible by the act of God. There is a diversity between a condition subsequent by which an estate is to be defeated, and a condition precedent by which an estate is to be created or a right is to accrue: Co. Lit., tit. Conditions.

The defendant agreed to convey the timber to the plaintiff, provided he executed the notes in a reasonable time. The principle is the same as if the condition had been to execute the

Digitized by Google

notes in ten days. Performance is necessary to give a right of action.

There is error. Judgment reversed, and a *venire de novo*.

CONTRACT FOR SALE OF TREES growing upon land is within the statute frauds, and should be in writing: *Putney* v. *Day*, 25 Am. Dec. 470; but see, *contra*, *Smith* v. *Bryan*, 59 Id. 104, and note.

CONTRACT FOR SALE OF LAND signed by the vendor alone and accepted by the vendee binds the vendor, and, it seems, the vendee also: *Worrall* v. *Munn*, 55 Am. Dec. 330; *Old Colony R. R. Corp.* v. *Evans*, 66 Id. 394, and notes collecting other cases.

LETTER INSUFFICIENT MEMORANDUM WHEN: *Givens* v. *Calder*, 2 Am. Dec. 686.

TIME FIXED FOR PERFORMANCE is at law of the essence of the contract, and if the vendee is not ready to perform his agreement at the time stipulated, the vendor may elect to consider the contract as terminated; *Tyler* v. *Young*, 35 Am. Dec. 116; and see *Shinn* v. *Roberts*, 43 Id. 636; *Curtis* v. *Blair*, 59 Id. 257.

CONDITION PRECEDENT MUST BE PERFORMED and proved, to entitle plaintiff to recover on his contract: *Eldridge* v. *Rowe*, 43 Am. Dec. 41; *Jones* v. *Walker*, 56 Id. 557; *Oakley* v. *Morton*, 62 Id. 49, and notes to these cases.

EXECUTORY CONTRACT FOR SALE of growing trees is within the statute of frauds: *Ely* v. *Bush*, 89 N. C. 358; and specific performance thereof cannot be enforced against the party to be charged, unless the contract or some memorandum thereof be made in writing and signed: *Green* v. *North Carolina R. R. Co.*, 73 Id. 526, both citing the principal case.

CONTRACT WITHIN STATUTE OF FRAUDS is binding upon the party who signs, but not upon the party who does not sign: *Edwards* v. *Kelly*, 8 Jones L. 71; *Wade* v. *City of Newbern*, 77 N. C. 462, both citing the principal case.

PARTY CANNOT AVAIL HIMSELF of the benefit of the statute of frauds, unless he is a party to the contract, and is to be charged thereby: *Green* v. *North Carolina R. R. Co.*, 77 N. C. 98; *Davis* v. *Inscoe*, 84 Id. 401, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Francis* v. *Love*, 3 Jones Eq. 223, to the point that time specified for the performance of an act becomes, or may become, of the essence of the contract, and that an offer made by letter would have the effect of binding the writer for a reasonable time; still, where there was nothing to bind the other party, a delay of six years in filing a bill asking for specific performance is an unreasonable time to keep a party so bound, and it was said in effect by Rodman, J., in his dissenting opinion in *Crook* v. *Cowan*, 64 N. C. 750, that if assent is given by letter to a proposition made by letter, it must be made by the first post of the next day, unless further time is extended in the proposition, and that a delay of twenty-one days in giving assent by letter to an offer made by telegram was unreasonable, and that the party making the offer ought not to be bound, citing the principal case in support of this view.

CONDITION PRECEDENT MUST BE PERFORMED to entitle a party to recover the price as upon a complete performance, notwithstanding such performance was prevented by inevitable accident: *Buffkin* v. *Baird & Roper*, 73 N. C. 289, citing the principal case.

Digitized by Google

MANN v. TAYLOR.

[4 JONES'S LAW, 272.]

GRANT CANNOT BE LOCATED WHEN DESCRIBED as beginning at a stake, and the other corners are described as points at the end of course and distance, as such description is void on account of vagueness.

EJECTMENT. The opinion contains the facts.

The plaintiff was not represented by counsel.

Moore and Bryan, for the defendant.

By Court PEARSON, J. The objection in regard to the location of the grant to Dobbs is fatal to the plaintiff's claim, and it is unnecessary to advert to any of the other points made in the court below.

The grant has two descriptions: 1. It is a grant of twelve thousand five hundred acres, being a subdivision of tract No. 2, and it is bounded by tract R on the south and east, and by the tract T on the west. If the tracts R and T could be identified, this description, under the rule, *Id certum est quod certum reddi potest*, would be sufficient to make out a location of the tract in question by aid of the fact that it is a parallelogram, which having three sides known, the fourth could be ascertained; but no proofs were offered for the purpose of identifying the tracts R and T. So this description may be put out of the case.

The second description is in these words: "Beginning at a stake, running thence north five hundred chains, thence west two hundred and fifty chains, thence south five hundred chains, thence east two hundred and fifty chains to the first station." A stake is an imaginary point. There is no telling where it is. So the grant has no beginning, this description being void on account of its vagueness: *Massey* v. *Belisle*, 2 Ired. L. 177. That was a stronger case than this; for the "stake" at the beginning was in Gillespie's line; the next "stake" was in Hay street; the third "stake" had no description; and the fourth "stake" was in Gillespie's line. The court say: "According to this description, its location was impossible, because in law it covered no land." "It is a settled rule of construction with us that when stakes are mentioned in a deed simply, or with no other description but that of course and distance, they are intended to designate imaginary points. Every corner in this description is a stake or imaginary point;" "two are said to be in Gillespie's line, and one in Hay street, but in what part

Digitized by Google

of Gillespie's line, or in what part of Hay street, the points are, can neither directly nor indirectly be discovered from this description."

In our case, the beginning is at a stake; in other words, at a point, and the other corners are points at the end of course and distance; so we have points with no other description than that of course and distance, and the main point or beginning has no other description whatever. There is error, and there must be a *venire de novo*.

Judgment reversed.

CONVEYANCE VOID FOR UNCERTAINTY in description, when: *Lumbard* v. *Aldrich*, 28 Am. Dec. 381; and that a deed which conveys no particular spot of ground can transfer no title: *Hart* v. *Hawkins*, 6 Id. 666. When the description in a deed is so indefinite that it cannot be identified with certainty, the deed is void, and transfers no title: *Howard* v. *North*, 51 Id. 769; see also note to *Grant* v. *Hunsucker*, 55 Id. 414, collecting cases on this point; and *Nixon* v. *Porter*, *ante*, p. 408, and note.

DESCRIPTION IN PLAT WHICH MENTIONS no particular tract is too vague to admit of the location of land: *Archibald* v. *Davis*, 5 Jones L. 324. This rule applies to a grant: *Hinchey* v. *Nichols*, 72 N. C. 68, both citing the principal case.

STATE v. ROSS.

[4 JONES'S LAW, 315.]

ENTRY BY OWNER OF LAND AND ERECTION OF BUILDING, against objection of tenant at sufferance in possession, does not constitute an indictable trespass at common law.

INDICTABLE TRESPASS IS THAT COMMITTED MANU FORTI, in a manner amounting to a breach of the peace, or which would necessarily lead to a breach of the peace, if the party in possession were not overawed by the force displayed, and induced to surrender possession because resistance would be useless.

WHETHER ONE HAVING RIGHT OF ENTRY may use force if necessary to exert his right is an unsettled question, according to common law; but the authorities may be reconciled on this distinction. One having a right of entry may use force, provided it does not amount to a breach of the peace; but one not having such right is guilty of indictable trespass if he enter with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace.

INDICTMENT for forcible trespass. The opinion states the facts.

William A. Jenkins, *attorney-general*, for the state.

No counsel appeared for the defendants.

By Court, PEARSON, J. We are told by the attorney-general that this was treated as an indictment at common law, for the

Digitized by Google

purpose of giving the state the benefit of the testimony of Hinson, who was not a competent witness in a proceeding under the statute. The question is, Has the statute made out a case indictable at common law? The indictment is strong enough, but the evidence does not maintain the allegations. The case made upon the facts is this: Hinson sold and conveyed the land to Ross, but remained on it under an alleged parol agreement "that he was to remain there for ten years." Ross, in company with four others, went to the land, taking with him a wagon loaded with provisions, and some household furniture, for the purpose of taking possession. Hinson was present and forbade them to enter, but they did enter against his will, and began to erect a house outside of the inclosure where Hinson's house was situated, and some of them continued there for several weeks. His honor was of opinion that these facts made out an offense indictable at common law. We do not think so.

To make a trespass indictable, it must be committed *manu forti* in a manner which amounts to a breach of the peace; or, according to some of the cases, which would necessarily lead to a breach of the peace, if the person in possession is not overawed by a display of force, so as to be induced to surrender and give up the possession because resistance would be useless. Unless this degree of force is resorted to, the trespass is a mere civil injury, to be redressed by action.

The courts should keep a steady eye to this distinction, because individuals are under great temptation to convert civil injuries into public wrongs, for the sake of becoming witnesses in their own cases, and of saving costs.

We can see nothing in this matter, even as told by Hinson himself, that can magnify it into an indictable trespass. There was no breach of the peace—no display of arms, or "multitude of people"—nothing of "the pomp and circumstance of war" calculated to frighten a man of ordinary firmness. Hinson was not expelled and put out of possession. His dwelling-house was not invaded, and his inclosure was unmolested. It was at most a mere civil trespass.

We do not feel at liberty to take into consideration the fact that, according to the evidence, Ross was the owner of the land, and had a right of entry—the alleged parol lease for ten years being void, and Hinson being in effect a mere tenant at sufferance, because we find it an unsettled question whether one who has a right of entry may not use force, if necessary to assert his right, according to the common law. It is not necessary for

Digitized by Google

us to enter upon this debatable ground in order to dispose of this case: 1 Hawk. P. C. 495, c. 28. "It seems that at common law, a man disseised of any land (if he could not prevail by fair means) might lawfully regain the possession thereof by force." "But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, it was thought necessary by many severe laws to restrain all persons from the use of such violent methods of doing themselves justice."

Blackstone, whose book on criminal law is of the highest authority, follows Hawkins, vol. 4, p. 148. "An eighth offense against the public peace is that of a forcible entry and detainer; which is committed by violently taking or keeping possession of lands with menaces, force and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred." But this being found very prejudicial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they had no justice in their claim."

In *Rex* v. *Wilson*, 8 T. R. 357, the correctness of this view of the common law is questioned in the remarks which fell from the judges in delivering their opinions. But on a subsequent day of the term they felt called on to explain, and Lord Kenyon says: "Perhaps some doubt may hereafter arise respecting what Mr. Sergeant Hawkins says, 'that at common law the party may enter with force into that to which he has a legal title;' but without giving any opinion concerning that *dictum* one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all we wish to say is, that our opinion in this case leaves that question untouched; it appearing by this indictment that the defendants unlawfully entered, and therefore the court cannot intend that they had any title." That was upon a demurrer.

So in *State* v. *Whitfield*, 8 Ired. L. 315, the court throws a doubt upon the view of the common law as laid down by Hawkins and Blackstone, and reference is made to Wilson's case. But the matter was before the court upon a motion in arrest of judgment, and, as was done in Wilson's case, the point is left undecided. Perhaps it will be found that the authorities may be reconciled on this distinction. One having a right of entry

Digitized by Google

may, at common law, use force, provided it does not amount to an actual breach of the peace; whereas one not having a right of entry is guilty of a trespass, indictable at common law, if he enters with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace. This, however, is merely a suggestion. *Venire de novo.*

Judgment reversed.

WHAT LAND-OWNER MAY DO TO TAKE POSSESSION OF HIS LAND—RIGHT OF LANDLORD TO ENTER AFTER TERMINATION OF LEASE.—It was early settled by the English common law that the owner having the right to possession might enter the premises by force, and repossess himself of the land, and although perhaps liable to the public for a breach of the peace, the lessee could maintain no action against him. Parke, B., in rendering the opinion in *Harvey* v. *Brydges*, 14 Mee. & W. 437, said "that where a breach of the peace is committed by a freeholder, who in order to get into possession of his land assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." This doctrine is maintained and affirmed in *Taylor* v. *Cole*, 3 T. R. 292; *Argent* v. *Durrant*, 8 Id. 304; *Davison* v. *Wilson*, 11 Ad. & El., N. S., 890; *Pollen* v. *Brewer*, 7 C. B., N. S., 371; *Davis* v. *Burrell*, 10 C. B. 821; *Kavanagh* v. *Gudge*, 7 Man. & G. 316; *Butcher* v. *Butcher*, 7 Barn. & Cress. 399; in *Turner* v. *Meymott*, 1 Bing. 158, this rule was held to apply to a case where the landlord, after the termination of the lease, went upon the premises and broke open the house occupied by the tenant for the purpose of regaining possession; so in *Taunton* v. *Coster*, 7 T. R. 431, it was said that though the landlord had entered and dispossessed the tenant by force, there could be no doubt of his right to enter upon the land at the expiration of the term, and that there was not the slightest pretense for considering him as a trespasser; while in *Blades* v. *Higgs*, 10 C. B., N. S., 713, the rule was held to apply as well to an entry for the recovery of chattels as for the possession of land.

CONFLICTING AUTHORITIES.—*Hillary* v. *Gay*, 6 Car. & P. 284, and *Newton* v. *Harland*, 1 Man. & G. 644, are in direct conflict with the doctrine stated above. The former was a case where the tenant had promised to leave on a particular day but afterwards refused to do so, and the court held that the landlord was not justified in using force to expel the tenant's wife from the house and in putting the tenant's furniture into the street. The latter case held that a landlord, in order to regain possession after the expiration of his tenant's term, was not justified in using force in expelling the tenant, and that possession so acquired was not sufficient to vest possession in the landlord with relation to the termination of the term. These cases, however, are expressly overruled by the later authorities cited *supra*.

AMERICAN DOCTRINES.—The weight of authority in the United States seems to be in accord with the established English doctrine, namely, that the landlord may, after the expiration of the tenant's term, when not prevented

Digitized by Google

by statutory enactment, enter, and forcibly eject the tenant, being liable to indictment only when the force so employed amounts to a breach of the peace. The authorities, however, upon this question are somewhat conflicting, and it will be the purpose of this note to first collect those upon the point.

When Owner may Enter and Forcibly Eject Tenant after Expiration of his Term.—If the owner, having a right of entry, enter upon the land with force, and turn the tenant out of possession, after the expiration of his term, the landlord is not liable, in an action for damages, to the tenant for thus dispossessing him: *Hyatt* v. *Wood*, 4 Johns. 150; S. C., 4 Am. Dec. 258; although liable to indictment for forcible entry: *Ives* v. *Ives*, 13 Id. 235; *Jackson* v. *Morse*, 16 Id. 197; S. C., 8 Am. Dec. 306; *Wilde* v. *Cantillon*, 1 Johns. Cas. 123; *Brown* v. *Cram*, 1 N. H. 169; *People* v. *Field*, 52 Barb. 198; *Fuhr* v. *Dean*, 26 Mo. 116; *Bowler* v. *Eldredge*, 18 Conn. 1; *Scribner* v. *Beach*, 47 Am. Dec. 625; *Miner* v. *Stevens*, 1 Cush. 482. The owner of the legal title, after gaining possession, may use force in repelling any attempt to expel him: *Tribble* v. *Frame*, 7 J. J. Marsh. 599; S. C., 23 Am. Dec. 439. So where a tenant at will of a house, after demand of rent and notice to quit, refused, it was held that he could not maintain an action against the landlord for entering with force and taking away the windows and doors: *Meader* v. *Stone*, 7 Met. 147; *Mugford* v. *Richardson*, 6 Allen, 76; and an entry by the landlord in such case, without expelling the tenant, is sufficient to revest the title in him: *Curl* v. *Lowell*, 19 Pick. 25; nor can the tenant maintain an action against a purchaser of the legal title for forcibly entering and ejecting his family, or removing his furniture: *Curtis* v. *Galvin*, 1 Allen, 215, although the furniture remained without shelter, and was rained upon and damaged, before again coming into the possession of the owner: *Clark* v. *Keliher*, 107 Mass. 406; and an action will not lie in favor of a tenant at sufferance, and against the landlord, for entering and removing a partition from the tenant's office: *Moore* *Mason*, Id. 406. Assuming that the tenancy has expired, "the landlord may take possession by any means short of personal violence; . . . . he may break into a dwelling-house for the purpose; . . . . he may remove goods which he finds there; . . . . he may protect that possession, as well against the individual who, in violation of his contract, has attempted to wrong him, as against a stranger who intrudes upon his possession:" *Todd* v. *Jackson*, 26 N. J. L. 525; *Sage* v. *Harpending*, 49 Barb. 166; and if the tenant, after a reasonable opportunity, neglects or refuses to remove his chattels, the landlord may remove them: *Sterns* v. *Sampson*, 59 Me. 568; *Sellam* v. *Janson*, 17 Pa. St. 467—in this case the removal took place during the absence of the tenant; and if the owner of the land forcibly break into the dwelling-house of the tenant, and commit an assault and battery upon him, still the landlord cannot be held liable in an action for damages for the forcible entry: *Sampson* v. *Henry*, 13 Pick. 36. Thus, where the owner entered the premises after the termination of the term, and removed corn, he was held not liable to the tenant in trespass: *Wickham* v. *Freeman*, 12 Johns. 183. The principle that the owner, having the right to possession, may enter and forcibly eject a tenant after the expiration of his term, or that he may eject one who, without right, has mere naked possession, is fully sustained by *Johnson* v. *Hannahan*, 1 Strobh. L. 313; *Sullivan* v. *Carberry*, 67 Me. 531; *Jackson* v. *Farmer*, 9 Wend. 201; *Beecher* v. *Parmele*, 31 Am. Dec. 633; *Overdeer* v. *Lewis*, 37 Id. 440, and note; *Low* v. *Elwell*, 121 Mass. 309, this latter case collecting and discussing the authorities on this subject at considerable length.

WHEN OWNER MAY NOT ENTER WITH FORCE.—There are some authorities which maintain the doctrine that the owner, having the right to possession, has no right to enter and forcibly eject the party in possession, and that

Digitized by Google

by so doing he renders himself liable in a civil action to the person receiving the injury. These cases, however, have met with severe criticism, and some of them have been expressly overruled in the state where rendered. In Vermont, under her statute of forcible entry and detainer, the court, in *Dustin* v. *Cowdry*, 23 Vt. 631, after a lengthy review of the authorities, held that where a tenant who had held over after the expiration of his term, and had had notice to quit, was forcibly ejected by the party having title and right of entry, the entry was unlawful, and that the tenant might maintain an action and recover damages. They further held that it would make no difference that the tenant had agreed to leave by a certain time, and that if he did not do so the landlord might eject him and his effects in any manner he chose. This is no doubt an extreme case, and has met with severe criticism. It was overruled in *Mussey* v. *Scott*, 32 Id. 82, where it was held that, under the same statute, the owner of the premises might enter during the absence of the tenant and take possession, even though he broke open a door to gain admission to the house. See also 4 Am. L. Rev. 429 et seq. In *Flaherty* v. *Andrews*, 2 E. D. Smith, 529, it was said that though the tenancy had terminated, the landlord had his remedy by statute, and was not justified in ejecting the tenant by force, even under an agreement to surrender. See also *Krevet* v. *Meyer*, 24 Mo. 107; *Larkin* v. *Avery*, 23 Conn. 304; *Noel* v. *McCrory*, 7 Coldw. 623. Nor for a breach of covenant contained in the lease: *Fox* v. *Brissac*, 15 Cal. 223. That the landlord may remove the tenant and his goods peaceably, but that he has no right to take out windows and doors, remove effects, or assault the tenant when resisted, see *Commonwealth* v. *Haley*, 4 Allen, 318; *Sampson* v. *Henry*, 11 Pick. 379; *Adams* v. *Adams*, 7 Phila. 160; but see the Massachusetts cases cited *supra*. Although the entry may be lawful, if the tenant be thrust out with violence, the landlord is liable in damages: *Moore* v. *Boyd*, 24 Me. 242; and even after notice to quit, the owner is liable for any abuse of authority: *Brock* v. *Berry*, 31 Id. 293; such abuse will render him a trespasser from the beginning: *Whitney* v. *Sweet*, 22 N. H. 10; S. C., 53 Am. Dec. 228; *Page* v. *De Puy*, 40 Ill. 506. In Illinois, the statute of forcible entry and detainer has taken away the common-law right of entry by force; and an action of trespass for damages will lie in favor of a tenant, and against the owner of the fee, for such entry. The tenant, in such case, is entitled to exemplary damages for the invasion of his possession: *Reeder* v. *Purdy*, 41 Ill. 279; *Doty* v. *Burdict*, 83 Id. 473. But the landlord is not liable when his right is exercised in a peaceable manner: *Dean* v. *Comstock*, 32 Id. 173; *Fabri* v. *Bryan*, 80 Id. 182.

FORCIBLE TRESPASS CAN ONLY BE COMMITTED by a demonstration of force amounting to a breach of the peace, or directly tending to it, or such force as is calculated to intimidate or put in fear: *State* v. *Covington*, 70 N. C. 71, citing the principal case.

GILES *v.* PALMER.

[4 JONES'S LAW, 386.]

TITLE HELD BY DEFENDANT AS TRUSTEE MAY BE TRANSFERRED by sale under an execution against him.

EJECTMENT. The opinion states the facts.

Bailey and Fowle, for the plaintiff.

Graham, for the defendant.

Digitized by Google

By Court, NASH, C. J. The defense offered in this action cannot avail the defendant here. The defendant holds the land in question as trustee for his wife; as such, the legal title is in him. The lessor of the plaintiff is the purchaser of the land at a sheriff's sale, under an execution against the defendant. A purchaser at a sheriff's sale succeeds to all the rights of the defendant in the execution; that is, acquires the interest the latter had, whatever that may be, in the state it was in at the time the execution was levied: *Rutherford* v. *Green*, 2 Ired. Eq. 121. The defendant in the execution cannot deny the purchaser's right to stand in his shoes. Should the plaintiff in this case attempt to deprive the trustee of the possession of the premises, the remedy of the *cestui que trust* will be in a court of equity.

There is error in the judgment below, and by consent of the defendant, judgment is rendered for the plaintiff.

Judgment reversed.

PURCHASER AT SHERIFF'S SALE ACQUIRES whatever possession the defendant in the execution had: *Gingrich* v. *Foltz*, 57 Am. Dec. 631; *Stump* v. *Henry*, 61 Id. 300; *Whipple* v. *Farrar*, 64 Id. 99; and such title will support an action of ejectment: *Snavely* v. *Wagner*, 45 Id. 640; *Lyerly* v. *Wheeler*, 53 Id. 414; but should the execution defendant be a trustee, the purchaser may be enjoined from taking possession by the *cestui que trust*: *Tally* v. *Reed*, 74 N. C. 469–470; *Blackmer* v. *Phillips*, 67 Id. 343, both citing the principal case.

THAT DEFENDANT IN EXECUTION happened to be a trustee does not affect the title acquired by a purchaser at execution sale: *Parmer* v. *Giles*, 5 Jones Eq. 79; because a levy and sale would divest him of the legal title: *Moore* v. *Byers*, 65 N. C. 243, both citing the principal case. Where, however, the defendant holds the legal title as a trustee, and without any beneficial interest therein, the better opinion is that an execution sale against him is entirely inoperative: Freeman on Executions, secs. 173, 181; *Smith* v. *McCann*, 24 How. 398.

DUPREE v. DUPREE.

[4 JONES'S LAW, 387.]

PRESUMPTION DOES NOT ARISE FROM PURCHASE of a particular estate in land by a remainderman or reversioner that an adjustment of a claim which the vendee has against the vendor is embraced in such purchase.

ACTION MAY BE MAINTAINED BY REMAINDERMAN or reversioner after the purchase by him of a particular estate, for waste committed before.

TRESPASS on the case in the nature of waste. The land in controversy belonged to Redmond Dupree and Willis Dupree in fee, and the latter assigned his interest to the former before the commission of the waste alleged. The defendant in this action,

Digitized by Google

Elizabeth Dupree, was the widow of said Willis, and having dissented from her husband's will, was assigned as dower the land in dispute. It was proved that Abram and Elizabeth had jointly cultivated the said premises, and that the former, with the consent of the latter, had cut down trees and cleared a portion of the said land and put it into cotton. The plea of accord and satisfaction, relied upon by defendants, was sought to be sustained by proof tending to show that the estate of Elizabeth was worth two thousand dollars. They also produced a treaty for the sale of her right, and a deed showing that a consideration of one thousand seven hundred and fifty dollars had been paid by plaintiff to her, for the conveyance of the land by her to him. Defendants contended that this action could not be maintained, for the reason that plaintiff had purchased said estate after the waste alleged had been committed. The court below held that the plea of accord and satisfaction was not sustained, and that plaintiff's cause of action was not barred by the purchase of the dower interest after the waste was committed. Exceptions and appeal by defendants.

B. F. Moore, for the plaintiff.

Rodman, for the defendants.

By Court, BATTLE, J. The defendants objected to the plaintiff's recovery, upon two grounds: 1. Because of an accord and satisfaction; 2. Because the plaintiff had purchased the life estate of the defendant Elizabeth Dupree before the commencement of his action.

We are of opinion that there was no evidence to support the first objection, and that in law the second is not tenable.

1. The only testimony offered to prove the accord and satisfaction was the treaty between the parties for the purchase of the defendant Elizabeth's life estate, and the deed by which it was conveyed to the plaintiff, upon the payment of the price by him. We are unable to perceive any such necessary, or even probable, connection between that transaction and the adjustment of the damages, which the plaintiff had a right to claim for the injury done to the land by the defendants, as to make the one a settlement and compensation for the other. In all the cases cited and relied upon by the counsel for the defendant, where one thing is presumed from another, the presumption is founded upon the principle that the one is ordinarily the consequence of the other.

Thus as it is common in England for the purchaser of goods

Digitized by Google

to give his note for the price, a note given after the purchase of goods is, in the absence of direct proof, presumed to have included the price of such goods: *Mutrie* v. *Harris*, 1 Moo. & M. 322. So an order for money is not usually left in the hands of the drawee, unless the money has been paid. Hence the possession of the order is admitted as evidence of the payment: *Blount* v. *Starkey*, Tay. 110. So of all the other cases where such presumptions have been allowed; and they can never be safely admitted unless observation and experience have shown that, in the large majority of instances, certain facts have caused, or been followed by, certain results. Can it be shown from observation and experience that the purchase of a particular estate in land by a reversioner, or remainderman, usually embraces an adjustment of the claim for damages which the purchaser may have against the vendor? Is it so in the analogous case of a purchase by a remainderman of a life estate in slaves, or other personal property? It may perhaps be said, and said truly, that such instances are too rare for the production of any such cases. If so, it will be rather hazardous to lay down any rule of presumption on the subject. The fact might be so, or it might not be so. It is a mere matter of conjecture, and conjecture is no proof in favor of him who is bound to make proof: *Sutton* v. *Madre*, 2 Jones L. 320. We therefore agree with his honor that there was no evidence given in support of the plea of accord and satisfaction.

2. The second objection is founded upon the idea that there must exist a particular estate, and a reversion at the time when the action is brought, as well as when the waste was committed. In support of this, the counsel for the defendants relies upon the authority of Co. Lit. 35 b, where it is is said: "Note, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if, after the waste, he granteth it over, though he taketh back the whole estate again, yet is the waste dispunishable; so if he grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privity) is gone."

The counsel referred also to the case of *Bacon* v. *Smith*, 41 Eng. Com. L. 571, where Patteson, J., in remarking upon this passage said: "It had immediate reference to the old form of action, but the rule equally applies to an action on the case in

Digitized by Google

the nature of waste." It is unnecessary for us to inquire whether if the plaintiff in the present case had granted away his reversion he could have maintained his action. If he could not, it would not be for the want of privity, simply because privity is not now necessary to the action on the case in the nature of waste. Instead of being confined, as the old action of waste was, to the owner of the inheritance against his immediate tenant for life or years, it may be brought by a person in remainder or reversion for life or years as well as in fee or in tail, and against a stranger as well as against a tenant: *Green* v. *Cole*, 2 Saund. 252, note 7; *Williams* v. *Lanier*, Busb. L. 30; *Dozier* v. *Gregory*, 1 Jones L. 100. It may be brought also in the tenuit against a tenant after the term for life or years has expired: *Kinlyside* v. *Thornton*, 2 W. Black. 1111. Privity, then, not being essential to the maintenance of the action, we are not aware of any principle which forbids a suit by a remainderman or reversioner after the purchase by him of a particular estate for waste done before.

The counsel contends that the right to damages is an incident to the tenure, and that when the plaintiff has, by his own act, put an end to the tenure, the incident must be extinguished with it; but we have seen that the right to damages for the waste does not depend on the tenure, and of course the inference that it must cease with it cannot be legitimately drawn.

There is no error in the judgment, and it must be affirmed.

Judgment affirmed.

ACTION OF WASTE, when it may and may not be maintained by a remainderman or reversioner: *Pynchon* v. *Stearns*, 45 Am. Dec. 207; *Klemence* v. *Steere*, 53 Id. 621; *Miles* v. *Miles*, 64 Id. 362, and note 370.

WHEN ONE THING IS PRESUMED FROM ANOTHER, it is founded upon the principle that the thing presumed is ordinarily the consequence of that from which the presumption is raised: *Kennedy* v. *Williamson*, 5 Jones L. 287, citing the principal case.

CHASTEEN v. PHILLIPS.

[4 JONES'S LAW, 459.]

PURCHASER AT SHERIFF'S SALE UNDER VENDITIONI EXPONAS, who is not a party to the proceedings, need not show that all preliminary proceedings have been taken, and duly set out upon the record.

DESCRIPTION OF LAND IN LEVY AS BEING "three tracts of land on Caney fork, containing three hundred and sixty acres," is too vague and indefinite to identify any land.

Digitized by Google

SALE OF LAND MADE UNDER LEVY, the description in which is insufficient, cannot be made good by proof of facts not set out as part of the description.

EJECTMENT. The defendant claimed title to the land in controversy through one Allison, who was a purchaser at a sheriff's sale. The levy mentioned in the opinion is as follows: "Levied this execution on twenty head of hogs and ten head of sheep, and all of L. Higdon's standing crop of corn, wheat, and rye, and three tracts of land, containing three hundred and sixty acres on Caney fork." The description of the land contained in the *venditioni exponas* is sufficiently set out in the opinion, as are all other facts necessary to an understanding thereof, except that the defendant proved that the personal property mentioned in the levy was sold prior to the issuance of the *venditioni exponas;* but he did not prove how the money acquired at the sale had been applied. Verdict and judgment for the defendant; plaintiff appealed.

Baxter, for the plaintiff.

N. W. Woodfin and Gaither, for the defendant.

By Court, PEARSON, J. The levy (supposing it to be sufficient) and return of the executions gave the county court jurisdiction, so as to make applicable the rule, *Omnia præsumuntur rite esse acta*, in favor of a third person, who is a purchaser under the sheriff's sale. The *venditioni exponas* gave the sheriff power to sell. If the sale made under it could be treated as a nullity, by reason of a supposed irregularity in not setting out, either upon the record of the county court, or in the *venditioni exponas*, what disposition had been made of the personal property levied on, all prudent persons would be deterred from bidding for land at sheriff's sale. Accordingly, it is established, by several decisions of this court, to be against public policy to require persons who are not parties to the proceedings to see, at their peril, that all the preliminary proceedings have been taken, and duly set out; such as notice to the debtor, advertisement by the sheriff, a regular postponement of the sale—where it is made on any day of the return term other than Monday—that the debtor had no goods and chattels, or that the goods and chattels levied on had been otherwise duly disposed of: *Jones* v. *Austin*, 10 Ired. L. 20; *Reid* v. *Largent*, 4 Jones L. 454.

In regard to the sufficiency of the description of the land, set out in the levy, we do not concur in the view taken by his honor. The statute requires that the levy should specify the land, "where situate, on what watercourse, and whose land adjoins."

Digitized by Google

Huggins v. *Ketchum*, 4 Dev. & B. L. 414, *Smith* v. *Low*, 2 Ired. L. 457, and other cases, decide that the precise mode of description used in the statute need not be pursued, but that any other mode of description will answer, provided the land is as clearly identified by it as it would be if the description required by the statute had been given; for instance, the debtor's "home place," or "Lynn place." This departure is permitted, on the ground that the object of the statute, in requiring a description, being to inform the sheriff what land he was to sell, and to enable bidders and other persons to know what land was offered for sale, may be as well effected by other modes of description as that indicated in the statute; and consequently another mode of description will suffice, provided the land is thereby as well identified.

The description made in the levy in this case is, "three tracts of land taken as the property of Leonard and William Higdon, on Caney fork, containing three hundred and sixty acres." This description is as vague and indefinite as could well be; it describes no specific land—does not even say whether the three tracts are in detached parcels or adjoin each other, or how much each contains. Several witnesses swear that one of the tracts was well known in the neighborhood as the property of Leonard Higdon, was his residence, and that he owned no other land in the county, and they conclude "that the land would be as well known by the description in the levies as by any other, and as well known as if described according to the requisitions of the statute." This conclusion could not be established by the oath of fifty witnesses; for the simple reason that it is impossible for it to be true.

The witnesses and his honor in the court below fell into error by not distinguishing between that which is a part of the description and that which is merely evidence of a collateral fact. If the description had contained these additional words, "one of the said tracts being the residence of Leonard Higdon, and the other two tracts adjoining the same," then the facts stated by these witnesses would have established the truth of the conclusion; but without this addition to the description, the fact that Leonard Higdon resided on one of the tracts was simply collateral, and the insufficiency of the description could be in no wise aided by it. How could that fact enable the sheriff to tell what land he was to sell, or enable bidders, or other persons, to know what land he was selling? They had to be governed by the description set out in the levy, and that, as we have seen, was too vague and indefinite to identify any land.

Digitized by Google

If, although the description in a levy is not sufficient, a sale under it can be made good by proof of facts which are not set out as part of the description, the effect will be to defeat the operation and purposes of the statute, and allow land to be sold without the safeguards which the legislature has provided against fraud and surprise: *Phillipse* v. *Higdon*, Busb. L. 380.

The court erred in leaving "the point as to the sufficiency of the proofs to identify the land to the jury as a question of fact," and the plaintiff was entitled to the instruction asked for, "that the evidence was, in law, insufficient to establish that point," because there was no part of the description to which the evidence was applicable. In directing the jury to inquire "whether this description is as certain [*i. e.*, locates the land as definitely] as that required by the statute," his honor evidently confounds the description in the levy with the proof offered in regard to matter to which no part of the description referred. *Venire de novo.*

Judgment reversed

PURCHASERS ARE NOT REQUIRED to look into the regularity of judgments and executions under which they purchase: *Minor* v. *President etc. of Natchez*, 43 Am. Dec. 488, note 499; and when not plaintiff in the execution, they need not show the judgment on which the execution was founded: *Hardin* v. *Cheek*, 64 Id. 600; *Sydnor* v. *Roberts*, 65 Id. 84, and note 95.

DESCRIPTION WHEN TOO VAGUE and indefinite to locate land: *Mann* v. *Taylor*, *ante*, p. 750, and note. Instances of insufficient description of land in levy: *Taylor's Lessee* v. *Cozart*, 40 Am. Dec. 665; *Brigance* v. *Erwin's Lessee*, 57 Id. 779, and citations in notes to these cases.

PAROL EVIDENCE EXCEPT IN CASE of latent ambiguity is in general inadmissible to show the identity of land levied on under execution: *Brigance* v. *Erwin's Lessee*, 57 Am. Dec. 779, and note 782; but see *Summerlin* v. *Hesterly*, 65 Id. 639, note 641, where it is held that parol evidence is admissible to show that the description in a *fi. fa.* applies to certain land.

LEVY ON LAND PRESUMES WANT of personal goods, and a purchaser at execution sale is not bound to prove such fact in the trial of a case involving his title acquired at such sale: *Barnes* v. *Hyatt*, 87 N. C. 317, citing the principal case.

GAITHER *v.* BALLEW.

[4 JONES'S LAW, 488.]

MONEY BELONGING TO ABSCONDING DEBTOR in the hands of a clerk of a court of equity under a decree for the sale of land for the purposes of partition may, after an order of distribution, be attached, and the clerk garnished by the debtor's creditors, under the statute of North Carolina.

Digitized by Google

ATTACHMENT. The opinion contains the facts.

Avery, for the plaintiff.

Gaither, for the defendant.

By Court, PEARSON, J. It is not necessary to complicate the case by taking into consideration any other matter save that in reference to J. R. Ballew, because the amount belonging to him in the hands of the garnishee is more than enough to discharge the debt of the plaintiff.

Puett, the garnishee, states that he has in his hands three hundred and seventy-seven dollars and eighty-five cents, money belonging to J. R. Ballew; that the money came into his hands as clerk and master of the court of equity, under a decree for the sale of the land of Peter Ballew, sen., on a bill filed by the heirs at law, for a sale for the purposes of partition; that J. R. Ballew was one of the heirs, and that his share, to wit, three hundred and seventy-seven dollars and eighty-five cents, still remains in his hands as clerk and master. The question is, Can this money, belonging to an absconding debtor, be reached by a creditor under the provisions of the statute in reference to original attachments and garnishments?

The statute subjects to attachment all the estate of an absconding debtor, and all debts due to him by any person, and all effects belonging to him in the hands of any person. This money falls under the description of "effects belonging" to J. R. Ballew (the absconding debtor) in the hands of Puett (the garnishee). So the case is within the words of the statute, and the question is, What is there to take it out of its operation?

If there be anything, it must be the fact that the money was received, and still remains in the hands of Puett as clerk and master in equity.

How it would have been before the money was collected, and an order of distribution, we are not now to inquire; but most of the other heirs having received their shares, this money has been ascertained and set apart as belonging to J. R. Ballew, being his share. The point is, Does the fact that Puett, who has the money in his hands, is the clerk and master in equity, take the case out of the operation of the statute?

It a case falls within the words of a statute, it must be within its operation, unless there be a sufficient reason for making it an exception.

By way of illustration: if a debtor is entitled to an equitable chose in action, in a general sense, this is "a debt due to him,"

Digitized by Google

within the words of the statute; but as the proceeding is in a court of law, which, from its mode of trial, etc., is not competent to deal with and ascertain equities, the case, for that reason, is made an exception, and is held not to be within the operation of the statute. This is assumed in *Peace* v. *Jones*, 3 Murph. 256, and a distinction is taken: when the objects of a deed of trust are accomplished, so as to leave but one equity, which is ascertained and fixed, *i. e.*, the excess of the proceeds of the sale of the property conveyed, after the debts secured by the trust are all paid, whether such excess be in money or in notes, it may be reached by attachment and garnishment, "considering the general scope and spirit of the statute;" on the ground that the reason for making an exception, in respect to equitable choses in action, no longer exists after the extent of the equity is ascertained.

So in *Gibbs* v. *McKay*, 4 Dev. L. 172, it is held that where the wife of a debtor is entitled to a share of certain slaves, conveyed by deed "to hold in trust, to be divided into three equal parts," etc., the husband's interest is not subject to attachment, and in a very elaborate opinion, Ruffin, C. J., expresses the opinion that where slaves are held in trust for two or more, the interest of one of the *cestuis que trust* is not subject to attachment, because it could not be sold under execution by force of the act of 1812, inasmuch as the purchaser would acquire a part of the legal estate, and hold as tenant in common with the trustee, which division of the legal estate would embarrass the execution of the trust; for which reason, the case would be an exception, although the slaves would be "effects belonging to the debtor" in the hands of the trustee.

So in *Elliott* v. *Newby*, 2 Hawks, 22, it is held that the interest of a debtor, who is entitled to a distributive share of an estate, is not (before the estate is settled and the amount of the share ascertained) subject to attachment; for the reason that distributive shares and legacies are not recoverable in a court of law. But Henderson, J., expresses an inclination of opinion to the contrary; although, as he says, "the authorities are the other way."

The reason for which this class of cases is made an exception is that the amount of a distributive share, or the right to a legacy, depends upon how far there is enough to pay debts, which involves the necessity of taking an account; and it is admitted that the mode of trial in a common-law court is not adapted to that purpose. But if we suppose the amount of the share to

Digitized by Google

be ascertained, and the money itself set apart for the distributee, then the reason for making the case an exception no longer exists. So property held by or debts due to an absconding debtor as a trustee is an exception, for the reason that he has nothing but the naked legal title, and a purchaser or the person claiming under the proceeding would be in equity bound by the original trust: *Simpson* v. *Harry*, 1 Dev. & B. L. 202.

So money in the hands of a sheriff, collected under an execution in favor of an absconding debtor, forms an exception, and is not subject to attachment; nor is the sheriff subject to garnishment in respect thereof. This exception is made, not for the reason that the person having in his hands the effects of an absconding debtor is an officer of the court, but on the ground that the writ commands the sheriff to make the amount, and have it at the next term of the court, and make due return thereof, and that the performance of the duty imposed by this order of the court would be made impossible, or at all events, that its discharge would be greatly embarrassed, if the fund was liable to be intercepted by an attachment or garnishment. In *Orr* v. *McBride*, 2 Car. Law Repos. 257, this exception is admitted, but a distinction is taken in respect to the surplus in the hands of the sheriff after paying the amount of the execution, and it is decided that the surplus may be reached by a creditor of the debtor in the execution, and the court say: "It has been ruled that money in the hands of a sheriff, raised by him in obedience to a writ, is not attachable, because it would interfere with the rights of others, embarrass and sometimes render ineffectual the process of the court and produce endless litigation. But a surplus remaining in the sheriff's hands is the property of the defendant in the suit, who may immediately demand and enforce the payment thereof, on which account it is considered that the sheriff holds it in his private character, and not in his official capacity, although it came to his hands and he is accountable for it *in virtute officii*." For similar reasons, it is held that when an execution issues against A, and is levied *bona fide* on property in possession of B, on the allegation that the property really belonged to A, the action of replevin will not lie against the sheriff or other officer making the levy, either at common law or under our statute: *McLeod* v. *Oates*, 8 Ired. L. 387; *Carroll* v. *Hussey*, 9 Id. 89. The decision is not put on the ground that the taking, or the detention, or the conversion, was by an officer of the court, but on the ground that the execution of a command of the court would be prevented or embarrassed

Digitized by Google

if the officer could be stopped by the writ of replevin, and it is therefore held that although the case is within the words of the statute, it is excepted out of its operation.

These are all of the cases (with the exception of two, that will be referred to) which have been decided by our court, involving the construction of the statute, and they establish this position: to take a case out of the operation of the statute, the fund must be unascertained, and of such a nature that a court of law cannot deal with it; or it must be in the hands of an officer, the performance of whose duty in regard to it would be prevented or embarrassed if it was subject to be intercepted by the claim of an attaching creditor.

Upon the authority of these decisions, and the reasons on which they are put, we should have arrived at the conclusion, without hesitation, that a fund which is ascertained, in regard to which the court is expected to take no further action, and which is no longer subject to its control, but may be immediately demanded and the payment thereof enforced by the debtor, was subject to attachment, although the person who had it in his hands happened to be the clerk and master in equity, but for the cases of *Alston* v. *Clay*, 2 Hayw. 171, Battle's ed., 360, and *Overton* v. *Hill*, 1 Murph. 47, the one decided in 1802 and the other in 1805, which were cited and relied on in the argument. Both of these cases were decided before the present organization of this court. In *Overton* v. *Hill*, *supra*, the opinion of the court is given without any reason or reference to authority, and is a mere echo of *Alston* v. *Clay*, *supra*. In the report of that case Hayward's argument for the plaintiff is set out, and without noticing the reasoning of the learned counsel, the court announces the proposition that it had been several times decided that moneys in the hands of a sheriff cannot be attached; therefore, that moneys in the hands of a clerk of the court cannot be attached, which is a *non sequitur*. True, the clerk, as well as the sheriff, is an officer of the court, but the reason for making an exception in respect of money in the hands of the sheriff is not because he is an officer of the court, but because he could not obey the command of the writ, and the discharge of the duty imposed upon him would be embarrassed, if the money could be intercepted by an attachment; which reason does not apply to the case of money in the hands of a clerk. The conflict between these two cases and the subsequent cases to which we have referred is pointed at in a note by the editor of the last edition of Hayward's reports. After full consideration, we are satisfied

Digitized by Google

that the two cases cannot be supported, being opposed as well by the reason of the thing as by all the cases on the subject.

The provision of the revised code, c. 7, sec. 20, by which a creditor is enabled to reach, by a bill in equity, a fund which cannot be attached at law, so far from being opposed to our conclusion, tends to support it; for it shows that the legislature looked upon the remedy by attachment as a subject entitled to favor and to a liberal construction, because it tended to secure the ends of justice; for which reason, they give a creditor an attachment in equity, where the fund cannot be reached by an attachment at law.

The judgment in the court below must be reversed, and a judgment entered for the plaintiff. There was no controversy as to the facts, and the case is presented as one agreed, the only purpose being to decide the question of law, although the statement is not drawn in a manner strictly formal.

Judgment reversed, and judgment for the plaintiff.

MONEY IN CUSTODY OF LAW is not subject to attachment or garnishment: *Clymer* v. *Willis*, 58 Am. Dec. 414, and note, collecting prior cases; *Adams* v. *Haskell*, 65 Id. 491, and note; but surplus money in the hands of a sheriff after satisfaction of an execution is subject to attachment by creditors of the execution debtor: *Tucker* v. *Atkinson*, 34 Id. 650, and note 652; *King* v. *Moore*, 41 Id. 44; *Tucker* v. *Atkinson*, 43 Id. 650; *Pierce* v. *Carleton*, 54 Id. 405, and notes to these cases; for a full discussion of the question, see Freeman on Executions, sec. 130; Drake on Attachment, sec. 509, both citing the principal case to the point contained in the syllabus *supra*.

STATE v. PERRY.

[5 JONES'S LAW, 9.]

AFFRAY IS FIGHTING OF TWO OR MORE PERSONS in a public place, to the terror of the citizens; and if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow.

INDICTMENT for an affray. Perry and one Whitehall met, and the former asked the latter to step to one side with him, as he wished to have a friendly conversation with him; upon Whitehall's doing as requested, Perry began abusing him, by preferring charges against him, and speaking disrespectfully of his wife and daughter. He thereupon said that he would not stand the charge against his family, and struck Perry, knocking him down. By-standers interfered before Perry could strike, and

Digitized by Google

the conflict ended. The court charged that if from the above facts the abusive language used was calculated to bring on a fight, Perry was guilty, though he did not strike a blow. Defendant excepted. Verdict and judgment for the state.

William H. Bailey and William A. Perkins, attorneys-general, for the state.

Heath, for the defendant.

By Court, BATTLE, J. An affray is defined to be the fighting of two or more persons in a public place, to the terror of the citizens: *State* v. *Allen*, 4 Hawks, 356; *State* v. *Woody*, 2 Jones L. 335. From this definition, it seems to us to be plain that if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow. He is undoubtedly the immediate cause of the breach of the peace, and is morally the more guilty of the two; and we are not aware of any principle which prevents the law from regarding him as a criminal. The only argument urged in his favor is that the use of words alone, however insulting to his adversary, is not a misdemeanor, and that, being innocent up to the time when he is stricken, he cannot be made guilty by the sole act of such adversary. The argument is plausible, but will not bear the test of strict examination. If one man, by words or signs, instigates another to strike a third, he is clearly guilty of an assault and battery the moment the blow is stricken, though no offense is committed until that is done. That case is like the present in principle, and we cannot distinguish the one from the other. An affray is denounced by the law as a misdemeanor, because it is a breach of the peace; and surely, he who intends to provoke it, and does provoke it, ought not to escape the necessary consequence of his guilty intention. The charge of his honor in the court below was correct, and the judgment must be affirmed.

Judgment affirmed.

WORDS ALONE OF PARTIES will not constitute an affray; but words accompanied by acts in drawing knives and attempting to use them will make the parties guilty: *Hawkins* v. *State*, 58 Am. Dec. 517.

THE PRINCIPAL CASE IS CITED, and its doctrine approved, in *State* v. *King*, 86 N. C. 608; *State* v. *Davis*, 80 Id. 353.

Digitized by Google

BRANCH & THOMAS v. MORRISON.

[5 JONES'S LAW, 16.]

TURPENTINE IN BOXES CUT INTO TREES is personal property.

TENANT IN POSSESSION, THOUGH HE HAS NO TITLE to the land, is the true owner of turpentine produced by his labor and cultivation, and severed from the realty. He may maintain trover for its conversion against the owner of the land.

TROVER FOUNDED ON POSSESSION can only be defeated when the true owner is known; a mere possibility that such owner will afterwards be discovered will not defeat such action.

TROVER for the conversion of turpentine taken out of boxes cut into trees. Plaintiffs proved that they were the lessees of a tract of land from one McKay, who worked the land the year previous to their lease, and cut boxes in the trees; during plaintiffs' possession they cut other boxes, and after all of these boxes had filled with turpentine, one Morrison, the intestate of defendant Morrison, and the other defendant, dipped the turpentine, amounting to about forty gallons, from the boxes and carried it away. Defendants produced a grant dated January, 1854, to Alexander Morrison. This grant embraced the land upon which the trees were growing from which the turpentine was made, and they claimed to have entered and taken it under this grant. Plaintiffs then offered in evidence a grant to one Blount, dated 1795, and for the territory containing the trees producing the turpentine in controversy. They also produced several conveyances for the same, none of them, however, connecting the plaintiffs with Blount at the date of said lease, or at the time of the commencement of the present suit. The court below held that plaintiffs had shown title out of themselves, and therefore could not recover; they were nonsuited, and appealed.

McKay and Moore, for the plaintiffs.

Shepherd and Winslow, for the defendants.

By Court, PEARSON, J. Turpentine in boxes, in a state to be dipped up, is personal property. It no longer forms a part of the tree, but has been separated by a process of labor and cultivation. If, like the sap of the sugar-maple, its flow was directed into vessels on the ground near the tree, no one would doubt its being severed from the realty. This is the same, in effect, with turpentine, although its flow is directed into boxes cut in the tree itself. When it ceases to be a part of the tree, it becomes personal property: *State* v. *Moore*, 11 Ired. L. 70 [53 Am. Dec. 401].

Digitized by Google

It was then insisted, that although the turpentine was personal property, in the possession of the plaintiff at the time of the conversion, yet he could not maintain trover, for the right of property was not in him, and the true owner was known, to wit, the heirs of Blount, who had title to the land.

It is settled by *Barwick* v. *Barwick*, 11 Ired. L. 80, that trover will not lie upon a mere possession, where the true owner is known. The plaintiffs' counsel commented upon this case, but we are satisfied that it rests upon correct principles, and it is approved in *Craig* v. *Miller*, 12 Id. 375, which case is distinguished and put on the ground taken in *Armory* v. *Delamirie*, 1 Stra. 505, that the true owner was not known. In our case, however, suppose the land belongs to Blount's heirs, that does not give them a right to the turpentine which had been severed from the realty by the plaintiffs while they were in possession of the land; on the contrary, the turpentine, when by the labor and cultivation of the plaintiffs it was made personal property, became the property of the plaintiffs. So they are the true owners. The heirs of Blount, if they ever regain possession of the land, may have an action of trespass *quare clausum fregit*, "for treading down grass," against the plaintiffs; but they will have no right of action to recover this particular turpentine, either against them or the defendants, for they never had a right of property in it, and cannot acquire either a right of possession or of property in respect to it by the *jus postliminii: Brothers* v. *Hurdle*, 10 Id. 490 [51 Am. Dec. 400]. It is there held that the owner of land cannot maintain trover for corn, fodder, etc., that had been raised on the land and severed while the defendant was in possession. The court say: "The amount of it would be, when one who has been evicted regains possession, he may maintain trover against every one who has bought a bushel of corn or a load of wood from the trespasser at any time while he was in possession! This, especially in a country where there are no markets overt, would be inconvenient, and no person could safely buy of one whose title admitted of question."

The defendants' counsel took a distinction between things which are of annual cultivation, *e. g.*, corn, and such as are of the natural growth of the earth, *e. g.*, trees. The distinction makes a difference to this extent: the former is personal property for some purposes before severance, the latter is not; but after severance, both species become personalty, and the same principle is applicable.

Digitized by Google

The defendants' counsel then insisted that although he could not be sued in trover by Blount's heirs, yet he would be exposed to their action of trespass *quare clausum*, in which the value of this turpentine would be incidentally involved, and he could not protect himself by the plaintiffs' recovery from being charged a second time in respect thereof, and therefore he contended the case fell within the principle of *Barwick* v. *Barwick*, 11 Ired. L. 80.

The principle cannot be extended that far. The action of trover, founded upon the plaintiffs' possession, can only be defeated when the true owner is known, so that the defendant, by satisfying the judgment, would not become the owner of the chattel by a judicial transfer, but would be exposed to a second action in respect to the chattel itself. A mere possibility that the owner may afterwards be discovered will not defeat the action: *Armory* v. *Delamirie*, 1 Stra. 505; *Craig* v. *Miller*, 12 Ired. L. 375.

In our case, the plaintiffs are the owners of the chattel; the defendants, by satisfying the judgment, will acquire a perfect title to it, and the possibility that Blount's heirs may sue them for trespass to the land cannot defeat the action, for, in fact, the value of this turpentine would not even incidentally be chargeable to them, it having been severed and become the personal property of the plaintiffs before the defendants trespassed upon the land. So that the value of the turpentine could only be taken into the amount of damages in the action of trespass against the plaintiffs which Blount's heirs may bring against them. There is error.

Nonsuit set aside, and a *venire de novo*.

TROVER, WHAT POSSESSION AND TITLE NECESSARY in order to maintain: *Grubb* v. *Guilford*, 28 Am. Dec. 700; *Turley* v. *Tucker*, 35 Id. 449; *Lewis* v. *Mobley*, 34 Id. 379; *Lowremore* v. *Berry*, 54 Id. 188; *Ames* v. *Palmer*, 66 Id. 271, and citations in notes to these cases.

THE PRINCIPAL CASE was again before the court, and is reported in 5 Jones L. 16. The same questions were then involved, and it was decided on the authority of the case here reported.

Digitized by Google

PURVIS v. WILSON.

[5 JONES'S LAW, 22.]

COPARCENERS HAD RIGHT TO PARTITION at common law; such right was given to joint tenants and tenants in common by statute.

WHEN IN PETITION FOR PARTITION, filed in a court of law, the defendant pleads sole seisin in himself, the court may proceed and try the issue thus arising. It is only when the petition is filed in a court of equity that the action of ejectment becomes necessary.

PETITION for partition. Defendant pleaded that he had never been a tenant in common with petitioners, and also pleaded sole seisin in himself to the land in question. Upon the hearing, plaintiffs moved that the issue of title be submitted to a jury, but the court refused, and ordered the proceedings suspended until the question of title should be tried in an action of ejectment. Plaintiffs appealed.

Garrett and Barnes, for the plaintiffs.

Winston, jun., for the defendant.

By Court, PEARSON, J. Coparceners had a right to partition at common law; it was given to joint tenants and tenants in commor by statute. The remedy was in a court of common law by "writ of partition:" Fitz. Nat. Brev. 256; Co. Lit. 169 a, note 2. The inconveniences attending the mode of suing and having the partition made induced the court of equity to assume a concurrent jurisdiction; but this did not affect the common-law remedy: *Holmes* v. *Holmes*, 2 Jones Eq. 334.

If the proceeding is in equity, and the defendant denies the relation and avers a title in severalty so as to put the title in issue, the court will not undertake to decide it, but will direct it to be tried by an action of ejectment, the defendant admitting an actual ouster, etc., and the plaintiff, after getting a judgment in that action, is entitled to a decree for partition. But if the proceeding is in a court of common law, and the defendant pleads *non tenent insimul*, sole seisin in himself, which is the "general issue" in the action for partition, Com. Dig., tit. Pleader 3, F, 3, Boothe on Real Actions, 246, the issue joined upon that plea is tried like other issues, and if found in favor of the plaintiff, there is judgment that partition be made.

The suggestion that when the defendant pleads "sole seisin" the plaintiff cannot proceed in his action, and is put to the necessity of bringing another action, has nothing to sustain it. The court is just as competent to determine the question of title in

Digitized by Google

an action for partition as it is in an action of ejectment; and it involves an absurdity to suppose that a defendant, by simply pleading the general issue, can, without a trial, defeat the action, and force the plaintiff to institute another action to be tried before the same court.

It was insisted on the argument, in support of this suggestion, that although at common law the "general issue" in an action for partition was tried like other issues, yet the statute, Rev. Code, c. 82, sec. 1, has the effect of introducing this anomalous mode of proceeding. The statute provides that "the superior and county courts and courts of equity, on petition of one or more persons claiming any real estate," etc. The object and effect of the statute is to change the process, and in respect to a court of law, to substitute a petition in place of the writ of partition, it having been found that the difficulties attending "the process" in partition, that is, summons, attachment, and distress infinite, (there being usually many defendants), were not obviated by 8 & 9 Wm. III., c. 31, sec. 1: Allnatt on Partition, 66.

There is nothing in the statute to countenance the idea that if the defendant, by way of answer or plea, denies the relation, and alleges a sole seisin, the superior or county courts are not to proceed and try the issue arising thereon in the same way as when the action was by writ. It is only when the petition is filed in a court of equity that the action of ejectment becomes necessary, because in the course of that court it will not decide the legal title to land. *Thomas* v. *Garvan*, 4 Dev. L. 223, was a petition for partition filed in the superior court of law for the county of Bladen. The defendant pleaded that she was not tenant in common with the petitioners, but was in the sole adverse possession of the land. The issues joined were tried in that court, and the verdict being for the defendant, the petition was dismissed. The ruling was affirmed by this court, on the ground that the defendant had acquired the title in severalty. The case necessarily turned upon the question of title. There has been no instance of a disseisin since the time of Charles II., except a "disseisin at election," for the sake of the remedy; for accepting socage service (which with us is the payment of taxes) is not such a concurrence on the part of the lord as is necessary to consummate a disseisin. So the learning in Co. Lit. 67 a, has now no application. If one has title as tenant in common, he is, in contemplation of law, in possession with his co-tenant, in spite of anything that has been done or said, unless he elects to consider himself "actually ousted" for the sake of bringing

Digitized by Google

ejectment. Something is said in *Thomas* v. *Garvan*, *supra*, about putting the plaintiffs to their action of ejectment; but the court passed upon the title, and it being decided that the defendant owned the land in severalty, the petitioners could have no better ground to stand on in an action of ejectment than in the proceeding under the petition; and we presume the allusion made to the action grew out of an indistinct notion in regard to the course of a court of equity.

Rev. Code, c. 118, sec. 2: "Any widow having claim to dower may file her petition in the county or superior court," etc. This statute, like that in regard to partition, substitutes a petition for the writ of dower. If the title is put in issue, the court must pass on it; *e. g.*, suppose the seisin of the husband at the time of his death is denied in a petition for dower, the idea of an action of ejectment is out of the question, for the widow cannot maintain it until her dower is assigned. There is error.

Judgment reversed.

WHO MAY COMPEL PARTITION: *Nichols* v. *Nichols*, 67 Am. Dec. 699, and extended note 703.

JURISDICTION IN MAKING PARTITION between tenants in common is concurrent at law and in equity: *Beeler* v. *Bullitt*, 13 Am. Dec. 161; but equity will not proceed with partition when the defendant denies the legal title of the plaintiff or claims a sole and adverse possession, until the plaintiff has re-established the unity of his possession with the defendant as a tenant in common: *Ramsay* v. *Bell*, 42 Id. 163; but the bill will be retained until the legal title is tried at law: Id.; *Manners* v. *Manners*, 35 Id. 512; and see *Rutherford* v. *Jones*, 60 Id. 655, note 660. It is held in *Manners* v. *Manners*, *supra*, that partition is not the proper action to try the title to land.

THE PRINCIPAL CASE IS DISTINGUISHED in *Lowery* v. *Lowery*, 64 N. C. 112, as having no analogy to that case.

WHEN TENANT IN COMMON sets up sole seisin in himself, the issue thus raised may be tried in a court of law, and when decided, partition will be ordered: *Simpson* v. *Wallace*, 83 N. C. 480, citing the principal case.

BODENHAMMER *v.* NEWSOM.

[5 JONES'S LAW, 107.]

PAWNEE BY GIVING UP POSSESSION of the pawn, though for a special purpose, loses his lien, and cannot recover the pawn from an innocent purchaser of the pawnor.

TROVER. The charge to which exception and appeal was taken is stated in the opinion.

McLean and Fowle, for the plaintiff.

Miller, for the defendant.

Digitized by Google

By Court, BATTLE, J. Among the instructions given by his honor to the jury was the following: "If the horse were pledged to secure the plaintiff, and in conformity with that pledge passed into the plaintiff's possession, and continued in his possession, he would have such a property in the animal as would enable him to maintain the action of trover; and a loan of the animal to Reich for a special use, under the circumstances stated by him, would not be such a change or interruption of possession as to prevent a recovery, provided the pledge and possession were *bona fide* in the plaintiff." With this instruction we do not agree, and we think it is opposed in principle to the recent case decided in this court, of *Smith* v. *Sasser*, 4 Jones L. 43. The only difference between the facts of that case and the present is the length of time during which the pawnor had the article in possession, after a redelivery by the pawnee, before he sold it. But that cannot make any difference in the rule of law applicable to the transaction. By giving up the possession of the article pawned, the pawnee lost his lien, and it would be a fraud upon an innocent purchaser from the pawnor if the pawnee were permitted to recover the pawn from him. In the case of *Roberts* v. *Wyatt*, 2 T. R. 268, it was made a question whether, even as between the parties themselves, a redelivery of the thing pledged for a temporary purpose only would not prevent the pawnee from recovering it back from the pawnor after the purpose was fulfilled. It was, indeed, decided that the pawnee might recover from the pawnor; but if a doubt existed in such a case as that, it would hardly be pretended that a recovery would be allowed from one who claimed as a *bona fide* purchaser from the pawnor: See Story on Bailments, sec. 299.

The judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed.

IF PAWNEE IMMEDIATELY REDELIVER the thing pledged to the pawnor, the special property therein created by the bailment is terminated: *Fletcher* v. *Howard*, 16 Am. Dec. 686; note to *Lucketts* v. *Townsend*, 49 Id. 733, discussing the question at length.

Digitized by Google

STATE v. JOHN.

[5 JONES'S LAW, 163.]

ROBBERY IS COMMITTED BY FORCE, LARCENY BY STEALTH, and where there is no violence or circumstance of terror resorted to for the purpose of inducing the owner to part with his property for the sake of his person, the crime committed is not robbery, but larceny.

TO CONSTITUTE ROBBERY, FORCE USED must be either before or at the time of the taking, and of such nature as to show that it was intended to overpower the party robbed, or to prevent resistance on his part, and not merely to get possession of the property.

INDICTMENT for highway robbery. The only facts necessary to an understanding of the points decided are, that one Brooks, the prosecuting witness, was sitting in and driving his wagon along a road one evening after dark, when he overtook the defendant; they traveled on together, the defendant walking and Brooks riding, until defendant told him that he had found a bill of money, and that he wished Brooks to tell him its denomination. Brooks objected; but defendant insisted. At length a torch was lighted and the bill examined. Its amount being large excited the suspicions of Brooks, and caused him to take particular notice of defendant's face, his wearing apparel, etc. While Brooks was examining the bill he felt defendant's hand in his pocket on his pocket-book. He seized defendant's arm, who at the same time snatched the bill. A scuffle took place. Brooks was thrown out of his wagon. When he arose, defendant had escaped, taking with him the bill, and also the pocket-book containing two hundred and twenty-seven dollars. Brooks testified that defendant was the man who committed the crime. Defendant was convicted, sentenced to death, and took this appeal.

K. P. Battle, and William H. Bailey and William A. Jenkins, attorneys-general, for the state.

Defendant was not represented by counsel.

By Court, PEARSON, J. Robbery is committed by force; larceny by stealth. The original cause for making highway robbery a capital felony, without benefit of clergy, was an evil practice, in former days very common, of meeting travelers, and by a display of weapons, or other force, putting them in fear ("stand and deliver"), and in this way taking their goods by force. Hence the indictment (the form is still retained) contains this allegation: "And him [the person robbed] in bodily fear, and danger of his life, in the highway, then and there, did

Digitized by Google

feloniously put;" and it was for a long time held that the allegation must be proved.

In Foster's Criminal Law, p. 128, is this passage: "The prisoner's counsel say there can be no robbery without the circumstance of putting in fear. I think the want of that circumstance alone ought not to be regarded. I am not clear that that circumstance is, of necessity, to be laid in the indictment so as the fact be charged to be done *nolenter et contra voluntatem*. I know there are opinions in the books which seem to make the circumstance of fear necessary, but I have seen a good manuscript note of an opinion of Lord Holt to the contrary, and I am very clear that the circumstance of actual fear at the time of the robbery need not be strictly proved. Suppose the true man is knocked down without any previous warning to awaken his fears, and lieth totally insensible while the thief rifleth his pockets, is not this robbery?" And yet, where is the circumstance of actual fear? Or suppose the true man maketh a manful resistance, but is overpowered, and his property taken from him by the mere dint of superior strength, this doubtless is robbery. In cases where the true man delivereth his purse without resistance, if the fact be attended with those circumstances of violence and terror which, in common experience, are likely to induce a man to part with his property for the sake of his person, that will amount to a robbery. If fear be a necessary ingredient, the law *in odium spoliatoris* will presume fear, where there appeareth to be so just a ground for it."

In Foster's day, it would not have occurred to any lawyer that the facts set out in the record now under consideration made a case of highway robbery. There was no violence—no circumstance of terror resorted to for the purpose of inducing the prosecutor to part with his property for the sake of his person.

Violence may be used for four purposes: 1. To prevent resistance; 2. To overpower the party; 3. To obtain possession of the property; 4. To effect an escape. Either of the first two makes the offense robbery. The last, I presume it will be conceded, does not. The third is a middle ground. In general, it does not make the offense robbery, but sometimes, according to some of the cases, it does. It is necessary, therefore, to see how the authorities stand in respect to it.

After Foster's day, the idea of robbery was extended so as to take in a case of snatching a thing out of a person's hand and making off with it, without further violence; but in *Horner's Case*, 2 East P. C. 703, tried before Buller, J., and Thompson, B., it

Digitized by Google

was held that snatching an umbrella out of a lady's hand as she was walking the street was not robbery; and the court say: "It had been ruled about eighty years ago, by very high authority, that the snatching anything from a person unawares constituted robbery; but the law was now settled that unless there was some struggle to keep it, and it were forced from the hand of the owner, it was not so. This species of larceny seemed to form a middle case between stealing privately from the person and taking by force and violence." In *Lapier's Case*, Id. 708, an ear-ring was so suddenly pulled from a lady's ear that she had no time for resisting, yet being done with such violence as to injure her person, the blood being drawn from her ear, which was otherwise much hurt, it was held to be robbery. So in *Moore's Case*, 1 Leach, 335, a diamond pin which a lady had strongly fastened in her hair with a corkscrew-twist was snatched with so much force as to tear out a lock of hair, it was held robbery, because of the injury to the person. Possibly the ground on which these two cases is put may be questioned, as the injury to the person was accidental, and seems not to have been contemplated; but they have no bearing on our case.

In *Davies' Case*, 2 East P. C. 709, the prisoner took hold of a gentleman's sword, who, perceiving it, laid hold of it at the same time, and struggled for it. This was adjudged to be robbery.

In *Mason's Case*, 2 Russ. & Ry. 419 (in 1820), the prisoner took a watch out of a gentleman's pocket, but it was fastened to a steel chain which was around his neck; the prisoner made two or three jerks, until he succeeded in breaking the chain. Parke, B., instructed the jury that this was robbery, but doubts being expressed, he referred it to all the judges, who were unanimous in the opinion that it was robbery, because of the force used to break the chain which was around the gentleman's neck. This is all the report says. It is short, and to me unsatisfactory, seeming to go back to the idea of robbery that existed before *Plunket's Case*.

In *Gnosil's Case*, 1 Car. & P. 304, 11 Eng. Com. L. 400 (1824), the prosecutor was going along the street, the prisoner laid hold of his watch-chain, and with considerable force jerked it from his pocket; a scuffle then ensued, and the prisoner was secured. Garrow, B.: "The mere act of taking being forcible will not make this offense a highway robbery. To constitute the crime of highway robbery, the force used must be either before or at the time of the taking, and must be of such a nature as to show

Digitized by Google

that it was intended to overpower the party robbed, or prevent his resisting, and not merely to get possession of the property stolen. Thus if a man walking after a woman in the street were, by violence, to pull her shawl from her shoulders, though he might use considerable force, it would not, in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property." This decision was four years after *Mason's Case, supra*, and I suppose Garrow was then one of the judges. According to this case, which is the latest that we have met with, our case is not robbery, even if it be admitted to fall under the third head of violence above enumerated. Our case is clearly distinguishable from *Davies' Case*, 2 East P. C. 709, for both parties had hold of the sword, and struggled for it. If Davies had let it go, there would have been no necessity for violence; and his holding on and struggling for it could only be imputed to his determination to take it by force. In our case, the prosecutor did not have hold of the pocket-book; there was no struggle for it; but he had hold of the prisoner's arm; so he could not, by letting go the pocket-book, have avoided the necessity for violence; and the struggle, in which the prosecutor fell under the tongue of the wagon, is fairly imputable to an effort on the part of the prisoner to get loose from his grasp and make his escape. The only difference between this case and that of Gnosil is that the one succeeded in getting loose, and the other was less fortunate. Suppose in the struggle the prosecutor had been too strong for the prisoner, and had succeeded in arresting him, there was a taking of the pocket-book, and an *asportavit*, so as to constitute larceny in "picking of the pocket;" but would any one have said it amounted to robbery? Can the nature of the offense be changed by the accident, that the prisoner succeeded in getting away because the prosecutor happened to fall on the tongue and doubletree, which broke his hold from the arm of the prisoner?

Our case is also clearly distinguishable from *Mason's Case, supra*. The watch was fastened to a steel chain, which was around the neck of the prosecutor. Had Mason let the watch go, there would have been no necessity for violence; his holding on, and jerking until he broke the chain, could only be imputed to a determination to take the watch by force.

State v. *Trexler*, 2 Car. Law Repos. 90 [6 Am. Dec. 558], was also cited in the argument. That was an indictment for forcible trespass. The defendant had taken a bank note out of the pocket-book of the prosecutor, who tried to get it away from

Digitized by Google

him. He resisted, and a struggle ensued. Seawell, J., *arguendo*, expresses the opinion that the evidence showed force enough to constitute robbery, although the prosecutor did not have hold of the bank note. This, I suppose, was said to meet what Buller says in *Plunket's Case*, "unless there was some struggle to keep it, and it were forced from the hand of the owner." However that may be, it is sufficient to say that was a mere *dictum*. It is true, Judge Seawell was greatly distinguished as a criminal lawyer, but a *dictum* in reference to a capital offense cannot be much relied on when thrown out in considering a misdemeanor.

After much consideration, I am convinced that the facts set out in this record do not constitute highway robbery. I am therefore of opinion that the judgment ought to be reversed, and a *venire de novo* awarded.

NASH, C. J., absent.

Let the judgment be reversed, and this opinion certified, to the end that the prisoner may have a new trial.

BATTLE, J., dissented, but said that he would not permit himself to go so far as not to agree that the prisoner should have a new trial, and gave as his reasons: 1. The absence of the chief justice, leaving but two members on the bench, and that his (Battle's) refusal to concur would keep the prisoner in jail six months longer; 2. That the minute circumstances attending the taking the pocket-book did not appear to have been brought out with sufficient fullness and particularity as to make sure the true character of the transaction from the fact that much of the time of court and counsel was consumed with the main defense of the defendant, *i. e.*, the defect in the proof of his identity. He then proceeded to give the reasons which inclined him to the opinion that the prisoner was guilty of robbery, and said: "All the more recent writers on criminal law concur with singular unanimity in defining what is the kind of taking with violence which is necessary to constitute robbery. Sir William Russell says that 'the rule appears to be well established that no sudden taking or snatching of property from a person unawares is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it:' 2 Russell on Crimes, 68. In Archb. Crim. Pl. 225, the same language is used. Roscoe's Crim. Ev., 5th Am. from 3d Lond. ed., 898, says there must 'some injury be done to the person, or some previous struggling for the possession of the property.' Mr. Chitty, in his 3 Crim. L. 804, has it that 'there must be a struggle, or at least a personal outrage.' The language of Mr. East is nearly the same with that of Russell, 'that there must be some injury to the person or some previous struggle for the possession of the property:' 1 East P. C. 708. In his notes to 4 Bla. Com. 243, Mr. Chitty says: 'To constitute a robbery where an actual violence is relied on, and no putting in fear can be expressly shown, there must be a struggle, or at least a personal outrage.'" The learned judge then said that all of the above-mentioned writers on criminal law agree that if there is a struggle for the possession of

Digitized by Google

the property, or a personal outrage, the crime committed is robbery, and that they cite in support of this doctrine most of the authorities referred to in the opinion, *supra*, delivered by Pearson, J. He then said that the testimony of Brooks, the prosecuting witness, seemed to him to show "something very much like a struggle for the pocket-book before the prisoner succeeded in taking it from the pocket of the prosecutor and running off with it," and that the distinction between a struggle to escape and one to carry off property, when defendant was guilty of both, was too refined for practical use. He admitted, however, that the case of *Rex* v. *Gnosil*, 1 Car. & P. 304, 12 Eng. Com. L. 804, is authority against the position that a struggle is alone sufficient to establish the crime of robbery, but that it is but the opinion of a single judge against the whole current of previous adjudications, and that none of the text-writers whose works have been published since its rendition seem to have noticed it. For that reason, he did not place much reliance upon it. Having given the above reasons for dissenting, he concluded by again expressing his willingness that the prisoner should have a new trial.

IF GOODS ARE TAKEN by violence or by putting the owner in fear, it is sufficient to render the felonious taking robbery: *McDaniel* v. *State*, 47 Am. Dec. 93, but snatching a thing unawares is not considered a taking by force, but if there be a struggle to keep it, or any violence done to the person, the taking is robbery: *State* v. *Trexler*, 6 Id. 558.

Digitized by Google

INDEX TO THE NOTES.

ANIMALS, liability of owner for acts of, 103.
ASSOCIATIONS. See BUILDING AND LOAN ASSOCIATIONS; VOLUNTARY AND CHARITABLE ASSOCIATIONS.

BANK, certification of check by, 691.
liability for unauthorized certification of check, 691.
BUILDING AND LOAN ASSOCIATIONS, application of stock payments to loan, 162.
borrower, foreclosing mortgage, 163.
borrower, rights of, 163.
borrower, rights of on withdrawal, 163.
by-laws of, 158.
dissolution of, 165.
dues, obligation of members to pay, 152.
dues and fines, securing by mortgage, 152.
dues, termination of obligation to pay, 153.
effects of, in Philadelphia, 151.
estoppel to deny corporate existence of, 165.
fines and forfeitures, 153.
nnes and forfeitures, mortgage may secure, 153.
fines are in nature of liquidated damages, 153.
fines for non-payment of interest, 153.
fines, including in foreclosure, 153.
fines must be reasonable, 153.
forfeiture of stock for non-payment, 154.
forfeiture of stock, waiver of, 154.
loans, mode of obtaining, 151, 159.
loans, purpose of need not be inquired, 159.
loans, right of members to, 159.
loans, security, what may take, 160.
loans, to whom made, 159.
marshaling securities, 164.
members, liability of to contribute for losses, 154.
members, nature of liability of, 155.
members, rights of, 155.
members, rights of on withdrawing, 155.
membership, estoppel from denying, 152.
membership, how acquired, 151.

Digitized by Google

BUILDING AND LOAN ASSOCIATIONS, membership, stock-book as evidence of, 152.
mode of operating, 151.
officers, powers, duties, and liabilities of, 156.
origin of, 150.
powers of, generally, 157.
powers of, to borrow money, 158.
powers of, to contract, 157.
powers of, to invest in real estate, 158.
premiums, limitation, 161.
securities, which may take, 160.
stock, transfer of, how compelled, 152.
usury laws, not violated by, 160.
withdrawal, right of, and how exercised, 155.
BOUNDARY, establishing by parol agreement or by acquiescence, 711–713.

CARRIER, payment of fare as affecting liability of, 628.
CERTIORARI to review order of mayor and alderman in laying out or widening streets, 589.
CONSTITUTIONAL LAW, statutes embracing subjects not expressed in the title, 648.
statutes void in part, 649.
CONTRACT, construction of is for court, 454.
CONVERSION, bailee when guilty of, 121.
what constitutes, 90.
CORPORATION, liability for issue of false certificate of stock, 694.
liability for unauthorized act of agent, 693.

DAMAGES, for breach of contract for charter of steamer, 726.
for breach of contract to sell and deliver particular kind of seed, 728.
for breach of contract to sell and deliver at time specified, 727.
for defective construction of machinery, 725.
for delay in erecting building, 726.
for delay in furnishing a machine, 726.
for failure to make repairs, 726.
for future suffering or injury, 262.
for loss of profits, 725–727.
for mistake in transmitting telegram, 726.
for non-delivery of goods by carrier, 726.
for non-delivery of telegram, 727.
general rules of, 724.
loss of profits, 725–727.
DEED, construction of is for the court, 454.
delivery, acknowledgment and registration are evidence of, 418.
DRAFT drawn on corporation by its agent, 608.

EASEMENT, prescriptive right to, 264.
EJECTMENT, tenant in possession prior to action brought, 450.
EMBLEMENTS include only annual growths, 512.
tenant's rights to, 511–515.

Digitized by Google

EMINENT DOMAIN, compensation to which owner is entitled, 396.
setting off benefits against damages, 482.
EXECUTION, against equitable estate, 172.
injunction in aid of, 172, 173.
EXECUTION SALE, deficiency on resale recovering, 366.
purchaser, action against by plaintiff for amount of bid, 365.
purchaser, action against by sheriff for amount of bid, 365.
resale, notice of to purchaser, 366.
resale, remedy against purchaser for deficiency, 366.
resale, what justifies, 367.
resale, who must sue for deficiency, 367.
statute of frauds, what takes case out of, 365.
tender of deed to purchaser, 365.
forcible entry on land by its owner, 754–756.

HIGHWAY, negligence on part of city or town, what is, 535.
reverts to owner of the fee on abandonment, 664.
right to lay gas-pipes in, 664.

INDICTMENT, for assault with intent to kill, sufficiency of, 433.
grand jury, illegality of, how taken advantage of, 355.
time, how alleged, 355.
INFANT, disaffirmance of deed by, delay in, 443.
INNKEEPERS, care which must take of goods of guests, 221.
liability of, does not extend to goods not received in capacity of innkeeper, 223.
liability of, extends to all kinds of property, 223.
liability of, extends to money of guests, 223.
liability of, extends to servants of guests, 222.
liability of, for animals sent to pasture, 222.
liability of, is that of an insurer, 221.
liability of, not limited to personal baggage, 221.
liability of, when attaches, 222.
property retained in control of guest, 224.
property which they may refuse to receive, 224.
statutes limiting liability of, 224.
statutes limiting lien of, 225.
INJUNCTION against nuisance, 190.
against trespass, 664, 733.
to prevent debtor from disposing of his property, 172, 173.
to restrain collection of assessment and taxes, 198.
to restrain collection of municipal tax or assessment, 198.
to restrain collection of tax against personal property, 203.
to restrain collection of tax at suit of private person, 200.
to restrain collection of tax because a cloud on the title, 200.
to restrain collection of tax because of irregularities, 200.
to restrain collection of tax, payment of amount due must first be offered, 203.
to restrain collection of tax partly legal and partly illegal, 203.

Digitized by Google

INJUNCTION to restrain collection of tax, special reason must be shown, 199.
to restrain collection of tax, who may obtain, 204.
INSANITY, burden of proof in criminal prosecutions, 650.
INSOLVENCY, goods, when become in custody of law, 132.
INTEREST, rate after maturity of note, 348.

JOINDER of action against several wrong-doers, 87.
JUDGMENT, binding covenantor by, 622.
binding indemnitor by, 622.
JUDICIAL SALE, attachment to enforce payment of bid, 370.
death of party after, 371.
practice in obtaining order to pay purchase money, 370.
purchaser becomes *quasi* party to suit, 368.
purchaser, modes of enforcing liability of, 369.
purchaser, power of court over, 368.
resale and charging purchaser with deficiency, 371.
resale, how conducted, 373.
resale, rights of purchaser on, 373.
setting aside and ordering new sale, 370, 604.

LANDLORD AND TENANT, emblements, tenant's right to, 511–515.
fixtures, right of tenant to, 515.
landlord's right to enter by force on expiration of lease, 754–756.
tenant's rights after expiration of lease, 508–510.
tenant, when may not dispute landlord's title, 510.
LEASE, damages against tenant for holding over and preventing reletting, 509.
emblements, right to, as against mortgage, 514.
emblements, tenant's right to, after expiration of lease, 511.
emblements, tenant's right to, as against mortgagee, 514.
emblements, tenant's right to, does not exist when lease terminates at a certain period, 513.
emblements, tenant's right to, when forfeited, 513.
fixtures, right to remove, 515.
holding over, what is, 509.
landlord's right to take possession and remove goods, 508.
notice to quit, tenant holding over not entitled to, 509.
tenant, at expiration of, must yield possession, 508.
tenant holding over may be treated as trespasser, 509.
tenant, right of, to ingress and egress after, 508.
LIBEL, construction of, is for jury, 460.
LICENSE, revocation of, 488.

MARRIAGE, betrothal followed by cohabitation is not, 616.
confessions as evidence of, 117.
contract *per verba de futuro*, followed by cohabitation, 615–619.
in Scotland, 618.
presumption of, from copulation, 616.
MORTGAGE, of personal estate, does not cover substituted property, 172.
MUNICIPAL CORPORATION, liability for non-repair of streets, 535, 536.
powers of, are strictly construed, 589.

Digitized by Google

NEGOTIABLE INSTRUMENT, demand, where may be made, 128.
given in lieu of pre-existing debt, 126, 387.
NUISANCE, injunction against, 190.
right to abate, 545.

PARENT, liability for act of child, 431.
PARTITION SALE, remedy against purchaser, 374.
PARTY-WALL, owner's liability for rendering unsafe, or in replacing, 642.
PATENT, issued to deceased person, 447.
PLEADING, defenses which must be specially pleaded, 705, 706.
POSSESSION, adverse, what is, 466.
as evidence of notice of unrecorded deed, 474.
PROBATE SALE, remedy against purchaser, 374.
PRINCIPAL AND AGENT, liability for agent's act in excess of authority, 692.
PROMISSORY NOTE, what is, 609.
PUBLIC WORK, damages for injury occasioned by, 577, 580.

RAILROAD CORPORATIONS, liability for acts of lessees, 106.
liability for injury to one who is neither passenger nor employee, 628.
RAPE, upon one's wife, 266.
REGISTRATION, what party must take notice of, 399.

SALE of goods, part of which are forbidden by law to be sold, 85.
without delivery, 90.
STATUTES embracing subject not expressed in title, 648.
title of, may aid in construing, 650.
void in part, not necessarily wholly void, 649.
when deemed local, 650.
STREET, use of, for steam or horse cars, 662, 663.

TAXES, estoppel against denying validity of, 204.
injunction against collection of, 198–205.
TIME, when essence of contract, 749.
TITLE, cloud on, what is, 201.
TREES, contract for sale of, whether within statute of frauds, 749
TRUST, resulting to fraudulent debtor for benefit of his creditors, 422.

VOLUNTARY AND CHARITABLE ASSOCIATIONS, constitution and by-laws, amendments and additions to, 674.
constitution and by-laws are binding on members, 672.
constitution and by-laws, assent of members, whether necessary, 673.
constitution and by-laws, examples of valid and invalid, 675.
constitution and by-laws must not conflict with law or public policy, 672.
constitution and by-laws of grand lodges bind subordinates, 676.
constitution and by-laws, whether must be reasonable, 672.
contracts, power to bind members by, 678.
decisions of, bind their members, 676.
expulsion of members, 677.
reluctance of courts to recognise, 671.

WATER, mill-owner's rights, 98.

Digitized by Google

WITNESS, deceased, evidence of, when admitted in criminal cases, 440.
when cannot refuse to answer on ground that he might criminate himself, 332.
WRITINGS, construction of acknowledgment to revive debt, 455.
construction of commercial correspondence, when for court and when for jury, 456.
construction of contract is for the court, 454.
construction of deeds, notes, wills, etc., is for court, 454, 455.
construction of foreign laws is for court, 455.
construction of, is generally a question of law, 454.
construction of libel is for jury, 460.
construction of technical terms, 457.
construction of treaties and records is for court, 455.
construction of statutes, ordinances, and by-laws is for the court, 455.
construction of, when ambiguous or obscure, 459.
construction of, when must be left to the jury, 454.

Digitized by Google

INDEX.

ACCOUNT.

PROBATE ACCOUNT IS STATEMENT OF RECEIPTS AND PAYMENTS BY TRUSTEE concerning the estate confided to his care, the detailed statement of its administration while in his hands, what has been received and from what sources, what has been paid out and for what purposes, and the balance, if any, remaining. From the nature of such account, a claim for damages for a tort cannot be included in it. *Brown* v. *Howe*, 276.

See GUARDIAN AND WARD.

ACT OF GOD.

See CONDITIONS.

ADULTERY.

See CRIMINAL LAW, 1–5; MARRIAGE AND DIVORCE, 2–4.

ADVERSE POSSESSION.

1. WHAT WILL CONSTITUTE ADVERSE POSSESSION OF LAND must be determined by the circumstances of each case. In determining the question of adverse possession, much depends upon the nature and situation of the property, and the uses to which it can be applied; but the acts of ownership must be open and notorious, and of such a character as a person would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Draper* v. *Shoot*, 460.
2. PAYMENT OF TAXES BY CLAIMANT OF LAND IS FACT TO BE WEIGHED by the jury in determining the question of adverse possession, although it is not in itself evidence of an ouster of the true owner. *Id.*
3. ENTRY ON LAND WITH COLOR OF TITLE MAY BE SUPPORTED WITH LESS WEIGHT OF EVIDENCE than a bare entry by an intruder under no claim of right. *Id.*

See RIPARIAN RIGHTS, 2, 3.

AGENCY.

SUBSEQUENT RATIFICATION GIVES AGENCY FORCE AND EFFECT of an original express authority. *Starks* v. *Sikes*, 270.

See AUCTIONS, 1, 2.

AGISTERS.

See ANIMALS, 19.

Digitized by Google

ANIMALS.

1. OWNER OF BEASTS FERÆ NATURÆ IS, UNDER ALL CIRCUMSTANCES, LIABLE FOR INJURIES DONE BY THEM. *Decker* v. *Gammon*, 99.

2. ALLEGATION OR PROOF THAT OWNER OF ANIMALS FERÆ NATURÆ KNEW THEM TO BE MISCHIEVOUS IS UNNECESSARY in actions for injuries by such beasts, for he is conclusively presumed to have such knowledge. *Id.*

3. ALLEGATION OR PROOF THAT OWNER OF ANIMALS FERÆ NATURÆ WAS GUILTY OF NEGLIGENCE IN PERMITTING THEM TO BE AT LARGE IS UNNECESSARY in actions for injuries by such animals, for he is bound to keep them in at his peril. *Id.*

4. OWNER OF DOMESTIC ANIMALS, SUCH AS OXEN, HORSES, ETC., IS NOT LIABLE FOR INJURIES DONE BY THEM, if they are rightfully in the place where they do the mischief, unless he knew that they were accustomed to do mischief. *Id.*

5. KNOWLEDGE OF OWNER THAT BEAST WAS VICIOUS MUST BE ALLEGED AND PROVED IN SUITS FOR INJURIES BY DOMESTIC ANIMALS, if they were rightfully in the place where the mischief was done, for unless the owner knew that the beast was vicious, he is not liable; but if he did have such knowledge, he is liable. The gist of such actions is the keeping of the animal after knowledge of its vicious propensities. *Id.*

6. OWNER OF DOMESTIC ANIMALS IS LIABLE FOR MISCHIEF DONE BY THEM, IF THEY ARE WRONGFULLY IN PLACE WHERE THEY DO ANY MISCHIEF, though he had no notice that they had been accustomed to do so before. In such cases, the ground of action is that the animals were wrongfully in the place where the injury was done. *Id.*

7. IN ACTION AGAINST OWNER OF DOMESTIC ANIMAL, WRONGFULLY IN PLACE WHERE IT WAS DOING MISCHIEF, IT IS UNNECESSARY TO ALLEGE OR PROVE any knowledge on the part of the owner that it had previously been vicious. *Id.*

8. DECLARATION IS SUFFICIENT TO SUSTAIN VERDICT THEREON, which alleges that defendant's horse, being unlawfully at large, broke and entered plaintiff's close, and injured plaintiff's horse, which was there peaceably and of right depasturing. *Id.*

9. INSTRUCTION, IN ACTION ON CASE, THAT IF DEFENDANT'S HORSE, AT TIME OF INJURY TO PLAINTIFF'S HORSE, had escaped into plaintiff's close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be entitled to recover, is correct; and this being so, an instruction requested that the plaintiff must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that defendant had knowledge of such viciousness prior to the time of the injury, will be properly refused. *Id.*

10. DOGS ARE DOMESTICATED OR TAME ANIMALS, and as much the subject of property or ownership as horses, cattle, or sheep. *State* v. *McDuffie*, 516.

11. TRESPASS OR TROVER WILL LIE FOR DOG. *Id.*

12. ASSAULT MAY BE JUSTIFIED IN DEFENSE OF ONE'S DOG. *Id.*

13. DOGS WERE NOT SUBJECTS OF LARCENY AT COMMON LAW, although the owner could maintain a civil action for injuries to them. *Id.*

14. DOG WITHOUT COLLAR IS SUBJECT OF PROPERTY, AND TROVER MAY BE MAINTAINED FOR ITS CONVERSION, even where the statute legalizes the killing of such dog. *Id.*

Digitized by Google

15. ACTION FOR KILLING DOG MAY BE MAINTAINED WITHOUT SHOWING that it is of any pecuniary value. That is a question for the jury, after hearing evidence of the peculiar qualities and properties of the animal. *Id.*

16. LEGISLATIVE ENACTMENT THAT NO PERSON SHALL BE LIABLE BY LAW FOR KILLING ANY DOG not having around his neck a collar of brass, tin, or leather, with the name of its owner or owners carved thereon, is equivalent to a legislative declaration that the killing of all dogs having the required collars is unlawful and unjustifiable. *Id.*

17. DOGS KEPT WITH LAWFUL COLLARS ON are as fully within the purview of the statute against willful and malicious injury to personal estate as any other species of personal property. *Id.*

18. INDICTMENT LIES FOR WILLFUL AND MALICIOUS DESTRUCTION OF DOG alleged to have been worth fifty dollars, and to have had around its neck a brass collar with its owner's name engraved thereon, where the statute imposes a punishment for malicious mischief to personal property, makes dogs the legitimate subject of property, and specially protects those having the required collars on. *Id.*

19. AGISTER OF ANIMALS IS NOT INSURER OF THEIR SAFETY, and is liable for their loss only on proof of negligence or want of ordinary care on his part. *Rey* v. *Toney*, 444.

20. KILLING OF WILD AND VICIOUS BUFFALO BULL TRESPASSING within an inclosure, by the owner of such inclosure, when necessary to prevent the destruction of his property, is justifiable, though the close is not fenced as prescribed by statute. *Canefox* v. *Crenshaw*, 427.

See ASSUMPSIT; FENCES.

ANNUITIES.

PROMISE TO PAY ANNUITY TO MAN AND HIS WIFE, "DURING THEIR NATURAL LIVES," is a promise to pay during their joint lives, and the life of the survivor. *Hayden* v. *Snell*, 294.

ARBITRATION AND AWARD.

1. UNDER NEW JERSEY STATUTE ARBITRATOR MUST BE SWORN before he acts, in all cases, whether the submission to arbitration is made by rule of court or not. *Inslee* v. *Flagg*, 580.

2. IF ARBITRATOR IS NOT SWORN BEFORE HE ACTS, his award is void, and a judgment thereon will be reversed. *Id.*

3. OATH OF ARBITRATOR IS PREREQUISITE TO JURISDICTION, and cannot be waived. *Id.*

4. OMISSION OF ARBITRATOR TO BE SWORN before he acts may be pleaded in avoidance of his award. *Id.*

ARSON.

See CRIMINAL LAW, 7, 8.

ASSAULT AND BATTERY.

See ANIMALS, 12; BAIL; CRIMINAL LAW, 9, 10; PARENT AND CHILD.

ASSIGNMENTS.

1. ASSIGNMENT UNDER LAWS OF ONE STATE OF CHOSE IN ACTION NOT ASSIGNABLE IN ANOTHER STATE does not enable the assignee to sue thereon in his own name in the latter state. *Kirkland* v. *Lowe*, 355.

Digitized by Google

2. ASSIGNMENT UNDER INSOLVENCY LAWS OF ONE STATE of chose in action not assignable in another state vests only the equitable title in the assignee in the latter state; the legal title still remains in the insolvent in that state, and he may sue thereon. *Id.*

See MORTGAGES, 12.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS IS VOID when it contains a clause giving the trustee power to dispose of the property assigned "gradually, in the manner and on the terms in which, in course of their business, the assignors have sold and disposed of their merchandise;" such a clause being an unreasonable limitation of the trustee's powers. *Inloes* v. *American Exchange Bank*, 190.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS VOID ON ITS FACE IS NOT AIDED BY PAROL PROOF that the clause therein rendering it void was inserted at the suggestion of the assignee, and was designed to and did operate to the advantage of the creditors. *Id.*

3. TRUSTEE FOR BENEFIT OF CREDITORS MAY EXERCISE SOUND DISCRETION IN DISPOSING OF DEBTOR'S PROPERTY, and need not always sell immediately and for cash. *Id.*

ASSUMPSIT.

DELIVERY OF DOG IS GOOD CONSIDERATION FOR ASSUMPSIT. *State* v. *McDuffie*, 516.

ATTACHMENTS.

1. OFFICER HAS NO RIGHT TO ATTACH ON MESNE PROCESS ARTICLES WORN ON PERSON of the debtor as part of his dress or apparel at the time the attachment is made, or then in his actual manual possession and use. *Mack* v. *Parks*, 267.

2. WATCH WHICH DEBTOR IS WEARING ON HIS PERSON IS NOT LIABLE TO ATTACHMENT, and an officer who, on its being handed to him to look at, severs it from the owner's person by forcibly breaking the silk guard to which it is attached, and which passes around his neck, is a trespasser *ab initio*, and liable for the value of the watch. *Id.*

3. WATCH UNLAWFULLY TAKEN BY OFFICER FROM PERSON OF DEBTOR, under a writ of attachment, cannot be held under the writ, although it would have been liable to attachment if it had been taken by the officer when not connected with the debtor's person. *Id.*

4. MONEY BELONGING TO ABSCONDING DEBTOR in the hands of a clerk of a court of equity under a decree for the sale of land for the purposes of partition may, after an order of distribution, be attached, and the clerk garnished by the debtor's creditors, under the statute of North Carolina. *Gaither* v. *Ballew*, 763.

ATTORNEY AND CLIENT.

COMMUNICATION TO ATTORNEY, UNDER IMPRESSION THAT HE HAD CONSENTED TO ACT AS ATTORNEY OF PARTY, IS PRIVILEGED, even though the attorney himself may not have so understood the agreement; but the communication must have been made to the attorney as such, and for the purpose of obtaining his advice and opinion relative to some legal right or obligation. *Alderman* v. *People*, 321.

Digitized by Google

AUCTIONS.

1. AUCTIONEER IS AGENT OF BOTH PARTIES, AND HIS MEMORANDUM OF CONTRACT OR AGREEMENT is generally binding on both, so as to satisfy the requirements of the statute of frauds; but this rule is not applicable where the auctioneer is himself the vendor. *Bent* v. *Cobb*, 295.
2. GUARDIAN ACTING AS AUCTIONEER IN SELLING LAND OF HIS WARD under authority of the court is not authorized as such to sign for the purchaser a memorandum in writing to take the sale out of the statute of frauds. *Id.*

See STATUTE OF FRAUDS, 1–4.

BAIL.

ASSAULT AND BATTERY IS BAILABLE OFFENSE, and bail cannot be refused on such a charge because there is danger of death of the assaulted person in consequence of the assault. *Dunlap* v. *Bartlett*, 320.

BAILMENTS.

1. BAILEE IS GUILTY OF CONVERSION IF HE USES PROPERTY BAILED TO HIM IN DIFFERENT MANNER or for other purposes than those designated in the contract of bailment, and trover is maintainable therefor. *Crocker* v. *Gullifer*, 118.
2. BAILEE INTRUSTED WITH BAILED PROPERTY, TO BE USED IN HIS SERVICE AND IN HIS BUSINESS, has no right to lease such property to another to be used by the latter. The contract of bailment confers on him no general right to dispose of its use or enjoyment as he may see fit. *Id.*

BANKRUPTCY AND INSOLVENCY.

1. PROPERTY OF APPLICANT FOR BENEFIT OF INSOLVENT LAW IS IN CUSTODY OF LAW for the benefit of the creditors, and while in such custody cannot be distrained for rent. *Buckey* v. *Snouffer*, 129.
2. DEMAND FOR RENT DUE AT TIME OF APPLICATION FOR DISCHARGE UNDER INSOLVENT LAW, accompanied by a subsequent distress, does not follow the property as an incumbrance or lien into the hands of the trustee, under the Maryland act of 1805, when there is no levy of *fieri facias* prior to the application. *Id.*
3. CERTIFICATE OF DISCHARGE IN BANKRUPTCY CANNOT BE AVOIDED ON GROUND OF WILLFUL CONCEALMENT by bankrupt of his property, where he failed to insert in his schedule land that he had conveyed before the passage of the bankrupt act, as a voluntary gift, in fraud of his creditors; nor can the conveyance be considered as an arrangement made in contemplation of bankruptcy, since it was made before the passage of the act. *Abbey* v. *Commercial Bank*, 401.

See ASSIGNMENTS, 2.

BANKS AND BANKING.

1. BANK CERTIFYING CHECK AS "GOOD" creates a new and binding obligation on the part of the bank, towards a *bona fide* holder of the check for value, to hold sufficient funds of the drawer to meet the check. *Farmers' etc. Bank* v. *Butchers' etc. Bank*, 678.

Digitized by Google

2. TELLER'S CERTIFICATION OF NEGOTIABLE CHECK, WHERE DRAWER HAS NO FUNDS, for his accommodation, though in excess of the teller's authority, is nevertheless binding on the bank in favor of a *bona fide* holder, where the teller has been in the habit of certifying checks to the knowledge of the officers of the bank. *Id.*

BONA FIDE PURCHASERS.

1. POSSESSION OF LAND UNDER UNRECORDED DEED, THOUGH BROUGHT HOME TO SUBSEQUENT PURCHASER, does not constitute, in point of law, actual notice of such prior deed, within the meaning of the Missouri registry act. But such possession and apparent ownership are facts from which a jury will be warranted in inferring actual notice. *Vaughn* v. *Tracy*, 471.

2. KNOWLEDGE BY SUBSEQUENT PURCHASER THAT PERSON IS IN POSSESSION AS TENANT at sufferance of his vendor is not sufficient to charge such purchaser with actual notice of a prior purchase by such tenant. *Id.*

3. PURCHASER OF LEGAL TITLE IS NOT BOUND TO TAKE NOTICE OF LIEN upon land recorded against former owner of the equitable title through whom the purchaser does not deraign title, and whose name does not appear in connection with it. *Harper* v. *Bibb*, 397.

4. BONA FIDE PURCHASER FROM GRANTEE IN STATE PATENT IS NOT BOUND TO TAKE NOTICE of a judgment lien on the land recorded against one who formerly held a certificate for the patent, and who, after the lien attached, conveyed to the purchaser's grantor, who obtained the state patent direct to himself. *Id.*

5. EQUITY WILL NOT RELIEVE AGAINST BONA FIDE PURCHASER OF LEGAL TITLE for valuable consideration without notice. *Id.*

BONDS.

See OFFICE AND OFFICERS, 2, 3.

BOUNDARIES.

1. DEED OF LAND BOUNDED UPON ARTIFICIAL POND created by expanding a stream by means of a dam, and through which the thread of the stream has always been apparent, passes the land to the thread of the stream. *Phinney* v. *Watts*, 288.

2. IN BOUNDING LANDS, COURSES AND DISTANCES ARE BUT CIRCUMSTANCES, and in general must yield to monuments and abuttals. *Smith* v. *Slocomb*, 274.

3. PUBLIC TAKES EASEMENT ONLY IN LAND TAKEN FOR HIGHWAY, the fee remaining in the abutter, and he may, if he choose, on making a conveyance of his land, retain the fee in the soil under the road, by properly expressing such intention in the deed; but if the property is bounded in the deed "on the road," the grantee takes to the center of the way. *Id.*

4. CONVEYANCE OF LAND ABUTTING ON HIGHWAY, AND DESCRIBING the land as "beginning at an angle in the stone wall on the easterly side o the aforesaid road;" thence running around the rear of the lot granted, "to a stake and stones at the aforesaid road; thence northerly on the line of said road to the first-mentioned bound," excludes the road or the grantor's interest therein from such conveyance. *Id.*

Digitized by Google

5. PLACE OF DEPARTURE OF BOUNDARIES IN DEED MAY BE PROVED by direct evidence or common reputation, but it must be ascertained with reasonable certainty. *Nixon* v. *Porter*, 408.

6. THAT IS CERTAIN WHICH MAY BE RENDERED CERTAIN RESPECTING DESCRIPTIONS IN DEEDS. *Id.*

7. EVIDENCE OF DECLARATIONS AS TO BOUNDARIES IS INADMISSIBLE UNLESS MADE by a person while he was in possession, and claiming it as owner, or unless the boundary line was pointed out at the time the declarations were made. Where made by one now deceased, who had previously occupied, but never owned, the land, and who had ceased to occupy it at the time of the declarations, they are inadmissible as evidence against a subsequent owner. *Whitney* v. *Bacon*, 281.

8. HEARSAY EVIDENCE OR REPUTATION, TO PROVE BOUNDARIES, MUST BE AS CERTAIN as to the subject-matter as direct evidence would be. *Nixon* v. *Porter*, 408.

9. PAROL AGREEMENT DETERMINING BOUNDARY can be valid only when made between owners of lands which adjoin. Where a claimant of lands divided by a ditch alleged a parol agreement between himself and the apparent owner of lands on both sides of the ditch that the ditch should be the division line, but showed no title to either portion of the lands: *Held*, that such agreement was inoperative. *Terry* v. *Chandler*, 707.

See PARTY-WALLS.

COMMON CARRIERS.

1. FREIGHT IS COMPENSATION FOR CARRIAGE OF GOODS, AND WHEN PAID IN ADVANCE MUST BE REPAID, if by reason of any event not imputable to the shipper the goods are not carried and delivered, unless there be a special agreement to the contrary. *Atwell* v. *Miller*, 206.

2. LEGAL OPERATION OF CONTRACT IN BILL OF LADING MAY BE MODIFIED BY SUBSEQUENT PAROL AGREEMENT; as by the addition of a parol suppletory agreement that the freight should be at the risk of the shipper. *Id.*

3. FACT THAT SHIPPER INSURES FREIGHT IS CIRCUMSTANCE TENDING TO SHOW THAT HE ASSUMED RISK OF ITS LOSS, and taken in connection with parol evidence of a special agreement that the freight should be at his risk, is sufficient to be submitted to the jury as going to show an agreement to that effect, suppletory to that in the bill of lading. *Id.*

4. CONSIGNOR IS ORIGINALLY LIABLE FOR FREIGHT on goods shipped by him under contract, or for his benefit, and the insertion in the bill of lading of a stipulation for delivery to the consignee, "he or they paying freight," does not of itself relieve the consignor; such provision being for the benefit of the carrier, who may waive it and resort to the consignor, unless the latter is exonerated by some special stipulation. *Holt* v. *Westcott*, 74.

5. STAGE-COACH PASSENGER, TO RECOVER FOR INJURY BY CARRIER, must show negligence or want of ordinary care and prudence by the carrier, occasioning the injury, without fault on his own part. *Keith* v. *Pinkham*, 80.

6. PASSENGER RIDING ON OUTSIDE OF COACH, AGAINST WARNING of the stage-agent that he does so at his peril, assumes only the risks incident to his exposed situation, and may nevertheless recover for an injury caused by the negligence of the carrier or his servants. *Id.*

Digitized by Google

7. RAILROAD COMPANY IS LIABLE TO PASSENGER WHOM IT VOLUNTARILY UNDERTAKES TO CARRY, although gratuitously, for injuries sustained by the passenger without his own fault, and through culpable negligence chargeable to the company. This liability does not rest on contract, but on the public duty of the company to carry safely those whom it undertakes to carry. *Nolton* v. *Western R. R. Corporation*, 623.

COMMON LAW.

See ANIMALS, 13; STATUTES, 1.

CONDITIONS.

RIGHT DEPENDING UPON CONDITION PRECEDENT does not accrue unless the condition is performed, although performance becomes impossible by the act of God. *Mizell* v. *Burnett*, 744.

CONFLICT OF LAWS.

NOTHING IN LAW OR COMITY OF NATIONS REQUIRES COURTS OF ONE STATE to give effect to the law of another state which is in derogation of the former's laws, and in violation of rights that have vested by force thereof. *McLean* v. *Hardin*, 740.

CONSPIRACY.

See CRIMINAL LAW, 20–24.

CONSTITUTIONAL LAW.

STATE LAW REQUIRING TAKING OUT OF LICENSES BY THOSE WHO SELL THEIR OWN MANUFACTURE OF LAGER-BEER IN SMALL QUANTITIES IS CONSTITUTIONAL; such a law being but the exercise of the right to regulate internal police and everything that relates to the morals and health of the community. *Keller* v. *State*, 226.

See STATUTES.

CONTRACTS.

WRITTEN CONTRACT MUST BE CONSTRUED BY COURT, and not by the jury. *Randall* v. *Thornton*, 56.

See DAMAGES, 9, 10.

CORPORATIONS.

1. NO PARTICULAR FORM OF WORDS IS EVER REQUIRED TO CONSTITUTE CORPORATION. *Bow* v. *Allentown*, 489.
2. GRANT BY STATE WILL OF ITSELF CONFER CORPORATE CHARACTER. *Id.*
3. PARTIES NOT FOUND TO POSSESS CORPORATE POWERS WILL BE DEEMED CORPORATION, if the intention of the legislature would be otherwise defeated. *Id.*
4. GRANT TO AND ACCEPTANCE BY PRIVATE CORPORATION of a private charter is a compact which the legislature cannot violate. *Tinsman* v. *Belvidere etc. R. R. Co.*, 565.
5. PRIVATE CORPORATION CAN BE HELD LIABLE IN TORT for an act expressly authorized by statute when it transcends the authority conferred on it by the legislature. *Id.*

Digitized by Google

6. NOTICE TO DIRECTOR OF CORPORATION WILL NOT BIND CORPORATION, if it is acquired by him privately, or from rumor, or through channels open to all alike, and is not communicated to his associate directors. *General Ins. Co.* v. *U. S. Ins. Co.*, 174.

7. INJURY IS DIRECT AND IMMEDIATE CONSEQUENCE of the acts of a private corporation, when such corporation constructs an embankment in the mouth of a creek, thereby preventing the water from flowing in its accustomed channel, and depriving the injured party of its use for milling purposes, although the property injured is an incorporeal right in the land of another; and it is no defense to an action for damages for such injury that the water flowing in the mouth of the creek is a public navigable river, under servitude to the public interests and subject to legislative control. *Tinsman* v. *Belvidere R. R. Co.*, 565.

8. STOCK-SUBSCRIPTION BOOK OF CORPORATION FOR SHARES REQUIRED TO BE SUBSCRIBED for, before any assessment could be levied, is *prima facie* evidence that the number of shares requisite for an assessment had been subscribed for, in an action to recover the amount of an assessment laid, where such book came into the possession of the corporation immediately on its organization, and which book had always been treated by them as showing the number of shares subscribed for, and on the faith of which the said assessment was laid. *Marlborough Branch R. R. Co.* v. *Arnold*, 279.

9. PUBLIC CORPORATIONS ARE SUCH AS ARE CREATED for political purposes, and invested with subordinate legislative powers, to be exercised for the public good. These powers are subject to legislative control, and their charter may be altered or repealed at the pleasure of the legislature. But a corporation is not public merely because its object is of a public character. *Tinsman* v. *Belvidere etc. R. R. Co.*, 565.

10. LEGISLATIVE ANNEXATION OF OTHER TERRITORY TO TOWN WILL MAKE IT TOWN IN FUTURE, even if it was not a town before. *Bow* v. *Allenstown*, 489.

11. ACT OF INCORPORATION CANNOT BE PROVED BY EVIDENCE THAT PLACE HAS BEEN CLASSED for the choice of a representative; because unincorporated places are usually classed for that purpose. *Id.*

12. INCORPORATION OF TOWN MAY BE PROVED BY REPRESENTATION, LEGISLATIVE GRANTS necessarily implying a town corporation, or by claim and user of the corporate powers of a town with the knowledge and assent of the legislature, and without objection or interruption for a period long enough to furnish evidence of a prescriptive right, where no charter or act of incorporation of the place as a town can be found. *Id.*

13. NEW CHARTER DOES NOT EXTINGUISH OLD PRIVILEGES; AND ACT OF INCORPORATION does not raise any conclusive presumption that the town thus incorporated was not a corporate town before the act was passed. It is evidence to be weighed by the jury. *Id.*

14. PUBLIC POLICY REQUIRES THAT PROCEEDINGS OF MUNICIPAL CORPORATIONS should be kept strictly within the limits assigned to them by the statute authorising them, and if they appear not to come within those limits, they are liable to reversal by *certiorari* and are void and insufficient to support a title professing to be founded on them. *Carron* v. *Martin*, 584.

15. PUBLIC CORPORATIONS ARE EQUALLY LIABLE with private corporations or individuals for injuries inflicted, where the powers conferred are not

Digitized by Google

strictly for the public benefit, and if the grant is a special franchise, made as well for private advantage as for public good. *Tinsman* v. *Belvidere R. R. Co.*, 565.

16. WHERE POWER OF CITY COUNCIL TO ALTER OR WIDEN STREETS is confined by the city charter to cases where application is made in writing by three fourths of all owners of land along such streets, this is a case of a tribunal having a limited and special power to proceed only in the manner prescribed in the act. *Carron* v. *Martin*, 584.

17. ACT OF CITY COUNCIL IN LAYING OUT and opening street is *quasi* judicial in its nature, and the tribunal exercising such act is subject to the control of the supreme court. *Id.*

18. TOWNS ARE NOT LIABLE FOR DAMAGES CAUSED BY NON-REPAIR OF BRIDGES AND HIGHWAYS, being, like counties, *quasi* corporations, whose corporate powers and functions are conferred without their solicitation, for the benefit, not of themselves, but of the public at large. *Commissioners* v. *Martin*, 333.

19. TOWNS CANNOT BE INDIRECTLY SUBJECTED TO LIABILITY FOR DAMAGES FOR NON-REPAIR OF BRIDGES AND HIGHWAYS, by a suit, under the Michigan revised statutes, c. 119, against the commissioners of highways; this chapter does not authorize any action to be brought against township officers, by their name of office, except for acts done, or upon contracts made by them while acting within the scope of their official duty and authority. *Id.*

20. CORPORATE EXISTENCE OF PLAINTIFF IS ADMITTED BY DEFENDANT'S PLEADING GENERAL ISSUE, and they cannot afterwards contest it. *Inhabitants of Orono* v. *Wedgewood*, 81.

See EMINENT DOMAIN, 3, 10; EVIDENCE, 5; FRANCHISES; HIGHWAYS; JURISDICTION, 4; NEGOTIABLE INSTRUMENTS, 5, 6; RAILROADS; UNINCORPORATED SOCIETIES.

COSTS.

POSSIBILITY THAT PLAINTIFF MAY BE CHARGED WITH COSTS IN ACTION PENDING does not become a debt until the judgment for costs is rendered against him. *Inhabitants of Pelham* v. *Aldrich*, 266.

CO-TENANCY.

1. OCCUPATION BY ONE TENANT IN COMMON of the whole estate, claiming it as his own, is an ouster of his co-tenant, who must first establish his right at law to enable him to recover the mesne profits. One tenant is bound to account to another only as his bailiff appointed by contract, express or implied. *Izard* v. *Bodine*, 595.

2. TENANT IN COMMON ACTUALLY RECEIVING the rents, issues, and profits may be compelled to account for such profits actually received: this by statute, both in England and New Jersey. *Id.*

3. TENANT IN COMMON OCCUPYING WHOLE ESTATE, without claim on the part of his co-tenants to be admitted into possession, is under no obligation to account. *Id.*

4. TENANT IN COMMON IS ENTITLED TO POSSESSION in common of the whole with his co-tenant, but has no right to the exclusive possession of any particular portion; and if he exercise such right and excludes his co-tenant from participation in the possession, he must account to his co-tenant for his interest in the part from which he was ousted. *Id.*

Digitized by Google

5. DEED BY TENANT IN COMMON OF "SIXTY-FOUR RODS, BEING PART OF" LOT held by the grantor in common with another, passes no title in common; nor will it pass any title in severalty unless grantee enters and takes possession of the quantity of land conveyed by the deed, and thus makes certain the part which he claims to hold in severalty. *Phillips* v *Tudor*, 306.

6. LANDLORD AND TENANT ARE TENANTS IN COMMON OF CROPS RAISED ON SHARES, until a division is made. *Daniels* v. *Brown*, 505.

7. TENANT IN COMMON CANNOT JUSTIFY USE OF FORCE IN TAKING POSSESSION of the common property when held by his co-tenant. *Id.*

8. ONE TENANT IN COMMON CANNOT MAKE DIVISION OF COMMON PROPERTY without the consent of the other, so as to affect the rights of either. *Id.*

9. ONE TENANT IN COMMON MAY PLEAD TENANCY IN COMMON IN ABATEMENT if he alone be sued in trespass, trover, or case for anything respecting the land held in common. *Southard* v. *Hill*, 85.

See EJECTMENT, 1, 2; INSURANCE, 6; LANDLORD AND TENANT, 5–7; PARTITION; RIPARIAN RIGHTS, 6.

CRIMINAL LAW.

1. ADULTERY, BY CIVIL LAW, IS CARNAL KNOWLEDGE OF ANOTHER MAN'S WIFE. *State* v. *Weatherby*, 59.

2. ADULTERY IN MAINE IS ILLICIT INTERCOURSE BETWEEN PERSONS ONE OR BOTH OF WHOM ARE MARRIED. *Id.*

3. DIVORCED MAN DOES NOT COMMIT ADULTERY BY MARRYING AND COHABITING with another woman, though the divorce was procured by his wife and he has obtained no divorce. *Id.*

4. INSTRUCTION TO JURY, WHERE DEFENDANT IS ON TRIAL FOR ADULTERY, "that if from all the testimony in the case, introduced for the purpose of proving the marriage of the defendant, they were satisfied beyond a reasonable doubt that he was legally married, and his wife, to whom he was legally married, was living at the time the crime was alleged to have been committed, they were authorized to find the fact of marriage," is correct. *State* v. *Libby*, 115.

5. INSTRUCTION TO JURY, "THAT IF PERSON WITH WHOM ADULTERY WAS ALLEGED TO BE COMMITTED was as well known by the name of Vesta Brown as by that of Vesta A. Brown, they would be warranted in finding that the offense, if committed, was committed with Vesta Brown," is correct. *Id.*

6. AFFRAY IS FIGHTING OF TWO OR MORE PERSONS in a public place, to the terror of the citizens; and if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow. *State* v. *Perry*, 768.

7. INDICTMENT FOR ARSON MUST CHARGE OFFENSE TO HAVE BEEN DONE MALICIOUSLY, and charging it to have been done "feloniously, willfully, and unlawfully" is insufficient. *Kellenbeck* v. *State*, 166.

8. WORDS CONSTITUTING PART OF DESCRIPTION OF CRIME MUST BE USED IN INDICTMENT; and an indictment under the Maryland act of 1809, c. 138, charging a willful burning of a building, which is not a parcel of a dwelling-house, is insufficient on demurrer if it fails to describe the building as "not a parcel of any dwelling-house." *Id.*

Digitized by Google

9. IN PROSECUTIONS FOR ASSAULT, IT IS UNNECESSARY TO PROVE PLACE of committing the offense precisely as it is alleged in the indictment. An indictment for an assault in one town is supported by proof of an assault in another town in the same county, and within the jurisdiction of the court. *Commonwealth* v. *Tolliver*, 252.

10. MODE OF MAKING ASSAULT NEED NOT BE SET OUT IN INDICTMENT for an assault with a gun "loaded with powder and ball," with intent to kill. *State* v. *Chandler*, 432.

11. BET UPON RESULT OF ELECTION, THOUGH MADE AFTER ELECTION HAS BEEN HELD, is indictable under a statute providing an indictment for a bet upon the result of any election. *Miller* v. *State*, 351.

12. INDICTMENT FOR BETTING ON ELECTION WHICH CHARGES BET TO HAVE BEEN MADE BEFORE ELECTION, is supported by proof that the bet was made after the election upon the unknown result thereof, for time is immaterial since the statute draws no distinction. *Id.*

13. INDICTMENT CHARGING POSSESSION OF BURGLARIOUS IMPLEMENTS WITH INTENT TO USE THEM for the purpose of breaking and entering a building, or other depository of money or goods, in order to steal therefrom, need not allege an intent to use them in a particular place, or for a special purpose, or in any definite manner; it is sufficient to allege a general intent. *Commonwealth* v. *Tivnon*, 248.

14. PROOF THAT SOME OF IMPLEMENTS DESCRIBED IN INDICTMENT, under Massachusetts statute of 1853, chapter 194, were in the possession of the defendant, and designed and adapted to effect the objects charged in the indictment, is sufficient. *Id.*

15. IT IS NOT NECESSARY TO PROVE THAT IMPLEMENTS WERE ORIGINALLY INTENDED FOR UNLAWFUL USE in order to sustain an indictment under the Massachusetts statute of 1853, chapter 194. It is sufficient if they are suitable for the purpose charged. *Id.*

16. WHEN COMMON DESIGN OR ENTERPRISE BETWEEN TWO DEFENDANTS is first proved, declarations of one of them in relation to the joint undertaking are admissible against both. *Id.*

17. PROOF OF MERE POSSESSION OF BURGLARIOUS IMPLEMENTS BY ONE DEFENDANT, where two defendants intend to use them in a joint undertaking, is not sufficient to sustain an indictment under the Massachusetts statute of 1853, chapter 194, as against the defendant whose possession of the implements is not proved. *Id.*

18. POSSESSION OF BURGLARIOUS IMPLEMENTS WITH GUILTY INTENT MAY BE JOINT as well as several; and where the guilty intent of several is manifested by their joint act it becomes a joint offense. In such cases, all who join in the commission of the act may be indicted either jointly or separately. *Id.*

19. INDICTMENT AGAINST TWO, ALLEGING THAT THEY HAD IN THEIR POSSESSION, on a certain day, certain implements designed and adapted for forcing and breaking open buildings, safes, trunks, and vaults, sufficiently sets forth a joint possession and charges a joint offense in apt words, under the Massachusetts statute of 1853, chapter 194. Under this allegation, it is competent to prove the commission of one offense by both defendants on any day after the statute took effect and before the indictment was found. *Id.*

20. TO CONSTITUTE INDICTABLE CONSPIRACY, THERE MUST BE COMBINATION OF TWO OR MORE PERSONS to commit some act known as an offense at

Digitized by Google

common law, or that has been declared such by statute. *Alderman* v. *People*, 321.

21. DESCRIPTION OF OFFENSE BY TERM BY WHICH IT IS GENERALLY KNOWN IS SUFFICIENT, if the nature of the offense is clearly indicated thereby, and the charge is a conspiracy to commit an offense known and recognized as an offense at common law. *Id.*

22. MEANS SUCH AS TO CONSTITUTE AN OFFENSE, EITHER AT COMMON LAW OR BY STATUTE, MUST BE PARTICULARLY SET FORTH, in an indictment for a conspiracy to do an act not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means. *Id.*

23. OFFENSE IN CONSPIRACY IS UNLAWFUL COMBINATION AND AGREEMENT, and no overt acts need be done, in pursuance of such combination and agreement, to constitute the offense, nor need such acts be alleged. *Id.*

24. INDICTMENT FOR CONSPIRACY TO CHEAT AND DEFRAUD MUST SET OUT FALSE PRETENSES, TOKENS, AND DEVICES AGREED TO BE USED; false pretenses, tokens, or devices alone render "cheating" and "defrauding" punishable, and the conspiracy must be to cheat and defraud in some of the modes made criminal by statute. *Id.*

25. ON TRIAL OF INDICTMENT FOR OBTAINING SIGNATURE TO DEED BY FALSE PRETENSES, evidence is admissible of previous conversations of defendant with a third person as to procuring such a signature. *Commonwealth* v. *Castles*, 278.

26. INDICTMENT FOR RAPE WHICH ALLEGES THAT DEFENDANT "VIOLENTLY AND AGAINST HER WILL FELONIOUSLY DID RAVISH and carnally know" the woman is sufficient. *Commonwealth* v. *Fogerty*, 264.

27. INDICTMENT FOR RAPE NEED NOT ALLEGE THAT WOMAN RAVISHED was not the wife of the defendant. *Id.*

28. UTTERANCE IN PUBLIC OF VULGAR, OBSCENE, AND INDECENT LANGUAGE is an outrage upon decency, and injurious to public morals, and is an offense indictable at common law, although not an open and notorious act of public indecency within the statute of Missouri. *State* v. *Appling*, 469.

29. INDICTMENT LIES FOR DISOBEYING INJUNCTION OF LEGISLATURE, though no mode of punishment is pointed out by the statute enjoining the doing of an act. *Keller* v. *State*, 226.

30. INDICTMENT ALLEGING THAT DEFENDANTS DID WILLFULLY AND MALICIOUSLY KILL HORSE of another person named is a sufficient averment of the offense, under a statute which prescribes a punishment for "every person who shall willfully and maliciously kill, maim, or disfigure any horses, cattle, or other beasts of another person." *Commonwealth* v. *Sowle*, 289.

31. TIME OF COMMISSION OF OFFENSE MUST BE PROVED AS LAID IN INDICTMENT only when time is of the essence of the offense, or a necessary ingredient in the description of it; and then it must be proved, at least so far as may be necessary to identify the offense charged. *Miller* v. *State*, 351.

32. OBJECTION TO INDICTMENT MUST BE TAKEN BY DEMURRER, as well when the case is submitted to the court as when tried by a jury; and under the Maryland act of 1852, the judgment will not be reversed for any matter which might have been a subject of demurrer to the indictment. *Kellenbeck* v. *State*, 166.

33. STATUTE REQUIRING INDICTMENT TO BE INDORSED "TRUE BILL" IS DIRECTORY merely, and the omission of such indorsement cannot be made

Digitized by Google

a ground of objection after trial and conviction, but the indictment may be quashed on that ground. *State* v. *Burgess*, 433.

34. ROBBERY IS COMMITTED BY FORCE, LARCENY BY STEALTH, and where there is no violence or circumstance of terror resorted to for the purpose of inducing the owner to part with his property for the sake of his person, the crime committed is not robbery, but larceny. *State* v. *John*, 777.

35. TO CONSTITUTE ROBBERY, FORCE USED must be either before or at the time of the taking, and of such nature as to show that it was intended to overpower the party robbed, or to prevent resistance on his part, and not merely to get possession of the property. *Id.*

See ANIMALS, 12, 18; BAIL; INSANITY; SURETYSHIP, 6–10; WITNESSES, 2.

CUSTOMS.

PRACTICE OF FEW PERSONS IN BUSINESS IN WHICH MANY ARE ENGAGED does not establish a custom which all persons who are engaged in the same pursuit are presumed to know and recognize. *Fuhr* v. *Dean*, 484.

DAMAGES.

1. QUESTION WHETHER SUM IS LIQUIDATED DAMAGES OR PENALTY which is stipulated to be paid upon breach of a contract is one of intention, and the language of the contract is not conclusive. *Bagley* v. *Peddie*, 713.

2. RULES FOR DETERMINING WHEN STIPULATED SUM IS PENALTY and when liquidated damages, in a contract, stated and discussed *per* Shankland, J. *Id.*

3. SUM DENOMINATED "LIQUIDATED DAMAGES" IN CONTRACT will nevertheless be construed to be a penalty if other parts of the instrument furnish reason even to doubt as to the intention of the parties; but where the covenants for breach of which the sum is to be paid are all of them for the performance of other acts than the payment of money, and the damages for a breach would be wholly uncertain and incapable of ascertainment except by conjecture, the sum will be deemed liquidated damages. *Id.*

4. SUM DENOMINATED "LIQUIDATED DAMAGES" IN BOND OF EMPLOYEE, stipulated to be paid upon a breach of the covenants of a contemporaneous agreement, to the effect that the obligor will serve the obligee faithfully and diligently for a specified term in his trade, perform his orders, keep the secrets of the trade, and not disclose any improvements, discoveries, or inventions by the obligee, etc., will be construed as "liquidated damages," and not as a penalty. *Id.*

5. SPECIAL DAMAGES NOT IMPLIED BY LAW AS NECESSARY CONSEQUENCES OF BREACH OF AGREEMENT to convey real estate cannot be recovered in an action for such breach unless they are alleged in the declaration. *Warner* v. *Bacon*, 253.

6. DAMAGES SUSTAINED AFTER ACTION BROUGHT FOR BREACH OF AGREEMENT to convey real estate, by reason of the withholding thereof from the plaintiff, cannot be given in evidence in that action, but may be recovered in a subsequent action. *Id.*

7 PLAINTIFF CANNOT, IN ACTION FOR BREACH OF AGREEMENT TO CONVEY REAL ESTATE, RECOVER EXPENSES incurred by him in erecting a building on his other land by reason of his not obtaining a right to put thereon a similar building standing upon the land agreed to be conveyed. That

Digitized by Google

ground of damage is too remote, not being a proximate consequence of the breach of the agreement. *Id.*

8. MEASURE OF DAMAGES IN TRESPASS DE BONIS ASPORTATIS, where the landlord and tenant are tenants in common of certain property, and where the tenant has taken the whole, is the value of the landlord's share, and compensation for all that he loses by the operation of the wrong and consequent judgment, which vests the property in the trespasser, and ordinarily no more. *Daniels* v. *Brown*, 505.

9. DAMAGES RECOVERABLE FOR BREACH OF CONTRACT INCLUDE PROFITS which the plaintiff certainly would have realized but for defendant's default; though speculative or contingent profits are not recoverable. *Griffin* v. *Colver*, 718.

10. RECOUPMENT OF DAMAGES IN ACTION FOR PRICE OF ENGINE, FOR DELAY in not furnishing it by a stipulated time, should be estimated by the value of the use of the engine during the period of delay, not by the profits which would have been realized from running it in connection with the machinery it was intended to drive. *Id.*

See ACCOUNT; ANIMALS; EMINENT DOMAIN, 4–9; GUARDIAN AND WARD; HIGHWAYS, 3; VENDOR AND VENDEE, 3, 4.

DEBTOR AND CREDITOR.

1. LETTER CONTAINING MONEY SENT BY DEBTOR TO CREDITOR through the mail is at the risk of the debtor, unless the creditor, either expressly or by the usual course of dealing between the parties, authorized such mode of remittance. *Gurney* v. *Howe*, 299.

2. DEBTOR IS ENTITLED TO BE SATISFIED OF AUTHORITY OF PERSON DEMANDING PAYMENT before complying with the demand, and a refusal upon that specific ground is justifiable. *Nash* v. *Union Mut. Ins. Co.*, 65.

3. POSSESSION OF SIGNED RECEIPT IS SUFFICIENT EVIDENCE OF AUTHORITY to demand payment of the receipted liability, if the receipt is signed by the proper person, and a demand under such authority is equivalent to a personal demand by the signer of the receipt. *Id.*

4. RECEIPT BY CREDITOR FROM DEBTOR OF PROMISSORY NOTE OF THIRD PERSON IN PAYMENT OF ACCOUNT DUE DOES NOT EXTINGUISH ORIGINAL CLAIM, unless there is an express agreement to receive the note as payment and run the risk of its being paid. *Berry* v. *Griffin*, 123.

5. MARSHALING OF SECURITIES IS DONE ONLY AT INSTANCE OF ONE CREDITOR AGAINST ANOTHER, and is never done *ex officio*, nor at the suit of the debtor, nor to the prejudice of a creditor; and the creditor seeking it must show that his co-creditor will sustain no injury thereby. *General Ins. Co.* v. *United States Ins. Co.*, 174.

See FRAUDULENT CONVEYANCES.

DEDICATION.

See HIGHWAYS, 1.

DEEDS.

1. DEED DULY ACKNOWLEDGED AND RECORDED DOES NOT TRANSFER TITLE UNTIL DELIVERY TO GRANTEE. *Bullitt* v. *Taylor*, 412.

2. DUE ACKNOWLEDGMENT AND RECORDING OF DEED IS MERELY PRESUMPTIVE, NOT CONCLUSIVE, EVIDENCE OF DELIVERY. *Id.*

Digitized by Google

3. WORD "PREMISES" IN DEED OF CONVEYANCE, TECHNICALLY MEANS everything which precedes the *habendum*. *Berry* v. *Billings*, 107.

4. OFFICE OF HABENDUM IS TO NAME GRANTEE, AND TO LIMIT CERTAINTY OF ESTATE. *Id.*

5. HABENDUM BECOMES EFFICIENT TO DECLARE INTENTION, where the premises in a deed are merely descriptive, and no particular estate is mentioned. *Id.*

6. DEED OF LAND "TO HAVE AND TO HOLD," TO B AND HIS HEIRS, IS GOOD, although the grantee is not named in the premises. *Id.*

7. DEED IS GOOD AND EFFECTUAL WHERE HABENDUM IS NOT REPUGNANT TO PREMISES. *Id.*

8. WORDS "PRIVILEGES AND APPURTENANCES" ARE UNNECESSARY IN DEED; as a grant of the land passes them without their being mentioned. A right to flow land will so pass. *Id.*

9. PROOF OF EXECUTION OF DEED BY ONE OF TWO SUBSCRIBING WITNESSES is sufficient to admit it to registration, since one subscribing witness to the execution is sufficient. *Shirley* v. *Fearne*, 375.

10. EXECUTION OF DEED PURPORTING TO BE EXECUTED BY PARTNERSHIP, but acknowledged by one of the firm alone, is not proved unless a previous authorization or subsequent ratification by his copartners is shown. *Id.*

11. NON-PAYMENT OF NOMINAL CONSIDERATION CANNOT BE SHOWN to defeat a deed. *Draper* v. *Shoot*, 462.

12. DEED TO DEFENDANT IN EJECTMENT EXECUTED UNDER DECREE OF CHANCERY may be introduced by the plaintiff without the production of the record in chancery, for the purpose of showing that the defendant claims under the plaintiff's grantor; though when a party claims title in himself under such a deed, it is generally necessary to produce the authority under which it was executed. *Nixon* v. *Porter*, 408.

13. INSTRUMENT VOID IN LAW CANNOT BE MADE GOOD BY AVERMENT, OR PROOF OF EXTRANEOUS FACTS, when the matter rendering it void appears in the deed itself. *Inloes* v. *American Exchange Bank*, 190.

14. DEED SHOWN TO BE THIRTY YEARS OLD OR MORE MAY BE PROVED by proof of the signature of one of the subscribing witnesses, for it is presumed that the subscribing witnesses are either beyond the jurisdiction of the court, or dead, or if living, that their memories have failed them as to the particular transaction. *Nixon* v. *Porter*, 408.

15. DEED IS SHOWN TO BE ANCIENT BY FACT THAT GRANTEE TOOK POSSESSION of land believed to be conveyed by the deed shortly after the date of the deed, and that the grantor twenty years afterwards acknowledged that he executed the deed upon the day of its date. *Id.*

16. DEED IS NOT VOID FOR UNCERTAINTY because from lapse of time it may be impossible to identify the lands conveyed by it. *Id.*

17. ADMITTING PROOF OF EXECUTION OF DEED other than by the subscribing witness is not a ground of exception by a party who subsequently calls the subscribing witness and examines him. *Commonwealth* v. *Castles*, 278.

See BOUNDARIES, 6, 7; CO-TENANCY, 5; EVIDENCE, 1; INFANCY; PLEADING AND PRACTICE, 30; REGISTRATION.

DEPOSITIONS.

1. NOTICE OF TAKING DEPOSITION, TO BE REASONABLE WHEN SERVED ON ATTORNEY, must be such as in all probability to allow him time to communicate with his client. *Hunt* v. *Crane*, 381.

Digitized by Google

2. OBJECTION THAT NOTICE OF TAKING DEPOSITION DE BENE ESSE was given to the attorney for the party instead of to the party, as required by statute, is waived by the appearance of the attorney at the taking of the deposition and his acknowledgment of notice. *Id.*

3. TWO HOURS' NOTICE OF TAKING DEPOSITION DE BENE ESSE IS NOT REASONABLE NOTICE when served upon the attorney, and when it does not appear that he could have notified his clients within the time. *Id.*

4. DEPOSITION CONTAINING ILLEGAL EVIDENCE SHOULD NOT BE WHOLLY EXCLUDED if any part of it is proper evidence. The illegal portions should be pointed out and excluded by the court. *Hamilton* v. *Scull's Adm'r*, 460.

5. DEPOSITION OF WITNESS SINCE DECEASED, TAKEN ON PRELIMINARY EXAMINATION in a criminal case, in the presence of the accused, is competent evidence on the trial, and its admission is not in contravention of the constitutional provision that the accused shall have the right to be confronted with the witnesses against him. *State* v. *McO'Blenis*, 435.

DETINUE.

DEFENDANT IN DETINUE AGAINST WHOM JUDGMENT HAS BEEN RENDERED has no right to pay the value assessed and retain the property, and he has no pretext for invoking the aid of equity to this end. *Jordan* v. *Thomas*, 387.

DOMICILE.

1. RESIDENCE, TO GAIN SETTLEMENT UNDER PAUPER LAW, MEANS HOME or dwelling-place. *Warren* v. *Thomaston*, 69.

2. RESIDENCE, DWELLING-PLACE, AND HOME DIFFER FROM SETTLEMENT, under the pauper law, and a person may have a settlement in one town and a residence in another. *Id.*

3. RESIDENCE DOES NOT INVOLVE CONTINUED PERSONAL PRESENCE necessarily, and temporary absences do not work a change of residence. *Id.*

4. RESIDENCE IS ACQUIRED ONLY BY PERSONAL PRESENCE WITHOUT PRESENT INTENT TO DEPART, under the pauper law, and when once acquired, is lost only by departure with intent to abandon it. *Id.*

5. DOMICILE IS NOT SYNONYMOUS WITH RESIDENCE, DWELLING-PLACE, OR HOME, in its ordinary legal sense, but it must be regarded as synonymous with those terms when used with respect to the *status* of a pauper as to habitation. *Id.*

6. RESIDENCE UNDER PAUPER LAW IS ABANDONED BY DEPARTURE without a present intent to return, and a subsequent intent to return formed upon disappointment of business expectations does not cure the abandonment. *Id.*

7. PARTICULAR HOUSE TO WHICH PARTY MAY RESORT AS MATTER OF RIGHT is not necessary to enable him to acquire or maintain a residence, within the meaning of the pauper law. *Id.*

8. RIGHTS OF HUSBAND AND WIFE TO MOVABLE PROPERTY ARE GOVERNED BY LAW OF MATRIMONIAL DOMICILE, no matter where such property happens to be, or how or where it is acquired. Thus, where an intestate's personal property has been distributed in Mississippi, and a slave assigned to a married woman domiciled with her husband in North Carolina, such slave belongs to the husband, according to the laws of

Digitized by Google

the latter state, and is not governed or controlled by the laws of the former. *McLean* v. *Hardin*, 740.

9. MOVABLE PROPERTY IS SUBJECT TO LAW OF DOMICILE, although it be in a foreign country. *Id.*

EASEMENTS.

1. RIGHT TO EASEMENT CAN BE CREATED ONLY BY DEED. *Fuhr* v. *Dean*, 484.
2. RIGHT TO ENTER ON ANOTHER'S LAND, AND REMAIN THERE for a certain time, or indefinitely, at the pleasure of the party claiming the privilege, is an interest in the land, which can be created only by deed. *Id.*
3. EASEMENT IN LAND OF ANOTHER CAN BE ACQUIRED BY ADVERSE USER only with the acquiescence of the owner of the land in its exercise under a claim of right. From such a use of an easement for twenty years the law will presume a non-appearing grant. *Powell* v. *Bagg*, 262.
4. WHERE OWNER OF LAND, BEING ON SAME, FORBIDS ANOTHER TO EXERCISE RIGHT to subvert the soil thereof for the purpose of repairing an aqueduct, under claim of an easement in the aqueduct by adverse possession, such verbal orders, though unaccompanied by further acts, are sufficient to show an interruption of the easement. *Id.*

See BOUNDARIES, 3.

EJECTMENT.

1. DEFENDANT IN EJECTMENT DENYING CO-TENANCY WITH PLAINTIFF as alleged in the complaint cannot claim the benefit of a co-tenancy, so as to require more stringent proof of ouster than in a case between strangers. *Peterson* v. *Laik*, 441.
2. LAW OF OUSTER BETWEEN CO-TENANTS IN EJECTMENT, WHERE DEFENDANT DENIES the plaintiff's title, is the same as if no co-tenancy existed. *Id.*
3. ONE NOT MADE PARTY TO ACTION OF EJECTMENT for land of which he was in the possession when the action was commenced cannot be dispossessed by virtue of a writ of *habere facias possessionem* issued under a judgment for the plaintiff in that action. *Garrison* v. *Savignac*, 448.

See DEEDS, 12; PARTITION, 2.

ELECTION.

MONEY PAYABLE IN REASONABLE TIME CANNOT BE DIVIDED at the election of the payor so as to make it payable at different times, reasonable time being indivisible. *O'Donnell* v. *Leeman*, 54.

ELECTIONS.

POWER TO ELECT REPRESENTATIVES WITHOUT CLASSIFICATION IS, UNDER CONSTITUTION OF NEW HAMPSHIRE, CONFINED TO TOWNS; viz., those places having one hundred and fifty ratable polls, or places with town privileges, which are really towns. No others have such power *Dow* v. *Allenstown*, 489.

EMINENT DOMAIN.

1. RIGHT OF EMINENT DOMAIN IS INHERENT AND ESSENTIAL ELEMENT OF SOVEREIGNTY. It results from the social compact, and would exist without any provision of the organic law. *Brown* v. *Beatty*, 389.

Digitized by Google

2. RIGHT OF EMINENT DOMAIN IS RECOGNIZED IN BILL OF RIGHTS IN MISSISSIPPI, and the only restrictions placed upon its exercise are that private property shall not be taken for public use without the consent of the legislature, or without just compensation being first made therefor. *Id.*

3. LEGISLATURE MAY EXERCISE RIGHT OF EMINENT DOMAIN IN BEHALF OF INCORPORATED RAILROAD COMPANY, or any other incorporated company, by means of which it is proposed to construct any work of internal improvement useful and beneficial to the public. *Id.*

4. OWNER IS ENTITLED TO CASH VALUE OF LAND APPROPRIATED FOR RAILROAD, and to indemnity for damage to his adjacent land, consequent upon the location of the road, and he cannot be compelled to receive as compensation, in whole or in part, the enhancement in the value of his remaining property. *Id.*

5. STATUTE AUTHORIZING JURY, IN ASSESSING DAMAGES ACCRUING FROM APPROPRIATION OF LAND for a railroad, to estimate, as an offset to the claim of compensation, the benefit to the owner resulting from the location of the road, is unconstitutional. *Id.*

6. AUTHORITY CONFERRED UPON MAGISTRATE TO SUMMON JURY TO ASSESS DAMAGES caused by location of railroad is not repugnant to the constitution of Mississippi. *Id.*

7. NO REMEDY EXISTS AT COMMON LAW WHERE STATUTE PROVIDES MODE for assessment and payment of damages resulting to individuals from the construction of works of internal improvement authorized by the legislature. *Id.*

8. MEASURE OF DAMAGES ALLOWED TO LAND-OWNER FOR INJURIES TO HIS LAND BY CONSTRUCTION OF RAILROAD over it includes all damages, direct and consequential, present and prospective, certain and contingent, which may fairly result to the land-owner by the loss of his property and rights, and the injuries thereto. *Johnson* v. *Atlantic etc. R. R. Co.*, 560.

9. JURY OR COMMISSIONERS WILL BE PRESUMED TO HAVE DONE THEIR DUTY IN APPRAISING DAMAGES done by a railroad company in constructing its road over another's land. *Id.*

10. PRIVATE CORPORATION AUTHORIZED BY STATUTE to construct public highways, or other works of public improvement, for private emolument, and to take private property in so doing, upon making compensation therefor, is not vested with the immunities that pertain to the sovereign, and is not exempt from liability to damages for injuries done to individuals in the exercise of the power granted. *Tinsman* v. *Belvidere etc. R. R. Co.*, 565.

EQUITY.

1. EQUITY WILL INTERFERE TO PREVENT MULTIPLICITY OF SUITS, OR PREVENT TITLE FROM BEING CLOUDED, by a claim which cannot be enforced either at law or in equity. *Holland* v. *Mayor etc. of Baltimore*, 195.

2. EQUITY DOES NOT EXTEND ITS JURISDICTION TO OFFENSES against the public. This general rule appears to be without exception. *Gause* v. *Perkins*, 728.

3. EQUITY DOES NOT EXTEND ITS JURISDICTION TO CIVIL TRESPASSERS except that jurisdiction will be assumed to prevent torts or injuries to property by injunction where plaintiff's title is admitted or established by legal adjudication, and where the threatened injury will cause irreparable damage. *Id.*

Digitized by Google

4. EQUITY WILL TAKE JURISDICTION OF SUBJECT-MATTER OF ACTION TO PREVENT INJURY, ETC., when a bill has been filed setting out that an action has been, or is about to be, instituted for the purpose of establishing title; but without assuming to decide the question of title. *Id.*

5. IRREPARABLE INJURY MEANS THAT WHICH CANNOT BE REPAIRED, retrieved, put back again, atoned for. It is an injury of such a peculiar nature that compensation in money cannot atone for it; and if the party liable in damages be insolvent, and therefore unable to atone for the injury, it will be considered irreparable. *Id.*

6. CULTIVATION OF PINE-TREES FOR TURPENTINE, OR CUTTING DOWN OF OAK-TREES FOR STAVES, or cypress-trees for shingles, is not destruction, in North Carolina, and will not be deemed an irreparable injury, unless there be an averment of defendant's insolvency. *Id.*

7. BILL ALLEGING THAT TRESPASSER IS ABOUT TO COMMIT IRREPARABLE INJURY by boxing and working turpentine trees, and by cutting timber and making staves on land fit only to be cultivated for these products, will, unless there be an averment of defendant's insolvency, be dismissed on motion. *Id.*

8. COURT OF CHANCERY WILL SET ASIDE EXECUTION SALE after delivery of deed, when some special ground is laid in the petition; such as fraud, or accident which has prevented a fair sale, and worked injustice to some party whose interests are affected thereby. *Campbell* v. *Gardner*, 598.

9. RESALE WILL BE ORDERED UPON GROUND OF MISTAKE, where it is shown that defendant, an aged woman, has been misled as to her rights, and deprived of her property without just compensation. *Id.*

10. APPLICATION FOR RESALE WILL BE REGARDED WITH MORE INDULGENCE when the mortgagee purchases than when a stranger is the purchaser; in a case where the party applying to open the sale offers to pay the money due upon the security, and there has been mistake on the part of the owner of the equity of redemption, owing to which the property has been sacrificed. *Id.*

11. COURTS OF EQUITY WILL NOT RESTRAIN DEBTOR in the enjoyment and power of disposition of his property, unless clearly within the limits of the authorities of the law; nor will they stretch their power to remedy supposed defects in the law, as the legislature is the body to remedy the defects in the law if any there be. *Uhl* v. *Dillon*, 172.

12. EQUITY WILL NOT ENJOIN EXECUTION OF JUDGMENT IN DETINUE in favor of trustee for a chattel purchased from the husband and wife, which by the terms of the trust is to remain under the trustee's control for the benefit of the wife; nor will it subrogate the purchaser to the usufructuary interest of the wife in the judgment. *Jordan* v. *Thomas*, 387.

13. DEFENSE THAT MUST HAVE BEEN KNOWN IN TIME TO BE PRESENTED AT LAW is not ground for relief in equity against the judgment. *Id.*

14. UNQUALIFIED SUBMISSION TO CONDITIONAL DECREE IN EQUITY IS NOT REQUIRED, and when the court orders a case reserved for determining compensation to a party, and orders the contract upon which suit is brought to be delivered up and canceled, and on failure so to deliver it up his case to be absolutely dismissed, the party against whom the decree is made may deliver up the contract and prosecute an appeal from that portion of the decree, and retain the benefit of the other portion of the decree. *Rider* v. *Gray*, 135.

Digitized by Google

15. EQUITY HAS JURISDICTION TO GRANT COMPENSATION in all cases of bills for specific performance, though denying the relief sought by the bill, but should exercise it only under special circumstances and upon peculiar equities. *Id.*

16. MEASURE OF COMPENSATION UPON DENYING BILL FOR SPECIFIC PERFORMANCE is the amount paid on the contract, with interest, when there is no defense made on the merits. *Id.*

See BONA FIDE PURCHASERS; INJUNCTIONS.

ESTATES.

TENANT FOR NINETY-NINE YEARS, OR FOR NINETY-NINE YEARS RENEWABLE FOREVER, AND NOT OWNER OF FEE, IS TO RECOMMEND PAVING of unpaved street in the city of Baltimore, under the Maryland acts of 1797, c. 54, and 1817, c. 143, construed with reference to the act of 1833, c. 40, he being the "owner" or "proprietor" within the meaning of those acts. *Holland* v. *Mayor etc. of Baltimore*, 195.

ESTATES OF DECEDENTS.

See EXECUTORS AND ADMINISTRATORS; WILLS.

ESTOPPEL.

See REMAINDERS.

EVIDENCE.

1. DEEDS AND OTHER PRIVATE DOCUMENTS ARE ADMISSIBLE AS EVIDENCE OF REPUTATION of the matters of general and public interest recited in them. *Bow* v. *Allenstown*, 489.

2. FOUNDATION FOR ADMITTING EVIDENCE OF REPUTATION, OR DECLARATIONS OF OLD AND DECEASED PERSONS, must, in subjects interesting to a comparatively small portion of the community, as a city or a parish, first be laid by showing that from he situation of such persons they were probably conversant with the matter of which they were speaking, or such evidence will be rejected. *Id.*

3. VERDICTS ARE RECEIVABLE EVIDENCE OF REPUTATION IN QUESTIONS OF GENERAL OR PUBLIC INTEREST, and the circumstance that the verdict was *post litem motam* does not affect its admissibility. *Id.*

4. VERDICT AND JUDGMENT AGAINST TOWN IN ACTION FOR SUPPORT OF PAUPER, THOUGH RENDERED AFTER ACT OF INCORPORATION, IS EVIDENCE OF REPUTATION of the place as a town, if they were founded on a claim and settlement of a prior date; and they are admissible to rebut the presumption that the town was not incorporated before, though they would have no tendency to prove an incorporation fifteen years prior to the act of incorporation. Their effect would not be modified by the fact that the plaintiff in the action afterwards supported the same pauper; and such fact would have no tendency to rebut the effect of the verdict and judgment as evidence of the reputation of the corporate character of the town. *Id.*

5. INCOMPLETENESS OF STATE RECORDS MAY BE SHOWN TO ACCOUNT FOR FACT THAT NO CHARTER OR ACT OF INCORPORATION OF TOWN CAN BE FOUND. Thus a private act reciting the burning of the secretary's office, and an account of the same fire communicated to the New Hampshire Historical

Digitized by Google

Society's Collections by one formerly secretary of state, are competent evidence of that historical fact for such a purpose. Evidence of an unsuccessful search in the office of the secretary for charters of other towns is also admissible to show the records to be incomplete. *Id.*

6. RECORDS OF TOWN ARE RECEIVABLE IN EVIDENCE, AS SHOWING CHARACTER IN WHICH PLACE ASSUMED TO ACT; whether they show acts only which a town could do, or such as unincorporated places might also do. *Id.*

7. PUBLIC BOOKS, THOUGH NOT STRICTLY TOWN RECORDS, ARE RECEIVABLE IN EVIDENCE as almost necessarily giving character to the action of the people of a place claiming to be a town, or a place not incorporated, where such books contain entries made by the officers of the place and of their doings as such. *Id.*

8. BOOKS CONTAINING STATEMENT OF TAXES AND ACCOUNTS ARE EVIDENCE PROPER TO BE WEIGHED BY JURY that the people of a place claimed to exercise the peculiar powers of a town, where they voted in their meetings to raise taxes for purposes for which unincorporated places could not raise money, as for the building of highways and the support of paupers, and where the proper officers proceeded to assess, collect, and appropriate such taxes. They are admissible, too, without being certified by the town clerk, as they are not records requiring his attestation; and are receivable on the ground that they are the written statements of persons conversant with the place and its affairs. The same facts might be shown without any books, by the testimony of any person to whom they were familiar. *Id.*

9. ACTS OF LEGISLATURE INCIDENTALLY RECOGNIZING PLACE AS TOWN ARE RECEIVABLE AS EVIDENCE OF REPUTATION of the place as a town, and also as evidence of the assent of the legislature to the exercise of the powers of a town. *Id.*

10. VENIRES FOR JURORS, OF THEMSELVES ALONE, ARE WITHOUT WEIGHT AS EVIDENCE OF REPUTATION OF PLACE as a town, because the courts cannot confer corporate powers. *Id.*

11. COURTS WILL TAKE JUDICIAL NOTICE OF TOWNS as the public bodies from which jurors are to be drawn, and to whose officers their writs for jurors are to be sent. *Id.*

12. TOWNS ONLY ARE AUTHORIZED TO DRAW JURORS, AND FACT THAT PLACE WAS REQUIRED by the courts to return jurors, and that jurors were drawn and returned to the courts, is evidence that the place was reputed to be a town and assumed to act as such. *Id.*

13. EVIDENCE TENDING TO PROVE EXISTENCE OF TOWN BY PRESCRIPTIVE RIGHT IS ALSO EVIDENCE proper to be weighed in the attempt to establish its existence by reputation. *Id.*

14. RECORD KEPT AS REQUIRED BY POST-OFFICE DEPARTMENT REGULATIONS, in accordance with the act of congress providing therefor, of registered letters received at a post-office, is admissible in evidence without the testimony of clerk who actually kept it. *Gurney* v. *Howe*, 299.

15. MISTAKE IN ENTERING DATE OF RECEIPT OF LETTER IN RECORD OF REGISTERED LETTERS kept by post-office will not conclude party endeavoring to prove sending of letter at certain time, and the mistake may be shown by testimony of the postmaster as to the ordinary course of the mails, or by other evidence. *Id.*

Digitized by Google

16. OBJECTION TO EVIDENCE MUST BE CONFINED TO THAT WHICH IS INADMISSIBLE, where testimony is taken under a commission, and a part is admissible and a part is not. *Pettigrew* v. *Barnum*, 212.

17. DECLARATIONS OF THIRD PERSON ARE NOT ADMISSIBLE AGAINST PARTY ON GROUND THAT HE IS AGENT OR PARTNER of the party, without sufficient proof being made to satisfy the court that a partnership or agency existed in fact between them. *Atwell* v. *Miller*, 206.

18. VOLUME OF STATE PAPERS PUBLISHED UNDER AUTHORITY OF CONGRESS is public record, and not open to objection as being secondary evidence of facts therein stated. *Nixon* v. *Porter*, 408.

19. DESCRIPTIONS IN DEEDS TO PERSON UNDER WHOM ADJOINING OWNERS CLAIM are admissible in evidence, in a controversy between such owners, as to the width of a passage-way between their estates. *Brown* v. *Stone*, 303.

20. NARRATION BY PATIENT TO HIS PHYSICIAN, OF CAUSE OF INJURIES received some months previously, is not admissible as evidence, on the part of the patient, of the cause of such injury. *Chapin* v. *Marlborough*, 281.

21. IN ACTION FOR DAMAGES FOR INJURY CAUSED BY COLLISION between teams, evidence is inadmissible of declarations by defendant's servant, made immediately after the collision, and while plaintiff was being extricated from his carriage, that the plaintiff was not to blame, either as a part of the *res gestæ* or to contradict the servant's testimony. *Lane* v. *Bryant*, 282.

22. PAROL EVIDENCE OF CONTENTS OF DESTROYED INDICTMENT IS ADMISSIBLE the same as with any other document, where the case does not, from its nature, disclose the existence of other or better evidence. *People* v. *Dennis*, 338.

See BOUNDARIES, 5–8; CORPORATIONS, 8; DEPOSITIONS; EXECUTIONS, 2, 3; HIGHWAYS, 4, 5; INSANITY; JUDGMENTS, 1–3; PARTNERSHIP; PLEADING AND PRACTICE, 22, 24, 25; USAGES; WAYS, 2, 3.

EXECUTIONS.

1. DEBTOR'S EQUITABLE INTEREST IN PERSONAL PROPERTY CANNOT BE SOLD UNDER FIERI FACIAS; but a judgment creditor may file his bill and obtain a decree for the absolute sale of the goods to pay off incumbrances, and to satisfy his own claim. *Rose* v. *Bevan*, 170.

2. RETURN OF LEVY OF EXECUTION UPON REAL ESTATE IS CONCLUSIVE EVIDENCE that the debtor's title to the property levied upon, and that of all persons claiming under him by title subsequent to the attachment of the property passed to the judgment creditor. Such return cannot be contradicted by any one. *Ladd* v. *Wiggin*, 551.

3. EVIDENCE TO CONTRADICT LEVY OF EXECUTION, AS EFFECTUAL BETWEEN PARTIES to pass the title of the debtor in the property levied upon, will not be received. *Id.*

See EQUITY, 8, 12.

EXECUTORS AND ADMINISTRATORS.

1. WHAT ESTATE OF DECEDENT VESTS IN HIS ADMINISTRATOR, AND HOW DIVERTED.—Upon the decease of an intestate and the granting of administration, his personal estate, and all contingent as well as absolute interests therein, vest in his administrator, including his bonds, contracts,

Digitized by Google

and choses in action, as well as his goods and chattels, and can be diverted only by operation of law, or some act of the administrator. *Ladd* v. *Wiggin*, 551.

2. ADMINISTRATOR MAY ASSIGN CHOSE IN ACTION by a proper instrument for that purpose without license. *Id.*

3. PROMISE BY ADMINISTRATOR TO PAY CLAIM NOT VALID as against his intestate's estate does not bind the assets in his hands as administrator. *Shepherd* v. *Young*, 242.

4. WHERE WIDOW FURNISHES BOARD TO DESTITUTE INFANT GRANDCHILD, AS GRATUITY, from motives of affection and kindness, without any expectation of remuneration or intention of charging therefor, she cannot, after the child's death, maintain an action for the price of such board against the administrator of the child, even though he has expressly promised to pay it. *Id.*

5. WHERE PURCHASER AT ADMINISTRATOR'S SALE REFUSES TO COMPLETE PURCHASE according to the terms of the sale, by executing a bond for the payment of the purchase price, the administrator may resell the property and hold the original purchaser responsible for the difference between his bid and the diminished purchase price obtained at the resale. *Mount* v. *Brown*, 362.

6. ADMINISTRATOR CANNOT TREAT SALE TO PURCHASER WHO REFUSES TO COMPLETE PURCHASE AS VALID, and sue him for the amount of his bid. *Id.*

7. ADMINISTRATOR'S SUIT FOR DEFICIENCY IN PURCHASE PRICE OBTAINED AT RESALE against a purchaser at the first sale who refuses to fulfill his bid need not be delayed until the expiration of the term of credit allowed by the terms of the first sale. *Id.*

See VENDOR AND VENDEE, 5.

EXTRADITION.

1. PRECEPT FROM GOVERNOR OF STATE APPOINTING AGENT TO RECEIVE FUGITIVE FROM JUSTICE, which recites that he has made a requisition in accordance with the provisions of the constitution and laws of the United States, upon the governor of the state into which the fugitive has escaped, is *prima facie* evidence of the truth of such recitals for the purpose of protecting such agent. *Commonwealth* v. *Hall*, 285.

2. WARRANT ISSUED BY GOVERNOR OF MASSACHUSETTS, AUTHORIZING AGENT OF ANOTHER STATE to "take and receive into custody" a fugitive from justice, authorizes him to arrest such fugitive, and is not in violation of the constitution or laws of the United States or of Massachusetts. *Id.*

3. STATUTE OF STATE AUTHORIZING GOVERNOR ALONE TO ISSUE WARRANT for arrest of fugitive from justice is not repugnant to the act of congress of 1793, directing that the demand and surrender of fugitives shall be made by the "executive authority" of the state. *Id.*

4. WHERE, UPON REQUISITION FROM GOVERNOR OF ANOTHER STATE, the governor of Massachusetts issues warrants for the apprehension of a fugitive from justice, one warrant being issued to the agent of the state making the requisition, and another similar warrant to a sheriff and his deputies, an arrest by such sheriff under his warrant, and release therefrom on bail on *habeas corpus*, will not prevent an arrest by the agent of the other state under his warrant. *Id.*

Digitized by Google

FACTORS.

NEITHER TROVER NOR ACTION FOR MONEY HAD AND RECEIVED CAN BE MAINTAINED against consignee of goods, or money received for a third party, with instructions to deliver them to him, until the consignee does some act by which he binds himself to such third party; without such act there is no privity of contract between them, and the title still remained in the consignor. *Per* Le Grand, C. J. *Eichelberger* v. *Murdock*, 140.

FENCES.

OWNER OF CLOSE IS NOT BOUND TO FENCE AGAINST ANIMALS FERÆ NATURÆ, by the fence law of Missouri, but only against the domestic animals enumerated in the statute. *Canefox* v. *Crenshaw*, 427.

FIXTURES.

See MORTGAGES, 1.

FORCIBLE ENTRY AND DETAINER.

1. COMMON LAW AFFORDS NO CIVIL REMEDY AGAINST ONE WHO, HAVING RIGHT, ENTERS FORCIBLY, but the party injured must resort to the statutory action of forcible entry and detainer. *Fuhr* v. *Dean*, 484.

2. WHERE OFFICER DISPOSSESSES PERSON IN POSSESSION OF LAND, by virtue of a writ of possession issued in an action to which he was not a party, although he was in possession when such action was commenced, and on the removal of the force the person so dispossessed returns to the possession, the plaintiff in that action will have acquired no such possession as will entitle him to maintain an action of unlawful detainer against the person so returning to the possession. *Garrison* v. *Savignac*, 448.

FRANCHISES.

1. CONCLUSIVE PRESUMPTION OF GRANT FROM STATE IS FURNISHED BY UNQUESTIONED USER and enjoyment of the franchise of a town for twenty years without interruption and with the assent of the government. *Boss* v. *Allenstown*, 489.

2. PLACES EXERCISING TOWN PRIVILEGES ARE TOWNS BY IMPLICATION. *Id.*

See PRESCRIPTION.

FRAUD.

See FRAUDULENT CONVEYANCES; NEGOTIABLE INSTRUMENTS, 19.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCE.—CONVEYANCE OF REAL ESTATE, ABSOLUTE IN ITS TERMS, but made for the purpose of securing a debt, with an understanding between the parties that the land is to be reconveyed upon payment of the debt and interest, is fraudulent and void, not only against existing creditors of the grantor, but against those who became his creditors after its execution. *Ladd* v. *Wiggin*, 551.

2. VOLUNTARY CONVEYANCE DULY RECORDED IS VOID AS TO SUBSEQUENT CREDITORS when fraud has intervened, as where the deed was never delivered to the trustee named therein, or where the debtor, before the execution of his deed, made an arrangement with another to make him advancements, and to recommend him to others for credit, and upon the

Digitized by Google

faith of such recommendations he was given credit, for the credit thus given relates back to the date of the agreement for recommendations, when the party recommending is presumed to have investigated the pecuniary condition of the debtor, and in subsequently recommending he was not bound to investigate anew. In using the agreement as a means of obtaining credit, the debtor, in substance, obtained credit directly upon the faith of the property conveyed. *Bullitt* v. *Taylor*, 412.

3. VOLUNTARY CONVEYANCE OF PROPERTY UPON FAITH OF WHICH DEBTS WERE CONTRACTED, under circumstances clearly showing that the debtor was at the time the true owner, is fraudulent and void as to the creditors. *Id.*

4. VOLUNTARY SETTLEMENT OF ONE'S PROPERTY FOR BENEFIT OF HIS WIFE AND CHILDREN, made for the sole purpose of protecting his family against the accidents of trade by saving the property from the payment of debts afterwards to be contracted, will be upheld against his subsequent creditors, unless it shall appear that the property thus conveyed remained so situated as to mislead easily as to the true state of the title, and to induce credit upon the belief that the title remained unchanged. *Id.*

5. DUE REGISTRATION OF VOLUNTARY CONVEYANCE IS NOTICE TO WORLD not to trust the donor longer upon the faith of the property conveyed; hence such a conveyance cannot be regarded as an act done in secret. *Id.*

6. CREDITORS CANNOT ATTACK VOLUNTARY CONVEYANCE BY SOLVENT PARTNER on ground that it was made without the knowledge of his insolvent copartner, since the latter himself could not complain. *Id.*

7. POSSESSION OF PERSONAL PROPERTY BY ONE WHO HAS CONVEYED IT VOLUNTARILY IN TRUST FOR HIS WIFE AND CHILDREN, by a deed duly recorded, is not fraudulent as to creditors, but will be regarded as the possession of those beneficially interested. *Id.*

8. CREDITOR WHO HAS REDUCED DEBT TO JUDGMENT IN FEDERAL COURT HELD WITHIN STATE may maintain a bill in the state courts to annul the debtor's fraudulent conveyance of his property. *Id.*

9. CONVEYANCE FRAUDULENT AND VOID AS TO EXISTING CREDITORS IS NOT VOID AS TO SUBSEQUENT CREDITORS, where the statute provides that such conveyance shall be void "only" as to those who are thereby defrauded; it operates to transfer the title to the property subject to the incumbrance of the grantor's debts then existing. *Id.*

10. VOLUNTARY CONVEYANCE MADE WITHOUT FRAUDULENT INTENT can be impeached and avoided by those only who were creditors when it was made. *Inhabitants of Pelham* v. *Aldrich*, 266.

11. CONVEYANCE IN FRAUD OF CREDITORS LEAVES NO INTEREST IN GRANTOR AS AGAINST GRANTEES. *Abbey* v. *Commercial Bank*, 401.

See MORTGAGES, 2.

GAMING.

See CRIMINAL LAW, 11, 12; WAGERS.

GRANTS.

GRANT CANNOT BE LOCATED WHEN DESCRIBED as beginning at a stake, and the other corners are described as points at the end of course and distance, as such description is void on account of vagueness. *Mann* v. *Taylor*, 750.

See FRANCHISES, 2; PRESCRIPTION.

Digitized by Google

GROWING CROPS.
See CO-TENANCY, 6.

GROWING TREES.
See STATUTE OF FRAUDS, 5.

GUARDIAN AND WARD.

GUARDIAN OF LUNATIC CANNOT, IN HIS PROBATE ACCOUNT, be allowed an item for damages occasioned to his own property by his ward's want of care. *Brown* v. *Howe*, 276.

See AUCTIONS, 2.

HIGHWAYS.

1. DEDICATION OF LAND FOR HIGHWAY DOES NOT PASS FEE, BUT EASEMENT, or right of use only. *Williams* v. *New York Cent. R. R. Co.*, 651.
2. APPROPRIATION OF HIGHWAY FOR RAILROAD, without the consent of the owner of the fee, or compensation, is the imposition of an additional burden upon his land, and entitles him to damages and also to an injunction, the injury being continuous in its nature. *Id.*
3. TOWNS ARE LIABLE IN DAMAGES FOR INJURIES SUSTAINED FROM DEFECTIVE ROADS, or wrongful acts of third persons, if accidents, not preventable by ordinary care and prudence, unite with these causes to produce the injury. *Norris* v. *Litchfield*, 546.
4. INCOMPETENT EVIDENCE FOR PLAINTIFF, IN ACTIONS AGAINST TOWNS, FOR INJURIES CAUSED BY DEFECTIVE SIDEWALKS.—It is incompetent for the plaintiff to prove that other persons, in passing upon the sidewalk at the place of the accident, had met with difficulty, and slipped there, where the alleged defect in the highway was its slippery condition caused from ice. It is excluded for the reason that, if admitted, it would present a collateral issue, with all its attendant circumstances, and thus raise an issue, material in the case, which the other party was not bound to be prepared to meet. *Hubbard* v. *City of Concord*, 520.
5. INCOMPETENT EVIDENCE FOR DEFENDANT, IN ACTIONS AGAINST TOWNS, FOR INJURIES CAUSED BY DEFECTIVE SIDEWALKS.—It is incompetent for defendant to prove that sidewalks similarly constructed, or constructed in any given manner, were common in other cities, towns, or localities, either for the purpose of showing that the sidewalk was properly constructed, or that the plaintiff did not exercise proper care and prudence in passing over it. *Id.*
6. IN ACTION AGAINST TOWN FOR INJURY OCCASIONED BY DEFECTIVE HIGHWAY, it is erroneous to instruct the jury, with reference to the degree of care and prudence to be exercised by one traveling over a highway, "that if the highway was defective, and the plaintiff knew of the defect, yet if it were not of a character from which an injury must so manifestly result as to render it unreasonable to attempt to pass, the plaintiff was entitled to recover, otherwise not." It is erroneous in omitting all reference to the degree of care and prudence required in the case, in suggesting no common standard to which the answer of the jury can be referred, and in giving more latitude to the traveler than what is sufficient to exonerate the town from liability. *Id.*

Digitized by Google

7. IN ACTION AGAINST TOWN FOR INJURY CAUSED BY DEFECTIVE HIGHWAY, it is correct to instruct the jury that the town was bound at all times to have its highways in a reasonably safe condition for the customary travel, if the instruction is accompanied with a proper explanation of the phrase "reasonably safe," and a proper qualification of the expression "at all times," so as to limit it to all times when the circumstances were such as to admit of their highways being in the reasonably safe condition required. So explained and qualified, it is unexceptionable; otherwise, it is not. *Id.*

8. IT IS ERRONEOUS TO INSTRUCT JURY, IN ACTION AGAINST TOWN FOR INJURY CAUSED BY DEFECTIVE HIGHWAY, that it would form no answer to the claim of the traveler for damages who should suffer an injury resulting from a defect in the highway, without any fault on his part, even though the defect was produced by the elements, and the defendants had no notice of it, or opportunity to repair it. This position is too unreasonable and too severe upon towns to be sustained. It subjects them to penalties for misfortunes falling upon the traveler, not merely without fault or negligence on their part, but against which the most unremitting vigilance and the most lavish expenditure are unavailing. *Id.*

9. JURY SHOULD BE INSTRUCTED, IN ACTION AGAINST TOWN FOR INJURY CAUSED BY DEFECT IN SIDEWALK, produced by the elements, that if the injury resulted from the condition of the sidewalk, produced by the recent sudden action of the elements, the defendants were not chargeable unless, under the circumstances, they ought to have repaired the defect before the accident happened, and had reasonable opportunity to do so; and that if they could have had no such notice and reasonable opportunity as would have enabled them to repair it, the defect was not an "obstruction, insufficiency, or want of repairs" contemplated by the statute, giving to travelers a remedy against the town. *Id.*

10. LAW EXONERATES TOWN FROM LIABILITY FOR INJURY caused in attempting to pass over a dangerous and defective sidewalk where the traveler takes such a degree of risk, such a probability or possibility of injury, that men of common care and prudence would not, under ordinary circumstances, try the experiment at their own risk. *Id.*

11. WHETHER HIGHWAY IS OR IS NOT IN SUITABLE STATE OF REPAIR for the travel passing thereon is a question for the jury under the particular circumstances of each case; among which are the nature of the route, the character of the ground, the kind and amount of travel, and the ability and means of the town to improve it in the particular involved in the inquiry. *Id.*

12. "OBSTRUCTIONS," "INSUFFICIENCIES," AND "WANT OF REPAIRS" DEFINED.—In determining what constitutes a defect within the statute subjecting towns to liability for injuries resulting from obstructions, insufficiencies, or want of repairs in their highways, it must be considered that nothing is an obstruction which the town was not bound to have removed at the time of the injury, under the circumstances of that particular case; nothing an insufficiency which it was not reasonably, having reference to those circumstances, bound then to have improved; nothing a want of repairs which in the same view it was not bound to have amended. *Id.*

Digitized by Google

13. TOWNS ARE NOT INSURERS AGAINST DAMAGES ARISING FROM CAUSES WHICH NO HUMAN FORESIGHT CAN ANTICIPATE, no human power can avert, and no human means, without time and opportunity, can remedy; under a statute making them liable for injuries resulting from obstructions, insufficiencies, or want of repairs in their highways. *Id.*

14. ACTUAL NOTICE IS NOT REQUIRED TO BE GIVEN TO TRAVELER OF EVERY SPECIFIC OBSTRUCTION on a public highway. Knowledge that there is a probability of danger is more than enough. It is sufficient that he has notice or knowledge enough of facts to put him on inquiry. *Id.*

15. USES OF PUBLIC HIGHWAY—WHAT USES OF HIGHWAY WILL NOT CONSTITUTE NUISANCE.—Highways may lawfully be used for other purposes than the accommodation of the traveling public, provided such use be not inconsistent with the reasonably free passage of travelers over them. They are designed and constructed for general convenience, and may be used as they have ordinarily been accustomed to be used, without nuisance. Time, necessity, and locality are important factors in determining the character of any particular use of a highway. It is no nuisance to use highways for moving buildings in a reasonable and judicious manner, where such highways have been commonly used for that purpose. *Graves* v. *Shattuck*, 536.

16. WHETHER USE OF HIGHWAY IN MOVING BUILDINGS IS REASONABLE AND JUDICIOUS is a question for the jury under all the circumstances of the case. Proper streets should be selected, the moving expedited, and no unnecessary obstruction should be caused. *Id.*

17. "LAW OF ROAD" DOES NOT APPLY TO BUILDINGS THAT ARE BEING MOVED THROUGH PUBLIC HIGHWAY. It is limited to the regulation of the conduct and rights of travelers with vehicles at the time and place of meeting, and while passing each other. *Id.*

18. PROTECTION AND DEFENSE OF TREES ON STREET—RIGHTS OF ADJACENT LAND-OWNERS ON STREET.—Towns are not bound to grade the entire width of their common highways; and in cities and villages foot-passengers may properly be accommodated and protected by sidewalks, curb-stones, posts, and railings, to the exclusion of carriages from a part of the way. Such curb-stones, posts, and railings, properly constructed, are in no sense nuisances. Adjacent land-owners may lawfully use the space between the carriage-path and such sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private property specially protected by statute; and if they are injured or unreasonably endangered by a building being moved through the highway, their owners are warranted in employing sufficient force to protect them from actual or impending destruction. *Id.*

See BOUNDARIES, 3, 4; CORPORATIONS, 16, 17; NUISANCE, 7, 8.

HUSBAND AND WIFE.

See DOMICILE, 8.

INDICTMENTS.

See CRIMINAL LAW.

INFANCY.

1. ACQUIESCENCE OF INFANT AFTER FULL AGE WILL NOT PRECLUDE DISAFFIRMANCE OF DEED made by him during infancy, unless such acquies-

Digitized by Google

cence continues for the period necessary to confer title under the statute of limitations. *Peterson* v. *Laik*, 441.

2. INFANT'S DEED IS DISAFFIRMED BY SUBSEQUENT CONVEYANCE of the same land by the infant after attaining his majority. *Id.*

3. WHETHER DEED AFTER MAJORITY CONSTITUTES DISAFFIRMANCE of a prior deed executed by the grantor while an infant is a question of law for the court. *Id.*

INJUNCTIONS.

1. EQUITY HAS JURISDICTION TO ENJOIN THREATENED INJURY whenever its nature is such that it cannot be adequately compensated by damages, and its continuance will occasion a constantly recurring grievance. *Hamilton* v. *Whitridge*, 184.

2. INJUNCTION WILL NOT BE DISSOLVED WHERE EQUITY OF BILL IS NOT DENIED IN ANSWER, when a motion to dissolve it is made upon the bill, answer, and testimony, under the Maryland act of 1835. *Id.*

3. EQUITY HAS JURISDICTION TO PROHIBIT OPENING OF HOUSE OF PROSTITUTION when the opening thereof will, by reason of its close proximity, deprive other persons of the comfortable enjoyment of their property and depreciate its value. In such cases, the suit may be brought in the name of the individual injured. *Id.*

4. COURTS OF EQUITY WILL NOT HESITATE TO PREVENT THREATENED ESTABLISHMENT OF HOUSE OF PROSTITUTION by the mere circumstance that in the exercise of its jurisdiction it might incidentally perform the functions of a moral censor by suppressing a vice denounced by the law, and amenable to its penalties from the earliest times. *Id.*

5. EQUITY WILL ENJOIN SALE OF LAND FOR PAYMENT FOR PAVING STREET, where the assent of the owners of a majority of feet fronting on the street was not obtained, as required by law. *Holland* v. *Mayor etc. of Baltimore*, 195.

6. WHERE COMPLAINANTS HAVE TAKEN NECESSARY STEPS to expedite their cause and procure the answer of all the defendants, an injunction will not be dissolved until the defendant upon whom the *gravamen* of the charge is made has answered; and if all of the defendants are implicated in the charge, not until all have answered. *Robinson* v. *Davis*, 591.

7. COMPLAINANT PROPERLY MAKES EVERY ONE a party who is a participator in the fraud, for the purpose of discovery; and as a general rule, he is entitled to hold his injunction until he obtains discovery. *Id.*

See CRIMINAL LAW, 29.

INNKEEPERS.

1. INNKEEPERS ARE LIABLE, WITHOUT REGARD TO ACTUAL FAULT OR NEGLECT, FOR LOSS OF BAGGAGE OF PERSON WHILE GUEST AT INN, as the custody of the baggage is assumed as a part of the service to be rendered, and the innkeeper thereby stipulates for the safety of the baggage. *Pettigrew* v. *Barnum*, 212.

2. INNKEEPERS ARE LIABLE ONLY FOR WHAT IS CONSIDERED BAGGAGE, and are not liable for every article that a guest may choose to carry with him; accordingly, they are not liable for the loss of silver knives, forks, and spoons stolen from the trunk of a guest. *Id.*

Digitized by Google

3. BAGGAGE INCLUDES ALL ARTICLES DESIGNED FOR PERSONAL USE OR CONVENIENCE ON JOURNEY, and includes personal ornaments appropriate for traveler's wardrobe. *Id.*

See WITNESSES, 1.

INSANITY.

1. BURDEN OF PROOF OF INSANITY IN CRIMINAL CASE IS ON DEFENDANT, but a preponderance of evidence is sufficient to establish it, and an instruction that it must be proved beyond a reasonable doubt is erroneous. *Per* Bowen, J. *People* v. *McCann*, 642.

2. SANITY IS ELEMENT IN CRIME OF MURDER, AND MUST BE PROVED by the prosecution. To charge that, sanity being the normal state, there is no presumption of insanity, but the burden of proving it is upon the prisoner, is error; the prisoner is entitled to the benefit of any reasonable doubt of his sanity. *Per* Brown, J. *Id.*

See GUARDIAN AND WARD.

INSURANCE.

1. INSURER OF SHIP UNDER POLICY AGAINST "TOTAL LOSS ONLY," even if a time policy, may recover for a constructive total loss. *Heebner* v. *Eagle Ins. Co.*, 308.

2. NOTICE TO UNDERWRITERS IS SUFFICIENT ABANDONMENT OF SHIP injured by perils of the sea, and therefore surveyed and condemned, on the west coast of the United States in time of peace, where such notice states that the assured "having received information of the condemnation of the ship at Humboldt, California, hereby abandons all in said vessel insured, and claims as for a total loss." *Id.*

3. POLICY FROM FOREIGN INSURANCE COMPANY, SIGNED BY ITS HOME PRESIDENT AND SECRETARY, but not to be valid till countersigned by its agent in Massachusetts, is to be construed by the Massachusetts laws, and therefore one third new for old is to be deducted in estimating a constructive total loss under such policy. *Id.*

4. EXEMPTION IN POLICY OF INSURANCE THAT INSURERS shall not be liable for breaking of the machinery unless occasioned by stranding will render insurers liable, where vessel is injured first by perils of the sea and afterwards by stranding, for so much of the injury only as the assured proves to have been occasioned by the stranding. *Id.*

5. WHERE ASSESSOR IN COMPUTING CONSTRUCTIVE TOTAL LOSS allowed two months' interest on funds paid for repairs, the court cannot increase this assessment without evidence to overcome the assessor's report. *Id.*

6. WHERE TWO OF THREE TENANTS IN COMMON LEASE ENTIRE ESTATE, without the concurrence of the third, to a lessee who covenants to insure for the benefit of the lessors, which he does, and the premises are burned during the term, and the whole of the loss is collected from the insurers by one of said lessors after an assignment to him by the other lessor, the third co-tenant may recover from the co-tenant who collected the insurance money his proportion of it. *Starks* v. *Sikes*, 270.

7. PERSON HAVING NO INTEREST IN FREIGHT CANNOT INSURE IT, as to support the policy he must have an insurable interest. *Atwell* v. *Miller*, 206.

8. MUTUAL INSURANCE COMPANY LEVYING AND COLLECTING ASSESSMENT TO PAY LOSS DOES NOT WAIVE its right, under its by-laws, of exemption

Digitized by Google

from liability for such loss on the ground of refusal by the assured to pay assessments, as stipulated in the by-laws. *Nash* v. *Union Mut. Ins. Co.*, 65.

INTEREST.

1. RATE OF INTEREST SPECIFIED IN PROMISSORY NOTE CONTINUES AFTER MATURITY AND UNTIL JUDGMENT OR NOTE IS PAID, notwithstanding the rate specified is greater than that established by law upon notes in which the rate is not specified. *Brewster* v. *Wakefield*, 343.
2. CONTRACTS IN WRITING TO PAY SPECIFIED RATE OF INTEREST ARE NO EXCEPTION TO RULE OF CONSTRUCTION OF CONTRACTS IN WRITING; the manifest intention of the parties controls the legal effect, and where the intention is doubtful, the contract is construed most strongly against the promisor. *Id.*
3. LEGAL RATE OF INTEREST APPLIES ONLY WHEN NO RATE IS SPECIFIED IN PROMISSORY NOTE; the agreement fixing the rate overrides and supersedes the application of the general statutory rate. *Id.*
4. INTEREST IS RECOVERABLE ON MONEY DUE FOR LABOR, after a demand of payment made at the expiration of a reasonable time. *Ford* v. *Tirrell*, 401.

See USURY.

JUDGMENTS.

1. PAROL EVIDENCE IS ADMISSIBLE TO IDENTIFY PARTIES WITH PARTIES IN INTEREST IN FORMER SUIT, and thus conclude them by the judgment therein rendered. *Shirley* v. *Fearne*, 375.
2. RECORD CANNOT BE IMPEACHED BY PAROL EVIDENCE. *Id.*
3. PAROL EVIDENCE IS ADMISSIBLE TO SHOW AGAINST WHICH OF TWO DEFENDANTS JUDGMENT OF JUSTICE OF PEACE WAS RENDERED, when the action was against two, and it appeared that the judgment was confessed by "one of the defendants." *Koechlept* v. *Hook's Lessee*, 133.
4. JUDGMENT OF JUSTICE OF PEACE UPON CONFESSION OF ONE OF TWO DEFENDANTS IS VOID as to the defendant who did not confess judgment, and a sale of his property thereunder conveys no title to the purchaser, when the judgment does not specify against which defendant it was rendered, and shows that it was rendered against one only. *Id.*
5. MARYLAND ACT OF 1831 RESTS UPON ASSUMPTION THAT THERE IS ACTUAL JUDGMENT against the party whose estate is sought to be divested; and it is unnecessary for such a party to appear and resist proceedings in the county court for the ratification of a sale, as they cannot create a judgment where none existed. *Id.*
6. RATIFICATION, UNDER MARYLAND ACT OF 1831, OF SALE UNDER JUDGMENT IS CONCLUSIVE ONLY of the notice required to be given and of the manner of sale, and is not conclusive as to the question of fraud or surprise in rendering the judgment. *Id.*
7. DECREE CANNOT BE USED by any of the parties to it for the purpose of defrauding creditors not parties to the suit in which it was entered; and upon proof of fraud on the part of the judgment debtor, his creditors are entitled to an injunction preventing the decree from being used for the benefit of the fraudulent debtor, and in keeping from his creditors the proceeds of property which belong to them. *Robinson* v. *Davis*, 591.

See STATUTE OF LIMITATIONS, 2.

Digitized by Google

JUDICIAL SALES.

1. NEGLECT OF SHERIFF TO RETURN ON EXECUTION LEVY ON LAND SOLD will not vitiate sale. *Hamblen* v. *Hamblen*, 358.

2. LEVY ON PROPERTY SOLD IS ESSENTIAL TO VALID SALE UNDER EXECUTION. *Id.*

3. LEVY ON LAND SOLD IS PRESUMED WHERE LAND HAS BEEN ADVERTISED and sold under a valid judgment and execution, and a deed made to the purchaser, whether the advertisement be held tantamount to an actual levy, or as evidence of a levy previously made. *Id.*

4. SALE OF LAND MADE UNDER LEVY, the description in which is insufficient, cannot be made good by proof of facts not set out as part of the description. *Chasteen* v. *Phillips*, 760.

5. PURCHASER AT SHERIFF'S SALE UNDER VENDITIONI EXPONAS, who is not a party to the proceedings, need not show that all preliminary proceedings have been taken, and duly set out upon the record. *Id.*

6. DESCRIPTION OF LAND IN LEVY AS BEING "three tracts of land on Caney fork, containing three hundred and sixty acres," is too vague and indefinite to identify any land. *Id.*

See EXECUTORS AND ADMINISTRATORS, 5–7; REGISTRATION, 1, 4.

JURISDICTION.

1. COURTS ARE NOT TO ASSUME JURISDICTION, BUT MAY AMPLIFY REMEDIES, and will grant relief in new cases if consistent with established principles, though no decision upon like facts can be found in which their jurisdiction has been invoked and exercised. *Hamilton* v. *Whitridge*, 184.

2. ACT JUDICIAL IN ITS NATURE is void when attempted to be exercised by a court or other tribunal having no jurisdiction. *Carron* v. *Martin*, 584.

3. CITY COUNCIL BEING TRIBUNAL OF LIMITED JURISDICTION, every fact necessary to give jurisdiction must affirmatively appear, to give their proceedings validity. *Id.*

4. SUPREME COURT OF NEW JERSEY MAY REVIEW PROCEEDINGS of municipal corporations, and other inferior tribunals, who do acts, judicial or *quasi* judicial in their nature, affecting the rights and property of individuals. This they may do as well when the proceedings are void for want of power in the tribunal to act, as when void in consequence of some material irregularity. *Id.*

JURY AND JURORS.

1. GRAND JURY COMPOSED OF NINETEEN JURORS IS ILLEGAL IN MISSISSIPPI under the statute of 1830, which is not repealed by the statute of 1854. *Miller* v. *State*, 351.

2. WHERE GRAND JURY WHO FOUND INDICTMENT APPEARS FROM RECORD TO HAVE BEEN ILLEGALLY CONSTITUTED, a motion in arrest of judgment on this ground should be granted. *Id.*

3. CONSTRUCTION OF COMMERCIAL CORRESPONDENCE IS SOMETIMES NOT MERE QUESTION OF LAW, but more a question of fact; and when this is the case, it may properly be left to the jury. *Fagin* v. *Connoly*, 450.

4. REASONABLE CARE AND UNNECESSARY DAMAGE ARE QUESTIONS OF FACT FOR JURY. *Dwinel* v. *Veazie*, 94.

See CONTRACTS; EMINENT DOMAIN, 6, 9.

Digitized by Google

LANDLORD AND TENANT.

1. TENANT IN POSSESSION, THOUGH HE HAS NO TITLE to the land, is the true owner of turpentine produced by his labor and cultivation, and severed from the realty. He may maintain trover for its conversion against the owner of the land. *Branch & Thomas* v. *Morrison*, 770.

2. DEMAND FOR RENT IS NOT PER SE LIEN ON GOODS ON LEASED PREMISES, but becomes a lien only after the right of distress has been exercised. *Buckey* v. *Snouffer*, 129.

3. TENANT, AFTER EXPIRATION OF HIS LEASE AND HIS REMOVAL FROM LEASED PREMISES, HAS RIGHT to a reasonable ingress upon the land in order to remove his property. *Daniels* v. *Brown*, 505.

4. TENANT CANNOT JUSTIFY USE OF FORCE IN OBTAINING POSSESSION OF HIS PROPERTY left on the leased premises after the expiration of the lease. *Id.*

5. TENANT CANNOT MAINTAIN TRESPASS AGAINST HIS CO-TENANT for taking and carrying away the common property. *Id.*

6. ENTRY OF TENANT FOR PURPOSE OF TAKING AWAY PROPERTY TO WHICH HE HAS RIGHT AS TENANT IN COMMON is justifiable of itself; but is so by force of a license in law. *Id.*

7. ENTRY OF TENANT UPON REAL ESTATE OF HIS LANDLORD FOR PURPOSE OF TAKING AWAY PROPERTY TO WHICH HE HAD RIGHT AS TENANT IN COMMON, if accompanied by violence to the owner of the property, makes him a trespasser *ab initio*, and liable, not only for the entry, but for the landlord's share of the crop carried away. *Id.*

8. DEFENDANT IS NOT LIABLE FOR TORTIOUS ACTS OF HIS LESSEES, UNLESS AUTHORIZED BY HIM. *Dwinel* v. *Veazie*, 94.

See CO-TENANCY, 6.

LARCENY.

See ANIMALS, 13.

LICENSE.

LICENSE CANNOT BE COUNTERMANDED AFTER IT HAS BEEN EXECUTED so as to permit acts done under it to be treated as trespasses. *Fuhr* v. *Dean*, 484.

LIENS.

WORD "MACHINE," IN MARYLAND MECHANICS' LIEN LAW OF 1845, DOES NOT INCLUDE MACHINES THAT ARE MOVABLE in their operation and use; such a construction not being in accordance with the intention of the legislature as shown by the act, or justified by sound rules of construction. "Coal-cars" are, therefore, not subjects of mechanics' liens, under the act. *Car Spring Co.* v. *Railroad Co.*, 181.

See BONA FIDE PURCHASERS, 3, 4; LANDLORD AND TENANT, 2; PAWNS; STATUTE OF LIMITATIONS, 2.

LUNATICS.

See GUARDIAN AND WARD.

MARRIAGE AND DIVORCE.

1. PROMISES TO MARRY IN FUTURE, although followed by cohabitation, do not constitute marriage in such sense as to render issue legitimate. *Cheney* v. *Arnold*, 609.

Digitized by Google

2. MARRIAGE MAY BE PROVED BY CONFESSION of one on trial for adultery that he had a wife, and that the woman with whom he lived was his wife. *State* v. *Libby*, 115.

3. ADULTERY AS GROUND OF DIVORCE MUST BE CHARGED as committed at a particular time and place. *Furr* v. *Furr*, 406.

4. NAME OF PERSON WITH WHOM ADULTERY, CHARGED AS GROUND OF DIVORCE, WAS COMMITTED need not be set forth in bill for divorce unless reasonable certainty cannot otherwise be attained. *Id.*

5. DIVORCE SEVERS MARRIAGE TIE AS TO BOTH PARTIES, without reference to the question as to which was in fault. *State* v. *Weatherby*, 59.

See WILLS, 6.

MASTER AND SERVANT.

1. IN ACTION BY SERVANT AGAINST MASTER FOR INJURIES SUSTAINED BY EXPLOSION OF STEAM-BOILER, where the statute required a fusible safety-plug on the boiler, and it was proved that there was no such plug on defendant's boiler, plaintiff was entitled to recover; and in such case there was no error in excluding evidence of a custom among engineers not to use such a plug, or in refusing to instruct the jury that the defendant was not liable if he used all the appliances ordinarily used on boilers for safety, but did not use such plug. *Cayzer* v. *Taylor*, 317.

2. ORDINARY CARE IN PARTICULAR CASE DEPENDS on the character and risks and exposures of the business in which it is to be exercised, and the degree required is higher where life or limb is endangered, or a larger amount of property is involved, than in other cases. *Id.*

3. MASTER IS LIABLE TO SERVANT FOR INJURIES CAUSED BY NEGLIGENCE OF INCOMPETENT FELLOW-SERVANT who was knowingly or negligently employed by the master. *Id.*

4. MASTER IS LIABLE TO SERVANT FOR INJURIES RESULTING FROM DEFECT IN MACHINERY, although a fellow-servant's negligence contributes to the injury. *Id.*

5. EVIDENCE OF TERMS OF HIRING OF OTHER EMPLOYEES OF SAME EMPLOYER is inadmissible for the purpose of ascertaining the terms upon which another employee was hired. *Lakeman* v. *Pollard*, 77.

6. EMPLOYEE PREVENTED BY SICKNESS OR SIMILAR DISABILITY FROM FULFILLING CONTRACT of service may recover on a *quatum meruit* for what he has done. *Id.*

7. EMPLOYEE QUITTING SERVICE BECAUSE OF PREVAILING DANGEROUS EPIDEMIC, of such a character that a man exercising ordinary care and prudence would have been justified in leaving by reason of it, is excused for not fulfilling his contract, though it appears that employees who continued at work in the same service were healthy and continued so. *Id.*

8. JURY ARE JUDGES WHETHER EMPLOYEE QUITTING SERVICE BECAUSE OF EPIDEMIC prevailing in the vicinity had adequate cause for so doing. *Id.*

9. DECLARATION BY EMPLOYEE FOR BREACH OF CONTRACT IS SUFFICIENT AFTER VERDICT, though it fail to allege that the plaintiff offered to perform his part of the agreement, if it allege that he was willing to do so, but after he had undertaken the work he was told by the defendant that if he continued in his service it must be at greatly reduced wages. *Hunt* v. *Crane*, 381.

Digitized by Google

10. EMPLOYEE WHO OBTAINS EMPLOYMENT AFTER DISCHARGE IS PRESUMED TO GET BEST WAGES HE CAN, and the burden of proving the contrary is on the defendant, in an action by the employee for damages caused by a refusal to allow him to complete his contract. *Id.*

11. EMPLOYER REFUSING TO ALLOW EMPLOYEE TO PERFORM CONTRACT AT AGREED RATE is liable to employee for such damages as he may sustain after due diligence to obtain other and the best wages he can in some proper business, and the burden of proving due diligence is upon the employee. *Id.*

MECHANICS' LIENS.

See LIENS.

MORTGAGES.

1. MORTGAGE OF "ALL RIGHT, TITLE, AND INTEREST WHICH MORTGAGOR NOW HAS in foundation or stone-work of a building in course of construction, and which he may have in and unto said building during its erection and completion, and after it is completed," for the purpose of securing advances to enable him to erect the building, passes the land on which the building stands. *Greenwood* v. *Murdock*, 272.

2. ORIGINAL MORTGAGE NOT EXTINGUISHED OR DISCHARGED BY SUBSEQUENT FRAUDULENT CONVEYANCE—AVOIDED CONTRACT RESTORES EACH PARTY TO HIS PREVIOUSLY EXISTING RIGHTS—RIGHTS OF PURCHASER UNDER HIS FRAUDULENT CONTRACT.—If a note secured by a valid pre-existing mortgage is given up to the mortgagor upon the execution by him to the mortgagee of a fraudulent conveyance of the premises, the amount of the note being included in the debt intended to be secured by the fraudulent conveyance, the original mortgage is not thereby extinguished or discharged. If such fraudulent conveyance is avoided by the creditors of the mortgagor, the mortgagee is remitted to his previously existing legal rights under the mortgage. The purchaser is permitted to hold nothing by his fraudulent contract, and the creditors take all their debtor fraudulently conveyed, and nothing more. *Ladd* v. *Wiggin*, 551.

3. SUBSEQUENT DISPOSAL BY MORTGAGOR OF CONSIDERATION OF MORTGAGE does not affect the validity of the mortgage, or render it not *bona fide* at the time it was made. *General Ins. Co.* v. *U. S. Ins. Co.*, 174.

4. APPEAL LIES FROM DECREE PASSED UNDER MARYLAND ACT of 1833, c. 181, and its supplements, concerning the summary foreclosure and sale of mortgages, and on such appeal the appellate court will review the proceedings as presented by the record, examine the terms and conditions of the mortgage, and determine whether the decree is in conformity therewith. *Robertson* v. *Homestead Association*, 145.

5. DECREE NOT IN CONFORMITY WITH CONDITIONS OF MORTGAGE, and embraced in the terms of assent to the decree contained in the mortgage itself, cannot be passed under the Maryland act of 1833, c. 181. *Id.*

6. AMOUNT DUE ON MORTGAGE CANNOT BE DETERMINED JUDICIALLY BY DECREE OF COURT under the act of 1833, c. 181. *Id.*

7. MORTGAGES TO BUILDING ASSOCIATIONS ARE NOT WITHIN PROVISIONS OF MARYLAND ACT of 1825, c, 50, requiring mortgages to specify on their faces the principal sums intended to be secured; or if they are, that act is repealed *pro tanto* by the act of 1852, c. 148, and the latter act, by

Digitized by Google

fair implication, brings such mortgages within the act of 1833, c. 181, and its supplements. *Id.*

8. RULE FOR ASCERTAINING AMOUNT BUILDING ASSOCIATION IS ENTITLED TO RECEIVE IN PRÆSENTI ON MORTGAGE given to it to secure interest on a loan, dues, fines, and charges on the property during the existence of the association, is to ascertain the probable duration of the association, then to estimate the aggregate amount of the interest and dues for that time, rebating from that sum a just sum for interest, and adding thereto the arrearages due, after allowing for payments made to the association. *Id.*

9. MORTGAGES TO BUILDING ASSOCIATIONS ARE FREE FROM OBJECTION ON GROUND OF USURY, if executed in conformity with the Maryland act of 1852, c. 148. *Id.*

10. FORECLOSURE OF MORTGAGE TRANSFERRED AS COLLATERAL SECURITY for the debt of a third person does not operate as a payment of such debt. The debt is not paid until the property mortgaged has been actually sold and converted into money; and where the debt so secured is that of another person, the right of action of the mortgagee against him for money paid to his use is not barred by the statute of limitations until six years after such sale and conversion. *Brown* v. *Tyler*, 239.

11. BOND BY GRANTEE TO GRANTOR IN CONSIDERATION OF CONVEYANCE, and conditioned for the support of grantor during his life, and in case of neglect or failure in the condition, to reconvey the land, does not constitute a mortgage; in case of neglect or failure to so support, the grantor is entitled to relief in equity by a decree of reconveyance. *Robinson* v. *Robinson*, 301.

12. MORTGAGE MAY BE ASSIGNED IN SAME WAY AS DEBT ITSELF, because it is a mere incident of the debt. *Ladd* v. *Wiggin*, 551.

13. MORTGAGE CAN BE DISCHARGED ONLY BY PAYMENT IN FACT OF DEBT IT SECURES, or a release by the mortgagee, where equity requires its continued existence. *Id.*

14. MORTGAGE OF PERSONAL PROPERTY DOES NOT EXTEND TO AND COVER OTHER PERSONAL PROPERTY SUBSTITUTED FOR IT UPON SALE, nor does it cover personal property purchased with the proceeds of the sale of that mortgaged. *Rose* v. *Bevan*, 170.

See RECEIVERS, 4; REGISTRATION, 2, 3.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 9–17; HIGHWAYS; JURISDICTION, 4.

MURDER.

See INSANITY.

NEGLIGENCE.

1. NEGLIGENCE IS MIXED QUESTION OF LAW AND FACT, to be settled by the jury under instructions of the court. *Norris* v. *Litchfield*, 546.

2. TOWNS ARE NOT LIABLE WHERE THERE HAS BEEN FAULT OR NEGLIGENCE, in any degree, on the part of him who has sustained the damage; and the fact that such person is a wrong-doer, a trespasser, or a violator of the law is wholly immaterial. *Id.*

3. ONE'S ACTION FOR DAMAGES SUSTAINED FROM NEGLIGENCE OF ANOTHER CANNOT BE DEFEATED by show[illegible] former party is a wrong-doer,

Digitized by Google

a trespasser, or violator of the law, unless it appears that his own negligence or his fault has directly contributed to his damage. *Id.*

4. ACTION IN NATURE OF ACTION OF CASE MAY BE MAINTAINED AGAINST GAS COMPANY for all consequential damages resulting from its negligently suffering the gas to escape from its pipes. But the burden of proof, in such an action, is upon the plaintiff to establish as a fact the failure of the company to exercise due and ordinary care in keeping its pipes in a sound and safe condition for the transmission and distribution of the gas. *Holly* v. *Boston Gaslight Co.*, 233.

5. IN ACTION AGAINST GAS COMPANY FOR INJURY CAUSED BY ESCAPE OF GAS from its pipes, the plaintiff must prove that he used ordinary care for his own protection against the noxious influence of the gas, or he cannot recover against the company. *Id.*

6. WANT OF ORDINARY CARE ON PART OF FATHER OF MINOR CHILD in adopting suitable precautions to protect such child from the hurtful effects of gas escaping from the pipes will defeat an action brought against the gas company for injuries sustained by said minor child from the escape of the gas. *Id.*

7. IN ACTION AGAINST GAS COMPANY FOR INJURY CAUSED BY NEGLECT TO REPAIR LEAKS in their pipes, evidence is admissible on the part of the defendant to show what was the system of the company in regard to complaints of leaks, not for the purpose of showing that the company exerted the same degree of diligence in that as in other instances, but to exhibit its system and plan of action and the means provided by it for conducting its enterprise. *Id.*

8. IN ACTION FOR DAMAGES FOR INJURIES TO PLAINTIFF'S CARRIAGE, caused by a collision with defendant's team, where it appears that defendant was in the act of occupying a public square with his team, when plaintiff passed by with his carriage and occupied the square himself, plaintiff would not, as a matter of law, deprive himself of his right to recover, if, in driving in, placing his carriage and remaining there, as he did, he was in the exercise of due and ordinary care, and the defendant, by want of ordinary care on his part in the management of his team, came into collision with plaintiff's team, and thereby caused the injury; and the burden of proof is on plaintiff to show that he was in the exercise of ordinary care, and that defendant was not. *Lane* v. *Bryant*, 282.

See ANIMALS, 3, 19; COMMON CARRIERS, 5–7; GUARDIAN AND WARD; INNKEEPERS; JURY AND JURORS, 4; MASTER AND SERVANT, 1–4.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTES ARE GOVERNED BY RULES OF COMMERCIAL LAW PREVAILING WHERE THEY ARE PAYABLE. *Emanuel* v. *White*, 385.

2. HOLDER OF NEGOTIABLE PAPER IS PRESUMED TO BE BONA FIDE HOLDER until something is shown in disparagement of his title. *Id.*

3. BURDEN OF PROVING HIMSELF BONA FIDE HOLDER IS NOT CAST UPON HOLDER of negotiable instrument by fact that the maker has paid the amount thereof to the original payee. *Id.*

4. PAYMENT OF ANTECEDENT DEBT, AND RELEASE OF PARTIES COLLATERALLY LIABLE, is sufficient consideration to make a transfer of a note *bona fide*. *Id.*

Digitized by Google

5. ORDER DRAWN BY PRESIDENT OF CORPORATION UPON ITS TREASURER, directing him absolutely to pay a sum certain to a third person, in discharge of a debt due from the corporation, is in legal effect a promissory note, and may be sued on as such, without averring or proving that the payee demanded payment from the treasurer. *Fairchild* v. *Ogdensburgh etc. R. R. Co.*, 606.

6. ORDER DRAWN BY ONE AGENT OF CORPORATION UPON ANOTHER agent of the same corporation is not a bill of exchange; for as both agents represent the same person, it lacks the essential element of two parties. *Id.*

7. MAKER OF PROMISSORY NOTE OR DRAWER OF BILL MAY LEGALLY MAKE IT PAYABLE TO ORDER OF HIMSELF. *Smalley* v. *Wight*, 112.

8. NEGOTIABILITY OF BILLS AND PROMISSORY NOTES PAYABLE TO ORDER OF ANY OTHER THAN FICTITIOUS PAYEE does not exist by the common law; but depends entirely upon the custom of merchants, which custom has directed that the assignment should be made by a writing on the bill, called an indorsement, appointing the contents of the bill to be paid to some third person. *Id.*

9. NOTES AND BILLS PAYABLE TO ORDER CANNOT BE NEGOTIATED IN FIRST INSTANCE EXCEPT BY INDORSEMENT of the payee or his legal representative, so as to enable the holder to maintain an action thereon in his own name. *Id.*

10. NOTE OR BILL PAYABLE TO ORDER OF MAKER IS INVALID AS CONTRACT UNTIL IT IS INDORSED BY HIM. Such paper will not pass the legal title in the first instance by a mere delivery. It is the indorsement alone which gives it efficacy. *Id.*

11. MAKER OF NOTE OR BILL PAYABLE TO HIS OWN ORDER MAY LIMIT ITS NEGOTIABILITY OR MAKE IT GENERAL, just as he chooses. *Id.*

12. WHERE PARTY NOT PAYEE SIGNS NOTE ON BACK, and the fact that such signature was made simultaneously with the signature of the maker, and before the note was delivered to the payee, is uncontroverted, the liability of the party as an original promisor results therefrom and exists in the absolute form indicated on the note itself, and is not to be controlled or varied by oral testimony of a liability as guarantor or any other conditional liability. *Wright* v. *Morse*, 291.

13. PERSON PLACING HIS NAME ON BACK OF NOTE SIMULTANEOUSLY with the signature by the maker, and before it is passed to the payee, is in the situation of an original promisor, and is liable in every respect to the payee of the note. Such party is deemed to participate in the original consideration, and to be liable without any new or further consideration. *Id.*

14. PERSON PLACING HIS NAME ON BACK OF NOTE MAY SHOW BY PAROL EVIDENCE that his signature was placed there after the note had passed to the payee, and thus establish the relation of guarantor, and its liabilities only. *Id.*

15. ONE WHO WRITES HIS NAME ON BACK OF PROMISSORY NOTE IS LIABLE AS ORIGINAL PROMISOR, where he is not otherwise a party to the note, and makes such signature the day after the date and execution of the note by other parties, but in pursuance of an agreement to do so at the time it was made. *Childs* v. *Wyman*, 111.

16. WHERE ONE, NOT PAYEE OF NOTE, SIGNED HIS NAME ON BACK, NO DATE BUT THAT OF NOTE APPEARING ANYWHERE, PRESUMPTION IS that

Digitized by Google

he signed it when the maker did, or agreed to sign it, and that he subsequently did so in pursuance of such agreement. *Id.*

17. WORDS "WITHOUT RECOURSE" ARE APPLICABLE TO INDORSER, AND NOT TO ORIGINAL PROMISOR. *Id.*

18. WORDS "WITHOUT RECOURSE" WRITTEN UNDER SIGNATURE OF ONE NOT PAYEE, UPON BACK OF NOTE, HAVE NO LEGAL EFFECT, and are mere surplusage; because such signature has the same effect to make the signer an original promisor as if he had signed it on the face with the maker. *Id.*

19. PROOF THAT PROMISSORY NOTE HAD ITS ORIGIN IN FRAUDULENT COMBINATION between the parties to it, for the purpose of defrauding the creditors of the plaintiff, is a good defense to an action on such note. *Hamilton* v. *Scull's Adm'r*, 460.

20. PRESENTMENT OF PROMISSORY NOTE AT PLACE OF DATE is sufficient, in the absence of proof that the holder at its maturity knew that the maker resided elsewhere. *Smith* v. *Philbrick*, 315.

21. PRESUMPTION IS THAT MAKER OF PROMISSORY NOTE RESIDES AT PLACE WHERE NOTE IS DATED, when no other place is designated as that of its negotiation and payment; but this presumption may be overcome by proof that the maker resides elsewhere and the holder was aware of his place of residence. *Sasscer* v. *Whitely*, 126.

22. DEMAND OF PAYMENT AND PROTEST OF PROMISSORY NOTE MUST BE MADE AT RESIDENCE OR PLACE OF BUSINESS OF MAKER, in order to charge an indorser; but where residence and place of business are unknown and cannot be learned by reasonable inquiry, demand and protest at the place at which the note is dated is sufficient. *Id.*

23. DEMAND OF PAYMENT OF NOTE PAYABLE AT PARTICULAR BANK, made at that bank after close of business hours, but to which the officers of the bank answer that the maker has no funds there, is sufficient to charge the indorser. *Shepherd* v. *Chamberlain*, 248.

24. CERTIFICATE OF PROTEST BY NOTARY IS SUFFICIENT EVIDENCE OF NOTICE OF DISHONOR to the indorser of a note, where it states that the notary exhibited the note at the promisors' place of business and demanded payment, and was answered by the person in charge that the promisors had left no funds there to pay it, and that the note remaining unpaid, he duly notified the indorsers by written notices sent them by mail at the request of the holder, the time limited and grace having expired. *Lewiston Falls Bank* v. *Leonard*, 49.

25. NOTICE TO INDORSER IS PRESUMED TO CONTAIN FACTS STATED IN CERTIFICATE of protest of the notary sending it, at least in substance. *Id.*

26. NOTICE OF DISHONOR OF NOTE SENT TO INDORSER'S FORMER RESIDENCE, where he has changed his residence, is nevertheless sufficient if he has held himself out to the public by his conduct as still residing at the former place, and has thereby led the holder to believe that such was the fact. *Id.*

See BANKS AND BANKING; DEBTOR AND CREDITOR, 4; INTEREST, 1–3.

NOTICE.

See BONA FIDE PURCHASERS; CORPORATIONS, 6; FRAUDULENT CONVEYANCES, 6; HIGHWAYS, 14; NEGOTIABLE INSTRUMENTS, 24–26.

Digitized by Google

NUISANCE.

1. ACTION MAY BE MAINTAINED AGAINST ONE FOR CONTINUING NUISANCE ERECTED BY ANOTHER, as well as for the original erection. *Pillsbury* v. *Moore*, 91.

2. PURCHASER OF PROPERTY ON WHICH NUISANCE IS ERECTED IS NOT LIABLE FOR ITS CONTINUANCE unless he has been requested to remove it. The conveyance does not transfer the grantor's liability to the grantee. *Id.*

3. PUBLIC NUISANCE MAY BE PREVENTED BY INJUNCTION AT SUIT OF PRIVATE PERSON if he would be specially injured by its creation, and for which the law would not afford an adequate remedy. *Hamilton* v. *Whitridge*, 184.

4. PARTY WHO ASSUMES THAT SOMETHING IS NUISANCE, AND UNDERTAKES TO ABATE IT AS SUCH, does so under the peril of being deemed a trespasser if he fail to establish the existence of the nuisance; or having established it, employs unnecessary force and unwarrantable means for its removal. Thus it is with a building which is being moved through a public highway. *Graves* v. *Shattuck*, 536.

5. ANY PERSON MAY ABATE COMMON NUISANCE; but he does so at the risk of being deemed a trespasser, unless the existence of the nuisance is established. *Id.*

6. DEFENSE OF PRIVATE PROPERTY MENACED BY MOVING BUILDING.—If an individual's private property is imperiled or endangered by a building that is being moved, he has the right to use whatever force is necessary to protect and defend that property from injury. But a mere prospect of future injury will not justify the destruction of the building, unless it be a common nuisance. And where there is time and opportunity for the interposition of an adequate legal remedy which may be effectual, the law will not justify the summary employment of force. *Id.*

7. DETERMINATION OF NUISANCE ON PUBLIC HIGHWAY.—The jury must determine from all the circumstances of each particular case whether any object permanently placed, temporarily left, or slowly moving in a public highway is or is not a nuisance. *Id.*

8. DETERMINATION OF NUISANCE ON PUBLIC HIGHWAY must, at common law, depend on the jury's finding of the fact whether or not the given object, under all the circumstances attending its occupation of the highway, unnecessarily obstructed the free passage of the public over and upon it. *Id.*

See HIGHWAYS, 15.

OFFICE AND OFFICERS.

1. LIABILITY FOR NEGLECT OF OFFICIAL DUTY BY OFFICER OF TOWN IS INDIVIDUAL, if at all, and not official. *Commissioners* v. *Martin*, 333.

2. SURETIES ON TAX COLLECTOR'S BOND ARE LIABLE FOR MONEYS THEIR PRINCIPAL OUGHT TO ACCOUNT FOR; but they should not suffer from a mistake of the treasurer in passing a credit to the wrong account. *Inhabitants of Orono* v. *Wedgwood*, 81.

3. SURETIES IN OFFICIAL BOND, CONDITIONED SIMPLY FOR FAITHFUL PERFORMANCE OF DUTY by the principal, are not precluded from contesting the grounds of the principal's liability by a judgment recovered against him in an action of which they had not notice. *Thomas* v. *Hubbell*, 619.

Digitized by Google

4. TAX COLLECTOR WHO HAS COLLECTED MONEY WITHOUT OBJECTION FROM TAX-PAYERS MUST ACCOUNT TO TOWN THEREFOR. *Inhabitants of Orono* v. *Wedgewood*, 81

PARDONS.

1. PARDONING POWER IS, BY CONSTITUTION OF MISSOURI, EXCLUSIVELY VESTED IN CHIEF EXECUTIVE officer of the state, and cannot be exercised by the legislature. *State* v. *Sloss*, 467.

2. ACT OF 1857, RELEASING FROM PROSECUTION ALL PERSONS IN STATE OF MISSOURI who were then indicted for the violation of the act to regulate dram-shops, committed before the fifteenth of December, 1856, upon payment by each of such persons of the costs in the case, and a fee of two dollars to the circuit attorney, is unconstitutional, being an attempted exercise of the pardoning power, and an interference with the judicial department of the government. *Id.*

PARENT AND CHILD.

FATHER IS NOT LIABLE FOR ASSAULT BY INFANT CHILD, even, it seems, when he knows the child to be of a vicious disposition. *Baker* v. *Haldeman*, 430.

PARTITION.

1. COPARCENERS HAD RIGHT TO PARTITION at common law; such right was given to joint tenants and tenants in common by statute. *Purvis* v. *Wilson*, 773.

2. WHEN IN PETITION FOR PARTITION, filed in a court of law, the defendant pleads sole seisin in himself, the court may proceed and try the issue thus arising. It is only when the petition is filed in a court of equity that the action of ejectment becomes necessary. *Id.*

PARTNERSHIP.

NEWSPAPER PARAGRAPH STATING THAT CERTAIN PERSON IS MEMBER OF CERTAIN PARTNERSHIP, but not purporting to be inserted by the partnership, is not admissible in evidence to charge such person as such partner, merely on proof that he was a subscriber to the paper at the time, and had made no public contradiction of the statement. *Potter* v. *Greene*, 290.

See DEEDS, 10; FRAUDULENT CONVEYANCES, 6.

PARTY-WALLS.

CONVEYANCES OF ADJOINING BUILDINGS HAVING PARTY-WALL TO DIFFERENT GRANTEES, the center line of the wall being made the boundary between them, give to each grantee a right to have his building supported by means of his neighbor's half of the wall. When either building becomes, by age and decay, so dilapidated that rebuilding becomes necessary, its owner may for that purpose, and on reasonable notice to the adjoining tenant, and using proper care and skill, take down and rebuild the party-wall, without incurring liability to the other tenant. *Partridge* v. *Gilbert*, 632.

Digitized by Google

PAWNS.

PAWNEE BY GIVING UP POSSESSION of the pawn, though for a special purpose, loses his lien, and cannot recover the pawn from an innocent purchaser of the pawnor. *Bodenhammer* v. *Newsom*, 775.

PENALTIES.

See DAMAGES, 1–4.

PERSONAL PROPERTY.

1. "MOVABLE PROPERTY" ATTENDS PERSON, AND IS THEREFORE CALLED "PERSONAL," as distinguished from fixed or real property. *McLean* v. *Hardin*, 740.
2. TURPENTINE IN BOXES CUT INTO TREES is personal property. *Branch & Thomas* v. *Morrison*, 770.

See REALTY.

PLEADING AND PRACTICE.

1. LAW OF FORUM DETERMINES WHO SHALL BE PARTIES TO ACTION. *Kirkland* v. *Lowe*, 355.
2. RULE THAT CERTAINTY TO COMMON INTENT MUST EXIST IN PLEADINGS applies as well in equity as at law, the reason of the rule in both instances being to inform the adverse party with sufficient precision of the charge made against him, and to enable the court to pronounce the proper judgment. *Farr* v. *Farr*, 406.
3. PLAINTIFF WILL BE ALLOWED TO AMEND HIS DECLARATION BY STRIKING OUT ITEMS OF ILLEGAL TRAFFIC, where he has brought an action for the value of a stock of goods sold, each article at an agreed price, but where the sale of some of the articles was prohibited by statute. *Boyd* v. *Eaton*, 83.
4. ALLEGATION OF SPECIAL INJURY IS SUFFICIENT TO MAINTAIN ACTION, if plaintiff shows that he has sustained a particular injury, different in its character from that which is common to all citizens, under the circumstances of the case. *Dwinel* v. *Veazie*, 94.
5. UNDER COMPLAINT SUBSTANTIALLY ALLEGING THAT PLAINTIFF WAS DEPRIVED OF USE OF HIS MEADOW by reason of the defendant causing water to overflow it, thereby rendering it spongy and impassable, it is competent for plaintiff to show that his muck-bed in the meadow, valuable for manure, was made inaccessible by the flowage, and that he was injured in consequence thereof; for if the single question is whether the railroad company so constructed its road as to injure the owner's meadow-land by flowage, the latter may show in what manner, and every manner, in which the flowing impaired the profits of the land. *Johnson* v. *Atlantic etc. R. R. Co.*, 560.
6. DEMURRER ADMITS ONLY FACTS WELL PLEADED; WHETHER INJURY IS REMOTE AND CONSEQUENTIAL is a conclusion of law upon the facts stated in the declaration. *Tinsman* v. *Belvidere R. R. Co.*, 565.
7. DECISION BY APPELLATE COURT UPON DEMURRER TO BILL IN EQUITY is not an adjudication upon the validity of a defense set up by plea which had not been decided by the lower court and was not considered in the appellate court. *Abbey* v. *Commercial Bank*, 401.

Digitized by Google

8. PLEA IN ABATEMENT FOR NON-JOINDER OF TENANTS IN COMMON OF DAM, without an averment that the dam was real estate, will be overruled on demurrer. *Southard* v. *Hill*, 85.

9. PLEA IN ABATEMENT OF WRIT MAY BE BOTH OF WRIT AND DECLARATION; and it must be so where it is intended to plead in abatement only to a part of the writ, and the cause of abatement arises only on some of the counts in the declaration. *Id.*

10. GREATEST ACCURACY AND PRECISION ARE REQUIRED IN FRAMING PLEAS IN ABATEMENT, as they delay the trial of the merits of the action. *Id.*

11. THERE IS SETTLED DISTINCTION BETWEEN MERE PERSONAL ACTIONS OF TORT and such as concern real property. *Id.*

12. PLAINTIFF IN ACTION EX DELICTO SHOULD NOT BE REQUIRED TO INCLUDE ALL TORT-FEASORS, because he may not know them, or be able to find proof against them; but where the gist of the action is that the defendants are proprietors of the land, and have neglected a duty incident to their title, it is otherwise. *Id.*

13. PAYMENT, COMPLETE OR PARTIAL, MUST BE PLEADED, BEING "NEW MATTER CONSTITUTING DEFENSE," under the New York code of procedure, sec. 149, and it cannot be shown (either in bar or mitigation of recovery) under a general denial. *McKyring* v. *Bull*, 696.

14. FILING AMENDED ANSWER THAT MEETS OBJECTIONS SET OUT IN DEMURRER TO ORIGINAL ANSWER is an admission that the demurrer was well taken, and it is not error to proceed to trial upon issues of fact without a decision upon the demurrer. *Shirley* v. *Fearne*, 375.

15. OBJECTION OF MULTIFARIOUSNESS MAY BE RAISED AT HEARING, but is usually done by demurrer; and when made at the hearing, its allowance is in the discretion of the court, and is never allowed where the real point in controversy can be determined as well as if there were as many suits as there are plaintiffs. *Hamilton* v. *Whitridge*, 184.

16. DIRECTION OF COURT UPON EFFECT OF TESTIMONY IN CAUSE MAY ALWAYS BE ASKED BY PARTY, without reserving objections as to its admissibility or effect at the time of its introduction. *Inloes* v. *American Exchange Bank*, 190.

17. FINDINGS OF FACT MUST BE LEFT TO JURY, except where the cause is tried upon admissions at the bar; and while the jury may discredit testimony, they cannot find contrary to the admissions of the parties. *Id.*

18. INSTRUCTION ASSUMING EXISTENCE OF FACT ADMITTED AT TRIAL IS NOT ERRONEOUS, where the admission is made for the benefit of a party, and is of a fact without the existence of which he could not, in any event, recover. *Id.*

19. PARTY MAY ASK INSTRUCTION AS TO APPLICABILITY AND EFFECT OF EVIDENCE when testimony is taken under a commission, and the parts that are admissible are so inseparably blended with those that are not that distinct objections cannot be made. *Pettigrew* v. *Barnum*, 212.

20. PRAYER, SUBJECT OF WHICH IS COVERED BY PREVIOUS INSTRUCTIONS, OUGHT NOT TO BE GRANTED, because such repetitions are calculated to embarrass and mislead the jury. *Id.*

21. JUDGMENT WILL NOT BE REVERSED FOR REFUSAL OF CORRECT PRAYER, if, by other instructions, the law has been given to the jury as favorably as the appellant could have desired. *Id.*

Digitized by Google

22. REFUSAL OF CORRECT ABSTRACT INSTRUCTIONS, applicable to no evidence in the case, is not error. *Jellison* v. *Goodwin*, 62.

23. INSTRUCTION IS PROPERLY REFUSED, THOUGH CORRECT AS ABSTRACT PROPOSITION, if it does not fully state the rule with reference to the facts of the case, and the jury have already been fully instructed. *Hunt* v. *Crane*, 387.

24. WHERE THERE IS NO EVIDENCE TO WARRANT JURY IN FINDING a material fact, the judge is not at liberty to leave it to them to determine whether or not such fact is proved; but he should direct them to find that it is not proved. *Story* v. *Brennan*, 629.

25. ERRONEOUS ADMISSION OF EVIDENCE WHICH PRODUCED NO EFFECT on the jury, as shown by their findings, affords no ground of complaint. *Lakeman* v. *Pollard*, 77.

26. REFUSAL OF INSTRUCTION IN ALTERNATIVE IS RIGHT, when one of the alternatives is erroneous, although the other may be correct. *Berry* v. *Griffin*, 123.

27. INSTRUCTION IS ERRONEOUS when the jury is instructed that if the creditor received a note "in settlement for or in payment of the account sued on," the debtor was entitled to a credit for the amount of the note, although the maker and first indorser became applicants for the benefit of the insovent laws and were finally discharged. *Id.*

28. NEW YORK ACT OF 1855, AUTHORIZING COURTS OF OYER AND TERMINER TO GRANT NEW TRIAL, ALTHOUGH NO EXCEPTION WAS TAKEN BELOW, does not require such court to reverse for every error which would be the subject of an exception, but only when satisfied that the verdict is against law or evidence, or that justice requires a new trial. *People* v. *McCann*, 642.

29. UNDER SAID ACT, in ordinary cases, the court cannot determine that such is the character of the verdict, unless the whole evidence is brought up. Yet if the charge is erroneous on a point of law fundamental to the defense, and the conviction appears to have been founded on that error, a reversal is proper, although the whole evidence is not before the court, and no exception was taken. *Id.*

30. COURT MAY ORDER PRODUCTION OF DEED UNDER WHICH PARTY TO SUIT CLAIMS TITLE, where, on examination, he admits that it is in his possession, and such deed may be put in evidence without calling the attesting witness. *McGregor* v. *Wait*, 305.

31. PARTY CANNOT COMPLAIN OF ERROR NOT PREJUDICIAL to him. *Baker* v. *Haldeman*, 430.

32. CAUSE WILL NOT BE REMANDED FOR FURTHER PROCEEDINGS unless the record shows that the ends of justice will be promoted thereby. *General Ins. Co.* v. *United States Ins. Co.*, 174.

See CO-TENANCY, 9; CRIMINAL LAW; DETINUE; EJECTMENT; INJUNCTIONS; TRESPASS; TROVER.

PLEDGE.

APPLICATION OF SURPLUS ARISING FROM SALE OF SECURITIES MAY BE MADE *pro rata* to all liabilities mentioned in a letter by the debtor to the pledgee, directing him to hold the stock as a general collateral security for all the pledgor's liability to the pledgee at present existing or which may hereafter be incurred by him. *Eichelberger* v. *Murdock*, 140.

Digitized by Google

PRESCRIPTION.

TITLE BY PRESCRIPTION, WHICH ALWAYS PRESUPPOSES GRANT, IS ACQUIRED BY UNQUESTIONED USER and enjoyment of the franchise of a town for twenty years without interruption and with the assent of the government. *Bow* v. *Allenstown*, 489.

PROCESS.

1. OFFICER CANNOT BREAK OUTER DOOR OF DWELLING-HOUSE in order to execute civil process. *Swain* v. *Mizner*, 244.

2. WHERE BUILDING IS LEASED IN DISTINCT PORTIONS to several tenants, all of whom have the right to use the outer door of the building and the hallways in common, the doors leading from the hallways into a tenement in the sole and exclusive possession of a tenant are to be regarded as outer doors which an officer has no right to break open in order to serve civil process. *Id.*

See ATTACHMENTS.

PUBLIC LANDS.

PATENT ISSUED TO FICTITIOUS GRANTEE IS NULLITY, and cannot form the basis of a valid title. *Thomas* v. *Wyatt*, 446.

RAILROADS.

1. RAILROAD CORPORATION HAS RIGHT TO CONSTRUCT ITS ROAD IN ANY SUITABLE AND PROPER MANNER for its own convenience and the public accommodation, and the right to vary and change that construction within the established limits of its road from time to time forever. *Johnson* v. *Atlantic etc. R. R. Co.*, 560.

2. RAILROAD CORPORATION HAS RIGHT TO CONSTRUCT ITS ROAD IN SUITABLE AND PROPER MANNER, whatever may be the injury to the residue of the lands of the same owner; but the mere purchase of the fee-simple does not authorize it to flow water upon lands above its road and on a stream, although its rights in this respect are more extensive than it would have as an owner against the parties whose lands have been taken for the road. *Id.*

3. IN ALL ORDINARY CASES, RAILROAD COMPANY IN BUILDING ITS ROAD HAS NO RIGHT TO OBSTRUCT NATURAL WATERCOURSE, and must construct a culvert or drain, with a proper grade, to carry off the water. *Id.*

4. IN CASES OF NECESSITY, RAILROAD COMPANY IN BUILDING ITS ROAD IN SUITABLE AND PROPER MANNER MAY WHOLLY OBSTRUCT NATURAL WATERCOURSE, and submerge lands of the owner other than those taken for the track, without being answerable for any damage resulting from that cause; for it will be regarded as having acquired the right to flow such lands. *Id.*

5. LAND-OWNER CAN MAINTAIN NO ACTION AGAINST RAILROAD COMPANY for any loss or injury which results from building its road in a suitable and proper manner. *Id.*

6. RAILROAD CORPORATION IS LIABLE FOR ALL DAMAGES RESULTING FROM IMPROPER and unsuitable construction of its road over the lands of another. *Id.*

Digitized by Google

7. RAILROAD COMPANY IS LIABLE FOR INJURIES OCCASIONED BY FAILURE TO ERECT AND MAINTAIN substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through inclosed and improved lands, if this is a duty imposed upon them by their charter. *Whitney* v. *Atlantic etc. R. R. Co.*, 103.

8. LEASE AND ASSIGNMENT OF RAILROAD BY ITS OWNERS DOES NOT RELIEVE COMPANY themselves from any liability for losses or injuries imposed upon them by their charter and the laws of the state. *Id.*

See COMMON CARRIERS, 7; HIGHWAYS, 2.

RAPE.

See CRIMINAL LAW, 26, 27.

REALTY.

DAM IS NOT NECESSARILY REAL ESTATE. If built by one person on the land of another, with the latter's consent, it would be personal estate. *Southard* v. *Hill*, 85.

RECEIVERS.

1. BILL IS INSUFFICIENT FOR INJUNCTION AND APPOINTMENT OF RECEIVER, if it alleges only that the defendant is indebted to the complainants, and that he is disposing of his property, collecting money due him, and secreting the same, with intent to defraud the complainants, and that they are informed and believe that he intends to abscond and defraud his creditors; it does not show that the complainants have any lien as judgment creditors or otherwise upon the defendant's property. *Uhl* v. *Dillon*, 172.

2. RECEIVER MAY BE APPOINTED AND INJUNCTION GRANTED AT SUIT OF JUDGMENT CREDITOR to restrain the debtor from selling his goods, notwithstanding a prior mortgage thereon, not yet due, to another person. *Rose* v. *Bevan*, 170.

3. BILL IS SUFFICIENT FOR INJUNCTION AND APPOINTMENT OF RECEIVER if it alleges that executions upon valid judgments have been levied upon goods in a store; that a sale thereof to satisfy the judgments is sought to be prevented by the holder of a prior mortgage thereon; that the property is more than sufficient to satisfy the mortgage, and the debtor has no other property; that since the execution of the mortgage the goods remaining in the possession of the mortgagor, some of them had been sold and other goods substituted in their place, and that if the debtor is allowed to retain the possession of the goods he would so dispose of them that the complainants' claims would be wholly lost. *Id.*

4. MORTGAGEE, BEFORE HAVING RIGHT TO FORECLOSE, MAY HAVE RECEIVER APPOINTED in a case of danger of loss of the goods mortgaged. *Id.*

RECOGNIZANCE.

See SURETYSHIP, 6–10.

RECOUPMENT.

See DAMAGES, 10.

Digitized by Google

REFEREES.

ORDER RATIFYING AUDITOR'S ACCOUNT WILL NOT BE REVERSED in a foreclosure case because of a failure to marshal securities, when the account was submitted by agreement, with a reservation of the right to except, and no exception was filed on that ground. *General Ins. Co.* v. *United States Ins. Co.*, 174.

REGISTRATION.

1. PURCHASER AT SHERIFF'S SALE IS PURCHASER within the meaning of the Missouri recording acts. *Draper* v. *Bryson*, 483.

2. MORTGAGES OF EQUITABLE INTERESTS IN LAND ARE WITHIN MARYLAND REGISTRY LAWS; these laws, being designed to avoid abuses and deceits by mortgages and pretended titles, and for the protection of creditors and purchasers, should be construed to effect that end. *General Ins. Co.* v. *United States Ins. Co.*, 174.

3. ACTUAL KNOWLEDGE OF EXISTENCE OF PRIOR UNRECORDED INSTRUMENT AFFECTING TITLE TO LAND MUST BE SHOWN, or at least knowledge of circumstances sufficient to put a party upon inquiry, in order to give such unrecorded instrument priority over a subsequent recorded deed, and the case must be so clear that the allowance of the recorded claim would be a fraud upon the party setting up the unrecorded instrument. *Id.*

4. PURCHASER AT SHERIFF'S SALE WHO TOOK WITH NOTICE OF PRIOR UNRECORDED DEED is postponed to the prior purchaser, under the Missouri act of 1817. *Draper* v. *Bryson*, 483.

See BONA FIDE PURCHASERS.

REMAINDERS.

REMAINDERMAN IS NOT ESTOPPED BY SILENCE OF TENANT FOR LIFE, when remarks are made in his presence in disparagement of his title. *McGregor* v. *Wait*, 305.

See WASTE.

REVERSIONS.

See WASTE.

RIPARIAN RIGHTS.

1. RIPARIAN PROPRIETORS HAVE RIGHT TO FLOW OF WATER in its natural current, without any obstructions injurious to them. *Pillsbury* v. *Moore*, 91.

2. RIGHT TO USE OF WATER IS ACQUIRED IN PARTICULAR MANNER BY UNINTERRUPTED ADVERSE ENJOYMENT of such use for over twenty years. *Id.*

3. ADVERSE ENJOYMENT BY ANOTHER IS WHAT DESTROYS OWNER'S RIGHT TO USE OF WATER. *Id.*

4. OWNER'S NON-USER OF HIS RIGHT TO USE OF WATER DOES NOT IMPAIR HIS TITLE or confer any right thereto upon another. *Id.*

5. ABANDONMENT OF MILL PRIVILEGE OR RIGHT OF WAY IS NOT CREATED BY MERE NON-USER for less than twenty years; nor will the sale of a mill privilege for its value, or an offer to sell, be regarded as an abandonment. *Id.*

Digitized by Google

6. ONE TENANT IN COMMON MAY MAINTAIN ACTION AGAINST HIS CO-TENANT for diverting the water from their common mill for separate purposes. *Id.*

7. EVERY MILL-OWNER HAS RIGHT TO USE OF WATER ABOVE AND BELOW HIS MILL, to float logs to it, to float rafts and lumber to market, and to float away waste stuff from his mill, etc., so far as such use is reasonable and conformable to the usages and wants of the community. *Dwinel* v. *Veazie*, 94.

8. OWNER OF MILL PRIVILEGE HAS NO RIGHT TO RAISE HEAD OF WATER SO HIGH AS TO INJURE the operations of an older mill above his mill site or dam, or to obstruct the public use of the stream as one navigable for boats, rafts, or lumber. *Id.*

9. IF MILL-OWNER BELOW OBSTRUCTS FLOW OF WATERS OF STREAM OVER THEIR ACCUSTOMED BED, thereby destroying their former use by the owner of an older mill above for the purposes of boating or floating rafts or logs, and turns the water into a new channel, the latter has a right to use the water in its new channel; and if that becomes obstructed, he has the right to effect a suitable passage-way over the former channel, but to cause no unnecessary damage in doing so. *Id.*

ROBBERY.

See CRIMINAL LAW, 34, 35.

SALES.

1. SALE WITHOUT DELIVERY IS VALID AGAINST VENDOR. *Webber* v. *Davis*, 87.

2. TITLE PASSES BY SALE WITHOUT DELIVERY FROM TRUE OWNER, though at the time of the sale the goods are in the tortious possession of a third person. *Id.*

3. SALE.—DELIVERY OF ARTICLE AT FIXED PRICE, UNDER ALTERNATIVE AGREEMENT that the article is to be paid for or returned at the option of the party receiving it, constitutes a sale. *Crocker* v. *Gullifer*, 118.

4. CONDITIONAL SALE.—WHERE PROPERTY IS SOLD AND DELIVERED BY ONE TO ANOTHER, and the vendee admits the title to be in the vendor, and to remain there until such property is fully paid for, the transaction amounts to a conditional sale. *Id.*

5. VENDOR'S RIGHT TO PROPERTY SOLD UNDER CONDITIONAL SALE.—The vendor, if guilty of no laches, may reclaim the property even from a vendee in good faith and without notice. *Id.*

6. CHATTEL SOLD UNDER CONDITIONAL SALE IS IN CONSTRUCTIVE POSSESSION OF SELLER, and an action may be maintained without a demand in case of a conversion by the purchaser. *Id.*

7. EXPRESS WARRANTY IN SALE OF CHATTELS MAY BE MADE WITHOUT USING WORD "WARRANT," or any precise form of expression, by any clear and distinct affirmation of a fact as to the essential qualities of the article, made as an inducement to the sale, and upon faith of which the vendee purchases. *Randall* v. *Thornton*, 56.

8. AFFIRMATIONS OF QUANTITY AND QUALITY PENDING SALE ARE WARRANTIES if they are made with a view to bring about a sale, and have that effect; but they must constitute an essential inducement to the purchase. *Id.*

Digitized by Google

9. WARRANTY IS NOT CREATED BY DESCRIPTIVE WORDS IN BILL OF SALE OF VESSEL, contained in a carpenter's certificate incorporated therein, respecting the capacity of the vessel. *Id.*

10. CONTRACT IS NOT ENTIRE AND INDIVISIBLE, WHERE ENTIRE STOCK OF GOODS IS SOLD at one and the same time, if each article was sold for a separate and distinct price agreed upon; and though the sale of some of the articles was prohibited by law, this illegality will not render the sale of the other articles illegal also, but an action can be maintained for the price of the latter. *Boyd* v. *Eaton*, 83.

SECURITIES.

1. SECURITY OF HIGHER NATURE EXTINGUISHES INFERIOR SECURITIES, as a general rule, but a higher security taken expressly as a second collateral security for the same debt, and upon the same property, will not extinguish the inferior security. *Ladd* v. *Wiggin*, 551.

2. SUBSEQUENT SECURITY FOR DEBT OF EQUAL DEGREE WITH FORMER SECURITY for the same debt will not, by operation of law, extinguish the former security. Such securities are distinct and independent, although both are liens upon property. To make the second security an extinguishment or discharge of the first, there must be an express release, or at least an implied release from a covenant not to sue. *Id.*

SLANDER.

1. DISTINCTION BETWEEN ACTUAL MALICE AND LEGAL MALICE IN SLANDER IS, that the former implies a desire and intention to injure, while the latter is not necessarily inconsistent with an honest or even laudable purpose. *Jellison* v. *Goodwin*, 62.

2. LEGAL MALICE IN SLANDER IS PRESUMPTION OF LAW, BUT ACTUAL MALICE a question of fact for the jury. *Id.*

3. LEGAL MALICE ALONE IS SUFFICIENT, IN SLANDER, to support the action. *Id.*

4. LEGAL MALICE IS IMPLIED FROM SPEAKING ACTIONABLE WORDS which are not privileged, and no further proof of malice is necessary. *Id.*

5. EVIDENCE OF ACTUAL MALICE IN SLANDER IS ADMISSIBLE TO ENHANCE DAMAGES, and disproof of it goes only in mitigation. *Id.*

6. PROOF THAT WORDS WERE PRIVILEGED COMMUNICATIONS REPELS LEGAL MALICE, and is a complete justification, in an action for slander. *Id.*

7. QUESTION AS TO PRIVILEGED COMMUNICATIONS RELATES ONLY TO LEGAL MALICE, as contradistinguished from actual malice, in slander. *Id.*

8. LEGAL MALICE, BEING QUESTION OF LAW, IS FOR COURT, and not for the jury, upon the evidence, in an action for slander. *Id.*

9. QUESTION AS TO WHAT IS PRIVILEGED COMMUNICATION IS FOR COURT TO DETERMINE, in an action for slander. *Id.*

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE WILL NOT BE DECREED OF CONTRACT NOT FAIR, JUST, CERTAIN, REASONABLE, AND MUTUALLY BINDING on each of the parties to it, and when it appears doubtful whether the party meant to contract to the extent to which he is sought to be charged; and the payment of the consideration does not change the rule. *Rider* v. *Gray*, 135.

Digitized by Google

2. PRELIMINARY AGREEMENT CANNOT BE ENFORCED IN EQUITY if it contains no words designed to make it mutually binding upon the respective parties. *Id.*

See EQUITY, 15, 16.

STATUTE OF FRAUDS.

1. MEMORANDUM SIGNED BY AUCTIONEER AT TIME OF SALE, stating the terms of sale and the parties thereto, is sufficient, within the statute of frauds, to validate a sale of realty, the auctioneer being deemed the agent of both parties. *O'Donnell* v. *Leeman*, 54.
2. MEMORANDUM BY AUCTIONEER MUST SHOW MATERIAL CONDITIONS OF CONTRACT, either by itself or by reference to some other paper, upon a sale of realty, or no action will lie thereon, either at law or in equity. *Id.*
3. MEMORANDUM OF AUCTIONEER NOT SHOWING TERMS OF PAYMENT upon an auction sale, except by stating "one third cash down," is not sufficient within the statute of frauds. *Id.*
4. EVIDENCE OF HANDBILLS AND NEWSPAPER NOTICES OF SALE TO AID MEMORANDUM, where it fails to state the terms of payment, is inadmissible. *Id.*
5. CONTRACT TO SELL "GROWING TREES" is within the statute of frauds, being a contract to sell "land, or some interest therein or concerning the same," and is binding on the vendor if signed by him; it is not necessary that it should also be signed by the vendee. *Mizell* v. *Burnett*, 744.
6. LETTER IS SUFFICIENT EVIDENCE OF WRITING, or memorandum, of a contract to bind a vendor, and subject him to an action for a breach, if there is no other difficulty in the way of the vendee. *Id.*

See AUCTIONS.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS WILL BAR SUIT FOR WAGES FOR SERVICES RENDERED THROUGH SERIES OF YEARS without any express agreement as to time of payment, upon a presumption that the hiring was from year to year, and the wages became due yearly; rather than that no right of action accrued until the end of the service. *Davis* v. *Gorton*, 694.
2. LIEN OF JUDGMENT OF FEDERAL COURT HELD WITHIN STATE is subject to the statute of limitations of that state. *Abbey* v. *Commercial Bank*, 401.

See ADVERSE POSSESSION.

STATUTES.

1. STATUTES IN DEROGATION OF COMMON-LAW RIGHTS are to be strictly construed, and it will not be inferred that the legislature intended to alter common-law principles further than is clearly expressed or the case absolutely requires. *Tinsman* v. *Belvidere etc. R. R. Co.*, 565.
2. STATUTES SHOULD BE CONSTRUED WITH VIEW TO ORIGINAL INTENT AND MEANING OF MAKERS; and the intention may be collected from the cause or necessity of making the act, or from foreign circumstances. *Car Spring Co.* v. *R. R. Co.*, 131.
3. UNCONSTITUTIONAL PROVISION OF STATUTE DOES NOT INVALIDATE OTHER PROVISIONS THEREOF which are distinct and independent of it. *Brown* v. *Beatty*, 389.

Digitized by Google

4. PROVISIONS OF GENERAL NATURE IN LOCAL STATUTE NOT INDICATED IN TITLE are valid notwithstanding a constitutional requirement that every local bill shall embrace but one subject, which shall be expressed in the title; as, in case of provisions relating to courts throughout the state contained in a statute entitled "An act to enlarge the jurisdiction of the courts" of a particular locality. *People* v. *McCann*, 642.

5. CHARACTER OF EVERY STATUTE IS DETERMINED BY PROVISIONS, AND NOT BY TITLE, for the purpose of ascertaining whether it is general or local. *Id.*

6. PENAL LAWS ARE NOT TO BE SO CONSTRUED AS TO DEFEAT OBVIOUS INTENTION OF LEGISLATURE, and though they are not to be extended, they should receive a rational construction. *Keller* v. *State*, 226.

7. MARYLAND LICENSE LAWS OF 1856 AND OF 1827, AND THOSE SUPPLEMENTARY TO LATTER, ARE TO BE CONSIDERED *in pari materia;* and the absence of a penalty in the later act leaves those failing to take out a license under it amenable to the penalties of the earlier act, the later act being passed with the design of subjecting the vendors of lager-beer to the same restraints as those selling other liquors. *Id.*

8. TITLE OF MARYLAND ACT OF 1856, CHAPTER 353, REQUIRING LICENSES OF VENDORS OF LAGER-BEER MANUFACTURED BY THEMSELVES IS SUFFICIENTLY DESCRIPTIVE OF ITS SUBJECT-MATTER, within the constitutional provision, which requires that "every law enacted by the legislature shall embrace but one subject, and that shall be described in the title," the title being "an act to raise additional revenue to pay the debts of the state, by increasing the rates of license to ordinary keepers and traders." *Id.*

See CONSTITUTIONAL LAW.

STREETS.

See HIGHWAYS.

SURETYSHIP.

1. JOINT PROMISOR ON NOTE KNOWN TO CREDITOR TO BE SURETY is entitled to all the benefits appertaining to that character. *Springer* v. *Toothaker*, 66.

2. WHERE SURETY IS SUED ALONE, WHATEVER WOULD DISCHARGE HIM in equity is a good defense at law. *Id.*

3. CREDITOR HAVING SECURITY FROM PRINCIPAL MUST HOLD IT FOR SURETY as well as for himself, in equity, and if he parts with it without the knowledge or consent of the surety, the latter is released to the amount of the property surrendered. *Id.*

4. SURETY IS RELEASED BY CREDITOR'S SURRENDERING ATTACHED PROPERTY OF PRINCIPAL to the amount of the property so surrendered, where it is done without his consent and after the creditor's lien has become absolute by the recovery of judgment. *Id.*

5. SURETY IS NOT DISCHARGED BY CREDITOR'S DISCONTINUING PROCEEDINGS AGAINST PRINCIPAL where there is no abandonment of any absolute lien or security. *Id.*

6. SURETIES ON RECOGNIZANCE ARE BOUND SEPARATELY FROM THEIR PRINCIPAL, a recognizance being simply a common-law obligation. *People* v. *Dennis*, 338.

Digitized by Google

7. OMISSION OF NAME OF PRINCIPAL IN DECLARATION ON RECOGNIZANCE CANNOT BE AVAILED OF ON MOTION IN ARREST OF JUDGMENT, as such motion is based solely on defects apparent on the face of the record; but non-joinder of a co-contractor can only be taken advantage of when the record does not show it by plea in abatement. *Id.*

8. RECOGNIZANCE TO ANSWER INDICTMENT FOR LARCENY, WITHOUT DESCRIBING WHAT LARCENY, IS SUFFICIENTLY DESCRIPTIVE OF OFFENSE; the naming of an offense, which belongs to a class which has a definite and well-understood general name, by such general name is sanctioned by long and uniform usage. *Id.*

9. FAILURE TO RECITE SPECIAL CIRCUMSTANCES UNDER WHICH RECOGNIZANCE IS TAKEN DOES NOT INVALIDATE IT if the officer had authority in cases of that general description to take it; and it is not necessary in declaring upon a recognizance to aver the existence of the particular facts showing that the officer had authority to take it. *Id.*

10. DESTRUCTION OF INDICTMENT BEFORE TERM AT WHICH PERSON IS RECOGNIZED TO APPEAR IS NO DEFENSE TO ACTION ON RECOGNIZANCE, the condition of which is that the person shall appear at a day certain and abide the order of the court; for until discharged by order of the court, he must appear to any other indictment that may be found against him for the offense. *Id.*

See OFFICE AND OFFICERS, 2, 3.

TAXATION.

1. MANUFACTURED DOMESTIC ARTICLE IS SUBJECT TO TAXATION AND LICENSE LAWS ON SAME FOOTING WITH IMPORTED ARTICLES; and while the state may not prevent the manufacture of a deleterious article, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem advisable or necessary to guard the health or morals of its citizens. *Keller* v. *State*, 226.

2. CITY CHARTER PROVIDING THAT WHEN CITY TAKES PRIVATE PROPERTY FOR STREET the city shall pay to the owner the value of the improvement to the public generally, and that the remainder of the value of the property taken shall be assessed against the property fronting on such street and in the blocks next adjacent, on either side thereof, "according to the value of the property so assessed, and in the proportion that the owners thereof may be respectively benefited by the improvements," is constitutional. And the assessment upon the lot-owners fronting on the street is a legitimate and constitutional exercise of the taxing power. *Garrett* v. *City of St. Louis*, 475.

See ADVERSE POSSESSION, 2.

TIME.

See ELECTION.

TORTS.

See ACCOUNT; CORPORATIONS, 5; LANDLORD AND TENANT, 3.

TRESPASS.

1. TRESPASS QUARE CLAUSUM FREGIT MAY BE MAINTAINED ON NAKED POSSESSION against a wrong-doer, but not against a party who had the title and right of entry. *Fuhr* v. *Dean*, 484.

Digitized by Google

2. TRESPASS IS NOT LESS WRONG THAT IT IS DONE BY ACCIDENT, or without design, or even against the will of the actor. *Norris* v. *Litchfield*, 546.

6. TRESPASS OR WRONG DONE BY ACCIDENT, WITHOUT DESIGN, OR AGAINST ACTOR'S WILL, IS NOT FAULT, in the sense of that word as used in connection with actions for negligence. It is a misfortune, and not a fault. *Id.*

4. INJURY IS IMMEDIATE, AND THEREFORE TRESPASS, ONLY WHEN IT IS DIRECTLY OCCASIONED by, and is not merely a consequence resulting from, the act complained of. *Holly* v. *Boston Gaslight Co.*, 233.

5. TRESPASS CANNOT BE MAINTAINED FOR ACT DONE UNDER AUTHORITY OF CONSTITUTIONAL STATUTE. *Brown* v. *Beatty*, 389.

6. HUSBAND IS NOT LIABLE AS TRESPASSER FOR REMOVING GRAVE-STONE, placed there by his wife's mother, from the grave of his wife, whom he has buried in a public burying-ground, where he does not injure the stone, and holds it in possession ready to be delivered to the owner on demand, and causes the removal for the purpose of substituting another stone. *Durell* v. *Hayward*, 284.

7. ENTRY BY OWNER OF LAND AND ERECTION OF BUILDING, against objection of tenant at sufferance in possession, does not constitute an indictable trespass at common law. *State* v. *Ross*, 751.

8. INDICTABLE TRESPASS IS THAT COMMITTED MANU FORTI, in a manner amounting to a breach of the peace, or which would necessarily lead to a breach of the peace, if the party in possession were not overawed by the force displayed, and induced to surrender possession because resistance would be useless. *Id.*

9. WHETHER ONE HAVING RIGHT OF ENTRY may use force if necessary to exert his right is an unsettled question, according to common law; but the authorities may be reconciled on this distinction. One having a right of entry may use force, provided it does not amount to a breach of the peace; but one not having such right is guilty of indictable trespass if he enter with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace. *Id.*

See ANIMALS, 11, 20; CO-TENANCY, 9; DAMAGES, 8; EQUITY, 3–7; LANDLORD AND TENANT, 5; LICENSE; NEGLIGENCE, 3.

TROVER.

1. THERE WILL BE CONVERSION OF PROPERTY WITHOUT MANUAL TAKING OR REMOVAL, where one interferes with it, and without the owner's consent assumes to dispose of it as having title in his own name. *Webber* v. *Davis*, 87.

2. NO DEMAND IS NECESSARY BEFORE COMMENCING SUIT IN TROVER, where there has been an actual conversion, and it can be proved. *Id.*

3. DEMAND AND REFUSAL ARE ONLY EVIDENCE OF CONVERSION. *Id.*

4. TROVER FOUNDED ON POSSESSION can only be defeated when the true owner is known; a mere possibility that such owner will afterwards be discovered will not defeat such action. *Branch & Thomas* v. *Morrison*, 770.

5. PLAINTIFF IN TROVER CLAIMING TITLE UNDER DEED OF JOINT OWNERS must show its due execution by all the grantors; it is inadmissible to show a transfer of the interest of one owner, unless it is offered for this purpose alone. *Shirley* v. *Fearne*, 375.

Digitized by Google

6. RECORD OF PROCEEDINGS TO TRY RIGHT TO PERSONAL PROPERTY LEVIED ON, in which the title is adjudged against the claimant, is conclusive against him in an action of trover by him for the property against the purchaser under the execution. *Id.*

7. JUDGMENT AND DISTRINGAS AGAINST CLAIMANT IN PROCEEDING TO TRY TITLE TO PERSONAL PROPERTY LEVIED ON may be introduced by the purchaser under the *distringas* in an action brought by the claimant against him for the property, even though he acquired no title by his purchase, for it is competent for him to show that the plaintiff has no title, and is therefore not entitled to recover. *Id.*

See ANIMALS, 11, 14; BAILMENTS, 1; CO-TENANCY, 9; FACTORS; LANDLORD AND TENANT, 1.

TRUSTS AND TRUSTEES.

1. TRUST RESULTS TO FRAUDULENT DEBTOR FOR CREDITORS ON PURCHASE OF LAND IN ANOTHER'S NAME by such debtor to defraud his creditors, and the debtor's interest is subject to sale on execution, and the execution purchaser may in equity compel the holder of the legal title to convey to him, to surrender possession, and to account for the rents and profits. *Dunnica* v. *Coy*, 420.

2. PURCHASER ON EXECUTION AGAINST FRAUDULENT DEBTOR MUST HAVE SHERIFF'S DEED to land purchased by such debtor in another's name to defraud his creditors before he can maintain a suit to compel the holder of the legal title to convey to him. *Id.*

3. TITLE HELD BY DEFENDANT AS TRUSTEE MAY BE TRANSFERRED by sale under an execution against him. *Giles* v. *Palmer*, 756.

4. TRUSTEE WHO SETS UP CLAIM FOR CESTUIS QUE TRUST, in proceeding to try right to personal property levied on, is presumed to have been properly appointed, in the absence of a showing to the contrary. *Shirley* v. *Fearne*, 375.

5. ACTION CANNOT BE MAINTAINED FOR INJURIES resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution, within the scope of their authority. *Tinsman* v. *Belvidere etc. R. R. Co.*, 565.

See ACCOUNT; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

UNINCORPORATED SOCIETIES.

1. CONSTITUTION AND BY-LAWS OF VOLUNTARY CHARITABLE ASSOCIATION, such as an Odd-Fellows' lodge, are of no legal validity and effect except as contracts, and are binding only on members who are shown to have personally assented to them. *Austin* v. *Searing*, 665.

2. CONSTITUTION OF GRAND LODGE OF ODD-FELLOWS is not binding on the members of an unincorporated subordinate lodge who are not shown to have subscribed it, unless it is adopted by the constitution of the subordinate lodge which such members have subscribed. *Id.*

3. PROVISION FOR FORFEITURE OF PROPERTY OF SUBORDINATE LODGE in the constitution of an Odd-Fellows' grand lodge for misconduct, on the adjudication of the grand lodge, is not binding upon members of an unincorporated subordinate lodge, even though they have assented to it, such provision being against public policy; and an adjudication of forfeiture under such provision will not be enforced by the courts. *Id.*

Digitized by Google

4. WHETHER VOLUNTARY CHARITABLE ASSOCIATION CAN SUE or be sued in the name of its president or treasurer, under the New York statutes of 1849 and 1851, *quære*. *Id.*

5. POWERS OF UNINCORPORATED PLACES UNDER CONSTITUTION AND LAWS OF NEW HAMPSHIRE POINTED OUT, and the gradual approximation of the condition and powers of such places to those of towns shown. *Bow* v. *Allenstown*, 489.

USAGES.

IN ACTION ON AGREEMENT TO BUILD OCTAGONAL CELLAR WALL at an agreed price per foot, evidence is admissible of the usage of measuring the angles of such walls, and of the proper mode of measuring the angles of rectangular walls. *Ford* v. *Tirrell*, 401.

USURY.

1. USURY IS PERSONAL DEFENSE; AND WHEN SET UP AGAINST SUBSEQUENT PURCHASER, only the amount of illegal interest is to be deducted from the conditional judgment for the amount due on a mortgage. *Ladd* v. *Wiggin*, 551.

2. AGREEMENT TO PAY INTEREST FROM DATE OF NOTE, IF NOTE IS NOT PUNCTUALLY PAID AT MATURITY, is not usurious, and may be enforced. *Rogers* v. *Sample*, 349.

VENDOR AND VENDEE.

1. WHERE ONE OF TWO PARTIES TO AGREEMENT FOR EXCHANGE OF LANDS EXECUTES HIS CONVEYANCE, and the other then refuses, but afterwards executes his conveyance also, which is accepted, such acceptance is a bar to an action by the first grantor for the rent of the land granted by him between the dates of the two conveyances. *Warner* v. *Bacon*, 253.

2. WHERE PARTY TO AGREEMENT TO CONVEY REAL ESTATE HAS BROUGHT ONE ACTION for damages for the breach of the agreement, he may, in a subsequent action on the same agreement brought after a conveyance has been made and accepted, recover the legal damages sustained by him between the time when the former action was commenced and the time when the conveyance was made to him, by reason of his not having, during that interval, a full title to the estate; and he may also, in such action, recover the amount of the rent which was accruing during that time, and which the defendant received. But in such action evidence that the defendant was induced to make the agreement by the false and fraudulent representations of the plaintiff cannot be admitted either by way of bar, set-off, or recoupment. *Id.*

3. MEASURE OF DAMAGES, IN ACTION BY VENDEE FOR BREACH OF CONTRACT TO CONVEY, is the amount of the purchase money and interest, where no special damage has resulted. *Herndon* v. *Harrisson*, 399.

4. VENDEE SUING FOR DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND can recover nothing where the vendor, before suit, offered to return the notes given for the purchase price, and brings them into court and tenders them to the plaintiff. *Id.*

5. ADMINISTRATOR OF DECEASED VENDOR IS PROPER PERSON FOR VENDEE TO TENDER PURCHASE MONEY TO and demand deed from, and not the heirs, *semble*. *Id.*

6. PRESUMPTION DOES NOT ARISE FROM PURCHASE of a particular estate in land by a remainderman or reversioner that an adjustment of a claim

Digitized by Google

which the vendee has against the vendor is embraced in such purchase. *Dupree* v. *Dupree*, 757.

7. DELAY OF TWENTY DAYS IS UNREASONABLE, and the vendor is not bound, where he agrees to convey timber to the vendee if the latter shall make and deliver notes in payment within a week, or within that time set a day for the consummation of the contract. *Misell* v. *Burnett*, 744.

See DAMAGES, 5–7.

VERDICT.

See EVIDENCE, 3, 4.

WAGERS.

NEW YORK STATUTE TO PREVENT BETTING AND GAMING gives the party to a wager an unconditional right to recover his stake from the stake-holder. The fact that the stake-holder, after the determination of the wager, paid the stakes to the winner by direction or consent of the loser, is no defense to an action afterwards brought by the latter, under the statute. *Story* v. *Brennan*, 629.

See CRIMINAL LAW, 11, 12.

WARRANTY.

See SALES, 7–9.

WASTE.

ACTION MAY BE MAINTAINED BY REMAINDERMAN or reversioner after the purchase by him of a particular estate, for waste committed before. *Dupree* v. *Dupree*, 757.

WATERCOURSES.

See RAILROADS, 3, 4.

WAYS.

1. OWNER OF RIGHT OF WAY OVER PASSAGE-WAY MAY DISTURB SOIL and pave or repair the way for the purpose of keeping it fit for use, provided in so doing he make no material change in the condition of the way nor interfere with the estates of others therein. *Brown* v. *Stone*, 303.

2. ADMISSIONS MADE BY WIFE WITHOUT KNOWLEDGE OF HER HUSBAND are not competent evidence of a way by prescription over land owned by them in her right. *McGregor* v. *Wait*, 305.

3. ADMISSIONS OF RIGHT OF WAY OVER LAND OF PARENTS, BY SON who resides with his parents and manages their estate, are not competent against the parents without proof of the extent of the son's agency. *Id.*

See HIGHWAYS; RIPARIAN RIGHTS, 5.

WILLS.

1. WHERE DEATH OF LEGATEE IS SPOKEN OF AS UNCERTAIN EVENT, whether in case of survivorship or in that of a bequest to one person with a limitation over, it can be so only in reference to some other event, and the death of the testator must of necessity be assumed as the event referred to, when no other is mentioned in the will. *Vass* v. *Freeman*, 734.

2. WHERE PROPERTY IS BEQUEATHED TO TWO OR MORE PERSONS IMMEDIATELY AS TENANTS IN COMMON, with a remainder over to the survivors, the survivorship will, unless the contrary appear, relate to the time of the testator's death, and those surviving him will take absolutely.

Digitized by Google

Aliter, if it appear that the testator referred to a survivorship among the legatees. *Id.*

3. SPECIAL CIRCUMSTANCES WILL PREVENT APPLICATION OF GENERAL RULE, which, in immediate bequests, refers the contingent terms in which the death of the legatee is spoken of to the event of the testator's death; particularly when such special circumstances are attended by words indicating that the testator referred to a survivorship to take place between legatees after his death. *Id.*

4. APPLICATION OF RULE SHOWING THAT SPECIAL CIRCUMSTANCES AND EXPRESS WORDS IN WILL REFER TO SURVIVORSHIP BETWEEN LEGATEES AFTER TESTATOR'S DEATH.—Where the testator gave a joint estate for life to his mother and sister with an absolute estate to the survivor, expressed a belief that he would soon die, that these two objects of his bounty would survive him, appointed them his executrixes, gave them minute instructions as to the management of the estate and selection of agents, advised as to their place of residence, and cautioned them against imposition, it was held that the testator meant to give the property to the survivor of the two who should become so by the death of one of them after his death. *Id.*

5. LEGATEES MAY STILL HOLD BY JOINT TENANCY IN NORTH CAROLINA, though the incident of survivorship was abolished by the act of 1784: See 1 R. S., c. 43, sec. 2; Rev. Code, c. 43, sec. 2. *Id.*

6. CONDITION IN HUSBAND'S WILL RESTRAINING WIDOW'S MARRIAGE by providing that if she marry again a devise or bequest to her shall be void, and that the property shall go over, is valid in Missouri, without regard to the question whether the property is real or personal, or whether there are children of the marriage, or whether the wife is otherwise provided for in the event of marriage. *Dumey* v. *Schœffler*, 422.

See EXECUTORS AND ADMINISTRATORS.

WITNESSES.

1. INTERESTED PARTY MAY TESTIFY IN HIS OWN BEHALF WHEN NO OTHER EVIDENCE IS REASONABLY TO BE EXPECTED; and when a guest sues an innkeeper to recover the value of articles stolen from his trunk, its contents may be proved, in the absence of other proof, by the testimony of the guest, as, from the necessity of the case and nature of the subject, no proof can otherwise be expected. *Pettigrew* v. *Barnum*, 212.

2. ACCOMPLICE BECOMING WITNESS FOR PEOPLE IS NOT ALLOWED BENEFIT OF PRIVILEGED COMMUNICATIONS, for in entering the witness-box to escape punishment himself, he contracts to give a full and complete statement of all that he and his associates may have done or said relative to the crime charged, no matter where or when done or to whom said. *Alderman* v. *People*, 321.

3. EXCLUSION OF EVIDENCE OFFERED BY DEFENDANT FOR PURPOSE OF CONTRADICTING WITNESS WHO, on his cross-examination, testified that he had never expressed any hostile feelings towards the defendant, that the witness in a conversation with a third person about a note which had just been signed by him and the defendant said that the defendant had never paid him for certain services, and that he was worth nothing himself, and that he had taken this course to get even with the defendant, is no ground of exception. *Starks* v. *Sikes*, 270.

See DEPOSITIONS; DEEDS, 17

Digitized by Google

Digitized by Google

Digitized by Google

EXTRA ANNOTATION
TO
PRECEDING VOLUME

Digitized by Google

Digitized by Google

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 69 AM. DEC.

---

69 AM. DEC. 49, LEWISTON FALLS BANK v. LEONARD, 43 ME. 144.

Certificate of protest as evidence of notice of dishonor.

Cited in Union Bank v. Humphreys, 48 Me. 172, holding notarial protest stating that he made notices to all the indorsers which he "caused to be left at their dwellinghouses" not sufficient evidence of notice to charge indorsers; Page v. Gilbert, 60 Me. 485, holding same where certificate stated that he "delivered notice" of the nonpayment of said note to the indorser "demanding payment of him;" Pattee v. McCrillis, 53 Me. 410, holding notarial certificate reciting that "the draft remaining unpaid, I duly and officially notified drawer" at his post-office address, "per mail, requiring payment," prima facie evidence of notice.

Cited in reference notes in 74 A. D. 428, on notary's certificate of protest as evidence of demand and notice; 79 A. D. 635, on notary's certificate of protest as evidence of notice to indorser; 82 A. D. 108, on effect of certificate of notary as evidence; 98 A. D. 425, on notary's certificate of demand, notice, and protest as evidence.

Cited in note in 96 A. D. 612, on sufficiency of statement in protest that "due notice" was given.

Form of notice of dishonor.

Cited in reference note in 81 A. D. 626, on necessary form of note of dishonor.

Sufficiency of notice of dishonor.

Cited in reference notes in 84 A. D. 370, on sufficiency of notice of dishonor sent to indorser's former residence; 1 A. S. R. 321, on sufficiency of notice of dishonor left at indorsee's place of business.

69 AM. DEC. 54, O'DONNELL v. LEEMAN, 43 ME. 158.

Sufficiency of memorandum of contract to satisfy statute of frauds.

Cited in Rucker v. Harrington, 52 Mo. App. 481; Ridgway v. Ingram, 50 Ind. 145, 19 A. R. 706,—holding memorandum of contract to be sufficient

Digitized by Google

must set out the contract with such reasonable certainty that its terms may be understood from the writing itself; Williams v. Robinson, 73 Me. 186, 40 A. R. 352, holding memorandum sufficient where consideration and quantity were sufficiently designated to be ascertainable; Aultman, M. & Co. v. Clifford, 55 Minn. 159, 43 A. S. R. 478, 56 N. W. 593, holding memorandum insufficient where written order provided for payment of note in "three full payments," as having time of payment too uncertain; Schroeder v. Taaffe, 11 Mo. App. 267, holding same where description of lands sold did not state where on certain street land was located; Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683, on sufficiency of memorandum to satisfy statute.

Cited in note in 11 L.R.A. 92, on essentials of memorandum of agreement to authorize specific performance.

Auctioneer's memorandum.

Cited in Horton v. McCarty, 53 Me. 394, holding mere writing of price and name of purchaser on slip of paper by auctioneer not connected with any other paper not a sufficient memorandum; Rafferty v. Lougee, 63 N. H. 54, holding entry by auctioneer in his memorandum book not sufficient memorandum to satisfy statute.

Cited in reference notes in 83 A. D. 186, on applicability of statute of frauds to sales by auctioneers, sheriffs, and administrators; 77 A. S. R. 746, on memorandum of sale at auction.

—Necessity of memorandum being contained in one paper.

Cited in Christensen v. Wooley, 41 Mo. App. 53, holding memorandum may be made up of several papers provided parol evidence not necessary to show their connection.

Admissibility of evidence to aid memorandum of contract insufficient to satisfy statute.

Cited in Horton v. Wollner, 71 Ala. 452, holding contract for the year before could not be resorted to as evidence to aid memorandum, which failed to state the terms of payment; Kingsley v. Siebrecht, 92 Me. 23, 69 A. S. R. 486, 42 Atl. 249, holding letters and telegrams sufficient evidence to aid memorandum of contract when parol evidence unnecessary to show their connection.

69 AM. DEC. 56, RANDALL v. THORNTON, 43 ME. 226.

Representations of vendor amounting to warranty.

Cited in Hahn v. Doolittle, 18 Wis. 196, 86 A. D. 757, holding representations on sale of note and mortgage that maker is solvent on which vendee relies, renders vendor liable, though both knew of marker's insolvency.

Cited in reference notes in 71 A. D. 491, on representations amounting to warranty on sale of chattels; 74 A. D. 165, on requisite words to create warranty; 11 A. S. R. 879, on sufficiency of words to constitute warranty in contract of sale; 83 A. D. 286; 16 A. S. R. 758,—on express warranties on sale of personalty.

Description of goods amounting to a warranty.

Cited in Morse v. Moore, 83 Me. 473, 23 A. S. R. 783, 13 L.R.A. 224, 22 Atl. 362, holding contract to deliver at a certain time and place a quantity of goods, clear, merchantable ice, is in effect warranty that ice delivered will be of kind described.

By whom written contract is to be construed.

Cited in reference notes in 75 A. D. 589; 80 A. D. 334,—on construction of written contracts by court.

Digitized by Google

Cited in note in 12 L.R.A. 376, on construction of written contract as question for court.

69 AM. DEC. 59, STATE v. WEATHERBY, 43 ME. 258.

What constitutes adultery.

Cited in reference notes in 75 A. D. 581; 83 A. D. 691,—on what is adultery; 11 A. S. R. 216, on what constitutes crime of adultery; 78 A. S. R. 877, on second marriage and cohabitation by divorced man as adultery.

Cited in notes in 24 L.R.A. 833, on effect of forbidding remarriage of guilty party after divorce where remarriage occurs in state of enactment; 18 L.R.A. (N.S.) 581, on effect of fact that but one of the parties is married on offense of "adultery" within penal statute.

Law governing validity of remarriage of divorced persons.

Cited in note in 57 L.R.A. 169, on conflict of laws as to validity of remarriage of divorced persons.

69 AM. DEC. 62, JELLISON v. GOODWIN, 43 ME. 287.

Actual and legal malice distinguished.

Cited in Re Maples, 105 Fed. 919, distinguished between actual and legal malice.

Cited in reference note in 91 A. D. 680, on malice in law as intentionally doing wrong without legal excuse.

Implication of legal malice in slander.

Cited in Jones & Co. v. Townsend, 21 Fla. 431, holding charging a party with being under indictment for crime, presumptively malicious and actionable per se; McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506, holding words charging another with being affected with a venereal disease, actionable per se and presumptively malicious; Pullen v. Glidden, 68 Me. 559, on creation of implication of malice at law; Karger v. Rich, 81 Wis. 177, 51 N. W. 424, on when accusations legally malicious.

Cited in reference notes in 71 A. D. 256, on presumption of malice from speaking actionable words; 81 A. D. 56, on implication of malice in actions for libel or slander; 88 A. D. 639, on implication of malice from speech of slanderous words; 32 A. S. R. 87, as to when malice is implied in slander; 53 A. S. R. 406, on implied malice in slander.

Right to show actual malice in slander.

Cited in Davis v. Starrett, 97 Me. 568, 55 Atl. 516, holding actual malice might be shown by proof that defendant had repeated the slander charged; Thompson v. Powning, 15 Nev. 195, holding proof of actual malice admissible where article is ambiguous, to enhance the damages.

Cited in reference note in 82 A. D. 63, on evidence in actions for slander.

Cited in note in 72 A. D. 429–430, on malice as element of damages in slander or libel.

Presumption of malice, how rebutted.

Cited in Powers v. Cary, 64 Me. 9, holding presumption of malice arising from publication of a charge which if false is libelous, not rebutted by proof that publisher had reason to suspect the truth of the charges made.

Question of malice as one for jury.

Cited in reference notes in 81 A. D. 56, on question of malice being for jury

Digitized by Google

in action for slander concerning privileged communications; 96 A. D. 285, on intent with which words, alleged to be slanderous, were spoken as question for jury.

Question of privilege as one of law.

Cited in reference notes in 25 A. S. R. 581, on whether privileged communications is question of law or fact; 43 A. S. R. 596, on question of privilege as one of law.

Abstract instructions.

Cited in note in 72 A. D. 540, on giving abstract instructions.

69 AM. DEC. 65, NASH v. UNION MUT. INS. CO. 43 ME. 343.

Evidence of authority to demand payment.

Cited in reference note in 90 A. D. 659, on possession of signed receipt as sufficient evidence of authority to demand payment.

Waiver of non-liability on insurance policy.

Cited in Cornell v. Milwaukee Mut. F. Ins. Co. 18 Wis. 388, holding insurance company did not waive their exemption from liability on a loss occurring by failure to object when insured gave them notice after expiration of time for giving such notice.

69 AM. DEC. 66, SPRINGER v. TOOTHAKER, 43 ME. 381.

Release of surety by acts of creditor.

Cited in First Nat. Bank v. Parsons, 45 W. Va. 688, 32 S. E. 271, holding on acts of creditor releasing surety.

Cited in reference note in 43 A. S. R. 358, on impairment of surety's remedy.

— Appropriation or misuse of security for debt.

Cited in Crosby v. Woodbury, 37 Colo. 1, 89 Pac. 34, holding surety relieved from liability on a debt where creditor having under his control property of debts which surety had a right to have applied to the debt acquired title to it; New England Mut. L. Ins. Co. v. Randall, 42 La. Ann. 260, 7 So. 679, holding sureties discharged where creditor appropriated to his own use property belonging to debtor which he had control of; Otis v. Von Storch, 15 R. I. 41, 23 Atl. 39, holding surety pro tanto discharged where creditor surrenders the collateral security.

Cited in reference notes in 82 A. D. 157, on release by creditor of securities of principal debtor as discharge of surety; 83 A. D. 314, on release by creditor of levy on personalty as discharge of surety; 83 A. D. 314; 30 A. S. R. 339,—on release of surety by creditor's parting with securities.

Cited in notes in 32 A. S. R. 728, on release of surety by creditor's parting with securities; 115 A. S. R. 95, on effect upon creditor's rights against surety of creditor releasing securities or funds in his possession; 115 A. S. R. 101, on effect of creditor's negligent loss of lien secured by levy of execution against principal on his right against surety.

Distinguished in Chapman v. Todd, 60 Me. 282, holding abandonment of an attachment of property in a suit against one surety no bar to maintenance of subsequent suit against cosurety.

— Discontinuance of suit or forbearance.

Cited in Barney v. Clark, 46 N. H. 514, holding discontinuance of suit commenced against principal did not discharge surety; Thorn v. Pinkham, 84 Me. 101, 30 A. S. R. 335, 24 Atl. 718, holding surety on chattel mortgage not dis-

Digitized by Google

charged by failure of mortgagee to enforce the mortgage for no unreasonable length of time.

Cited in reference notes in 72 A. D. 283, on release of surety by indulgence to principal; 98 A. D. 54, on discharge of surety by creditor's indulgence to principal.

Duty of creditor to surety in the control of securities held by him.

Cited in City Bank v. Young, 43 N. H. 457, holding creditor disposing of personal property mortgaged to him by principal as collateral security responsible to surety for ordinary care and prudence in the sale and application of proceeds.

69 AM. DEC. 69, WARREN v. THOMASTON, 43 ME. 406.

What constitutes party's residence.

Cited in reference note in 95 A. D. 241, as to what constitutes party's residence.

Acquirement of legal residence in a town.

Cited in Gardiner v. Farmingdale, 45 Me. 537, holding person non compos mentis from birth might acquire a legal residence in town by living there five years, continuously after majority without support from town, parents being dead; Woodstock v. Canton, 91 Me. 62, 39 Atl. 281, holding same where pauper had resided in town continuously for five years with no intention of leaving; Greenfield v. Buckland, 159 Mass. 491, 34 N. E. 952, holding same where pauper had resided in town for five years with exception of a few months' temporary absence; Concord v. Rumney, 45 N. H. 423, holding insane woman, insane at time of marriage and whose marriage is decreed null may gain a settlement at residence of husband if she has sufficient property and sufficient intellect to choose a home.

What is "legal settlement."

Cited in Clay County v. Adams County, 69 Neb. 106, 95 N. W. 58, holding the legal settlement of an insane person is the county which would be primarily liable for his support if a pauper.

Absence as affecting place of residence.

Cited in Bangor v. Brewer, 47 Me. 97, holding intention of pauper while temporarily away from place of domicil to move to another town without acting thereon, not sufficient to break up continuity of his residence in place of domicil; Church v. Rowell, 49 Me. 367, holding residence of a party not charged by his absence in another place for a specific purpose he having no intention of remaining away; Lee v. Lenox, 15 Gray, 496, holding same where party remained away less than a year with an intention to return.

Domicil as distinguished from residence.

Cited in Briggs v. Rochester, 16 Gray, 337; Littlefield v. Brooks, 50 Me. 475,—distinguishing between domicil and residence, dwelling place or home; Gilman v. Gilman, 52 Me. 165, 83 A. D. 502, on determination of what meant by domicil.

Cited in reference note in 96 A. D. 623, on meaning of terms domicil, residence, etc.

Cited in note in 59 A. D. 112, on distinction between domicil and residence, dwelling place, home, and inhabitancy.

Abandonment of legal residence.

Cited in North Yarmouth v. West Gardiner, 58 Me. 207, 4 A. R. 279, holding under pauper statute the party leaving his residence with no intention of returning abandons it, although he has not acquired another.

Digitized by Google

69 AM. DEC. 74, HOLT v. WESTCOTT, 43 ME. 445.

Liability for freight.

Cited in Portland Flouring Mills Co. v. Portland & A. S. S. Co. 145 Fed. 687, holding consignor not released from his primary liability for freight by statement in bill of lading that consignee liable for freight.

Cited in reference notes in 93 A. D. 193, on consignor's liability for freight; 85 A. D. 709, on waiver of lien by carrier and resort to consignor; 38 A. S. R. 402, as to who is liable to carrier to pay freight.

Cited in note in 8 A. D. 395, on consignor's liability for freight.

69 AM. DEC. 77, LAKEMAN v. POLLARD, 43 ME. 463.

Nonprejudicial error as ground for reversal.

Cited in reference notes in 75 A. D. 90, on nonprejudicial error as ground for reversal; 47 A. S. R. 420, on effect of harmless error in admission of evidence.

Right to recover on quantum meruit on contract of service not fulfilled.

Cited in McClellan v. Harris, 7 S. D. 447, 64 N. W. 522, holding party might recover quantum meruit for services rendered when by reason of sickness he was prevented from fulfilling the terms of his contract; Parker v. Macomber, 17 R. I. 674, 16 L.R.A. 858, 24 Atl. 464, holding same where plaintiff by death of wife whose services were essential part of contract could not continue performance of the contract; Jennings v. Lyons, 39 Wis. 553, 20 A. R. 57, holding same where by sickness of wife contract could not be fulfilled, it being for the personal services of plaintiff and wife; Dixon v. Fridette, 81 Me. 122, 16 Atl. 412, on right of party not fulfilling contract to recover for part performance.

Cited in reference notes in 74 A. D. 136, on servant's right to compensation in case of nonperformance of special contract; 98 A. D. 567, on recovery for services rendered under incompleted special contract; 31 A. S. R. 552, on discharge of servant for sickness before expiration of term.

Cited in notes in 38 A. R. 212, on right to recover compensation for part performance, though full performance is rendered impossible by act of God; 16 L.R.A. 858, on recovery for services on contract interrupted by sickness or death; 1 E. R. C. 350, on vis major or inevitable accident as excusing performance of contract; 6 E. R. C. 638, on right to recover upon quantum meruit for work done under contract for an entire service.

Sufficiency of record for review of evidence.

Cited in Brann v. Vassalboro, 50 Me. 64, holding certificate that "substance of all evidence" is returned insufficient.

69 AM. DEC. 80, KEITH v. PINKHAM, 43 ME. 501.

Liability for injury to passenger riding in dangerous position.

Cited in Whitehouse v. Grand Trunk R. Co. 2 Haskell, 189, Fed. Cas. No. 17,565, holding railroad company liable in damages for the death of a party while riding on engine of train by collision with another of defendant's trains, through negligence of employees on latter train; Buck v. People's Street R. Electric Light & P. Co. 46 Mo. App. 555, holding railroad company liable for injury to young man by falling under car on sudden lurch thereof he having been allowed by conductor to ride on front platform; Gradert v. Chicago & N. W. R. Co. 109 Iowa, 547, 80 N. W. 559, holding company not relieved from

Digitized by Google

liability for death of a passenger in a collision caused by employee's negligence because the deceased had gone onto a flat car on the train; Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 A. R. 360, 31 Phila. Leg. Int. 277, holding act of party injured in riding in the baggage car did not relieve railroad company from their liability for negligence.

Cited in note in 2 L.R.A. 252, on liability of railroad as insurer of life of safety of passenger.

Distinguished in Pennsylvania R. Co. v. Langdon, 92 Pa. 21, 37 A. R. 651, holding passenger injured in collision while riding in baggage car against the rules of the company could not recover damages it appearing he would have been safe in the coach.

Contributory negligence.

Cited in O'Brien v. McGlinchy, 68 Me. 552, on contributory negligence as a defense; Miller v. Atlanta & C. Air Line R. Co. 144 N. C. 545, 57 S. E. 345; Nieboer v. Detroit Electric R. Co. 128 Mich. 486, 87 N. W. 626 (dissenting opinion),—on negligence of party injured as a defence.

Cited in note in 43 A. D. 367, on passenger riding on platform as contributory negligence.

Degree of care required of common carrier of passengers.

Criticised in Edwards v. Lord, 49 Me. 279, holding common carrier of passengers bound to use greater than ordinary care.

69 AM. DEC. 81, ORONO v. WEDGEWOOD, 44 ME. 49.

Admission of plaintiff's corporate existence by pleading the general issue.

Cited in Ticonic Nat. Bank v. Bagley, 68 Me. 249, holding defendant by pleading the general issue admits the corporate existence of plaintiff bank and its capacity to sue.

Cited in reference notes in 78 A. D. 732, on admitting corporate existence and capacity to sue by plea of general issue; 79 A. D. 448, on admitting corporate existence of plaintiff by pleading general issue; 13 A. S. R. 54, on necessity of corporation proving its incorporation in action by it; 36 A. S. R. 104, as to when capacity of corporation must be proved.

Distinguished in Bank of Jamaica v. Jefferson, 92 Tenn. 537, 36 A. S. R. 100, 22 S. W. 211, holding in chancery proof of complainant's corporate character required even if answered by general denial.

Liability of sureties on bond of tax collector.

Cited in Trescott v. Moan, 50 Me. 347; Clifton v. Wynne, 80 N. C. 145; Webb Co. v. Gonzales, 69 Tex. 455, 6 S. W. 781; State v. Rushing, 17 Fla. 226,—holding sureties on bond of tax collector liable for taxes collected by collector though the collector had been made without proper authority; Phipsburg v. Dickinson, 78 Me. 457, 7 Atl. 9, holding deficits on accounts of tax collector who held the office for three successive years should be divided between the three bonds in proportion to sums collected on each commitment.

Cited in reference note in 1 L.R.A. 118, on sureties' liability for breach of official bond.

Exoneration of tax collector from proceeding under defective tax warrant.

Cited in Orneville v. Pearson, 61 Me. 552, holding tax collector exonerated

Digitized by Google

from liability for not completing a collection under a tax warrant directing an exemption not made by statute.

69 AM. DEC. 83, BOYD v. EATON, 44 ME. 51.

Right to recover on account on striking out illegal items.

Cited in Goodwin v. Clark, 65 Me. 280; Phillips v. Moses, 65 Me. 70,—holding party might recover on an account by striking out illegal items thereof and suing on remainder; Plummer v. Erskine, 58 Me. 59, holding plaintiff could recover on account which defendant had agreed to pay, items consisting of liquors sold in violation of law having been omitted because liquidated from former payment on account.

Cited in note in 117 A. S. R. 580, on effect of partial illegality of contract when consideration separable.

—Allowance of amendments to declaration.

Cited in Monroe v. Thomas, 61 Me. 581, holding an amendment by which a charge for spirituous liquors is stricken out of an account is properly allowed.

69 AM. DEC. 85, SOUTHARD v. HILL, 44 ME. 92.

Dilatory pleas.

Cited is reference note in 33 A. S. R. 893, on dilatory pleas.

Necessary parties in tort action relating to realty.

Cited in note in 1 E. R. C. 188, on necessity parties in action of tort relating to real property.

Misjoinder of parties in pleading abatement.

Cited in Virtue v. Tribe, 5 Pa. Dist. R. 634, on misjoinder of parties in plea of abatement.

Cited in note in 1 E. R. C. 166, on pleading nonjoinder of cotenant in abatement.

69 AM. DEC. 87, WEBBER v. DAVIS, 44 ME. 147.

Validity of sale without delivery.

Cited in Tome v. Dubois, 6 Wall. 548, 18 L. ed. 943, holding owner of property which has been converted may make a valid sale thereof though not in possession.

Cited in reference notes in 77 A. D. 310, on validity of sale without delivery; 74 A. D. 83, on when sale of personalty is complete so as to pass title; 75 A. D. 144, on validity of sale without delivery against vendor; 83 A. D. 142, on effect of sale of personal property without delivery; 98 A. D. 581, on validity as between parties of sale of chattels unaccompanied by change of possession.

What constitutes conversion.

Cited in Dodge v. Meyer, 61 Cal. 405, holding defendant who did not have possession of the property, when he transferred bill of lading wrongfully guilty of conversion; Omaha & G. Smelting & Ref. Co. v. Tabor, 13 Colo. 41, 16 A. S. R. 185, 5 L.R.A. 236, 21 Pac. 925 holding purchaser of ore taken from a mine by a trespasser is guilty of conversion though ignorant of the seller's want of title; McPheters v. Page, 83 Me. 234, 23 A. S. R. 772, 22 Atl. 101, holding defendant guilty of the conversion of carcass of deer unlawfully seized by officer and dressed by defendant and distributed among friends; Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781, holding conversion would lie against an officer seizing and selling property against protest of owner, as the property of an-

Digitized by Google

other; Howard v. Cooper, 45 N. H. 339, holding conversion would lie against officer attaching personal property exempt from taxation.

Cited in reference notes in 73 A. D. 308; 92 A. D. 582,—on what constitutes conversion; 73 A. D. 319, on conversion and evidence thereof.

Cited in notes in 15 A. D. 153, on what constitutes conversion; 24 A. S. R. 799, on conversion by words alone.

Demand as prerequisite to maintenance of trover.

Cited in reference notes in 83 A. D. 121, on necessity for demand before suit for property tortiously obtained; 94 A. D. 349; 85 A. D. 751,—on necessity of proving demand in trover where there is actual conversion; 89 A. D. 411, as to when demand is necessary in trover; 11 A. S. R. 409, on demand as prerequisite to maintenance of trover; 34 A. S. R. 588, on necessity of proof of demand and refusal in action for conversion.

69 AM. DEC. 91, PILLSBURY v. MOORE, 44 ME. 154.

Rights of riparian owners in water flow.

Cited in Ulbright v. Eufaula Water Co. 86 Ala. 587, 11 A. S. R. 72, 4 L.R.A. 572, 6 So. 78, holding riparian owner might restrain the diversion of a stream from its natural channel with a failure to return it to channel to the injury of plaintiff; Pickens v. Coal River Boom & Timber Co. 51 W. Va. 445, 90 A. S. R. 819, 41 S. E. 400, holding owner of mill might maintain action against defendant keeping log boom so close to mill that it impeded the flow of the water to injury of mill owner; Waddingham v. Robledo, 6 N. M. 347, 28 Pac. 663, holding equity had jurisdiction to prevent the diversion of a natural water way to injury of riparian owners.

Cited in reference notes in 78 A. D. 689, on riparian proprietor's right to uninterrupted flow of stream; 48 A. S. R. 945, on riparian owner's right to natural flow of stream.

Cited in notes in 43 A. D. 274, on rights acquired by prior appropriation of water of stream; 43 A. D. 275, on respective rights of riparian owners to use of water; 79 A. D. 638–645, on riparian owner's right to natural flow of stream; 41 L.R.A. 759, on right against continuer of wrong in use of flow of water in stream as between upper and lower proprietors.

Distinguished in Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610, holding municipal corporation not liable to lower riparian owner whose use of a stream has been interfered with by the construction of sewers, leading into, polluting the water.

Acquisition of water rights by adverse possession.

Cited in reference notes in 85 A. D. 150, on acquisition of water rights by adverse possession; 65 A. S. R. 34, on right to use water acquired by adverse enjoyment.

Cited in notes in 57 A. D. 689, on prescriptive right to overflow or raise water upon upper mill owner; 93 A. S. R. 712, on prescriptive title to surface water.

Effect of nonuser to extinguish easement.

Cited in note in 18 L.R.A. 536, on effect of nonuser to extinguish easement.

Liability of erector of nuisance.

Cited in Sloggy v. Dilworth, 38 Minn. 179, 8 A. S. R. 656, 36 N. W. 451, holding originator of a nuisance remains liable to successive actions for damages resulting from maintenance thereof.

Cited in reference note in 82 A. D. 213, on liability of erector of nuisance.

Digitized by Google

Liability for maintaining nuisance originated by another.

Cited in Samuelson v. Cleveland Iron Min. Co. 49 Mich. 164, 43 A. R. 456, 13 N. W. 499, holding as between landlord and tenant, the tenant is presumptively liable for a nuisance on the premises; Levi L. Brown Paper Co. v. Dean, 123 Mass. 267, holding agent merely carrying on a mill for the owner's benefit is not liable for its dam being maintained at too great a height whereby water is set back to injury of another mill owner; Holmes v. Corthell, 80 Me. 31, 12 Atl. 730, holding party suffering special damages from a nuisance may recover from the person creating and the person maintaining after request to abate.

Cited in reference notes in 80 A. D. 75, on liability of grantee or lessee for continuance of nuisance; 93 A. D. 136, on liability of grantee for continuance of nuisance on premises; 1 A. S. R. 48, as to when purchaser is liable for continuance of pre-existing nuisance; 8 A. S. R. 661, on liability of party acquiring title to property for nuisance thereon.

Cited in notes in 86 A. S. R. 511, on respective liability of grantor and grantee for nuisance; 4 L.R.A. 212, on right of action of one who suffers special injury from public nuisance; 59 L.R.A. 860, on effect of knowledge on purchaser's liability for damming back water of stream; 59 L.R.A. 861, on effect of notice on purchaser's liability for damming back water of stream.

— Necessity of notice to abate nuisance.

Cited in Central Trust Co. v. Wabash, St. L. & P. R. Co. 57 Fed. 441, holding mere continuance of a culvert and embankment was insufficient to charge defendant with liability in absence of notice that they constituted a nuisance; Groff v. Ankenbrandt, 124 Ill. 51, 7 A. S. R. 342, 15 N. E. 40, holding party coming into possession of property with a nuisance on it cannot be held liable for damages until he has first been notified to remove it; Staples v. Dickson, 88 Me. 362, 34 Atl. 168, holding owner of property could not be held liable for damages caused by obstruction built in street by former owner of property, no request having been made to defendant to abate it; Orvis v. Elmira, C. & N. R. Co. 17 App. Div. 187, 45 N. Y. Supp. 367; Dodge v. Stacy, 39 Vt. 558; Thornton v. Smith, 11 Minn. 15, Gil. 1,—holding continuance of a nuisance created by another entitled to notice to remove same before action brought for its abatement.

Cited in note in 14 A. D. 339, as to when notice to remove nuisance is necessary.

Distinguished in Valparaiso v. Bozarth, 153 Ind. 536, 47 L.R.A. 487, 55 N. E. 439, holding action may be maintained against lessee erecting house encroaching on street to abate the nuisance without any notice to him, also citing annotation on same point; Ahern v. Steele, 115 N. Y. 203, 12 A. S. R. 778, 5 L.R.A. 449, 22 N. E. 193; Conhocton Stone Road v. Buffalo N. Y. & E. R. Co. 51 N. Y. 573, 10 A. R. 646,—holding continuance of nuisance entitled to notice of its existence before commencement of action to abate.

Remedies against nuisance.

Cited in reference note in 80 A. D. 638, on remedies against nuisances.

69 AM. DEC. 94, DWINEL v. VEAZIE, 44 ME. 167.

Right of mill owner to use of waters of a stream.

Cited in Pearson v. Rolfe, 76 Me. 380, holding mill owner not obliged to provide a more suitable way for passage of logs over his dam than the stream naturally afforded; Pickens v. Coal River Boom & Timber Co. 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400, holding owner of boom liable to mill owner for

Digitized by Google

damages when boom erected so close to mill as to impair the flow of water; Veazie v. Dwinel, 50 Me. 479, on right of mill owners to use of stream.

Riparian owner's rights in stream.

Cited in reference notes in 92 A. D. 565, on right of owner of soil through which stream passes to erect dams and construct mills; 25 A. S. R. 863, on landowner's right to erect milldam in floatable stream.

Cited in notes in 50 A. D. 649, on obstruction of navigable waters; 79 A. D. 645, on riparian owner's right to natural flow of stream; 41 L.R.A. 378, on correlative rights of log and riparian owners in stream; 59 L.R.A. 53, on injury by individual as riparian owner to rights of navigation.

Right to use navigable stream.

Cited in notes in 81 A. D. 585, on right of public or of individuals to use water courses as highways and remedies available to vindicate right; 5 L.R.A. 393, on right to use navigable water course; 64 L.R.A. 984, on liability for injuries by floating logs in attempted exercise of rights of navigation.

Private action for injury from public nuisance.

Cited in notes in 57 A. S. R. 698, on private action for damages for obstruction of navigable waters; 4 L.R.A. 212, on necessity to recovery of plaintiff's showing special injury from public nuisance.

What is navigable stream.

Cited in note in 42 L.R.A. 326, on holding waters navigable or non-navigable on the facts.

What are private streams.

Cited in note in 3 L.R.A. 610, on what are private streams.

69 AM. DEC. 99, DECKER v. GAMMON, 44 ME. 322.

Liability for injury by animals.

Cited in Baldwin v. Ensign, 49 Conn. 113, 44 A. R. 200, holding owner liable for negligence in permitting colt to be at large upon highway, irrespective of knowledge of its viciousness; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554, holding violation of ordinance against permitting horses to run at large or pasture or graze in streets, ground for claim of negligence in action for personal injuries thereby; Parsons v. Manser, 119 Iowa, 88, 62 L.R.A. 132, 97 A. S. R. 283, 93 N. W. 86, holding keeper of bees bound to exercise ordinary prudence in locating the hives, so as to avoid injury to one making lawful use of highway; Bormann v. Milwaukee, 93 Wis. 522, 33 L.R.A. 652, 67 N. W. 924, holding that employee in elk and deer park, assumes risk of injury from viciousness to be imputed to such animals.

Cited in reference notes in 78 A. D. 265, on distinction between liability of owner for trespass by domestic animals and those wild by nature; 80 A. D. 688, on when owner of domestic animals liable for its mischievous or vicious propensities; 94 A. D. 407, on liability of owner of beasts feræ naturæ; 92 A. D. 617, on liability of owner of domestic animal for injuries occasioned by permitting it to be at large in highway; 94 A. D. 407, on liability of owner of domestic animals suddenly breaking through tameness of its nature; 21 A. S. R. 549, on liability of owner for mischief committed by domestic animals while in unlawful place; 51 A. S. R. 64, on liability of owner for injuries by animals; 87 A. S. R. 693, on liability of owner for injuries by animals feræ naturæ.

Digitized by Google

Cited in notes in 16 A. S. R. 632, on liability for injuries by vicious animals; 97 A. S. R. 288, on liability for attacks of animals.

— Effect of knowledge of vicious nature.

Cited in Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487, holding owner of pleasure park liable for personal injury from keeping buck at large therein after notice of its viciousness.

Cited in note in 3 E. R. C. 118, on liability for keeping mischievous animal with knowledge of its propensities.

— Effect of lack of knowledge.

Cited in Scott v. Drover, 56 Vt. 599, 48 A. R. 814, holding owner of bull not liable for injuries by it while on another's land through latter's negligence, where the owner had no knowledge of its vicious nature.

Distinguished in Clarendon Land Invest. & Agency Co. v. McClelland Bros. 89 Tex. 483, 59 A. S. R. 703, 35 S. W. 474, holding owner of cattle running at large not liable for their communicating disease to other cattle in absence of knowledge of diseased condition.

— Necessity of alleging or proving knowledge.

Cited in Mosier v. Beale, 43 Fed. 358, holding it not necessary to allege scienter in action for damages for injuries by defendant's cow when negligently allowed to trespass on plaintiff's land; Green v. Doyle, 21 Ill. App. 206, holding allegation of owner's knowledge of vicious propensity unnecessary, in action for injury by dog, taken by its owner into plaintiff's pasture; Mosier v. Beale, 43 Fed. 358, holding allegation of owner's knowledge of vicious propensity unnecessary where complaint alleges injuries by trespassing cow; Lyons v. Merrick, 105 Mass. 71, holding proof of knowledge of vicious propensity immaterial under allegation of injury by horse and mule negligently permitted to escape from their pasture; Chunot v. Larson, 43 Wis. 536, 28 A. R. 567, sustaining owner's liability for injury by trespassing dog although alleged knowledge of its viciousness is not proved.

— Sufficiency of allegation of vicious nature.

Cited in Graham v. Payne, 122 Ind. 403, 24 N. E. 216, sustaining sufficiency of allegation, in action for injuries by ram, that the animal had habit of attacking and butting mankind, without express allegation of being dangerous or vicious.

— Necessity of allegation and proof of freedom from contributory negligence.

Cited in Hussey v. King, 83 Me. 568, 22 Atl. 476, holding that in action for personal injury by dog, under statute, plaintiff need not allege and prove in first instance, his own due care.

— Liability of municipality.

Cited in Cochrane v. Frostburg, 81 Md. 54, 48 A. S. R. 479, 27 L.R.A. 728, 31 Atl. 703, holding city not liable for injuries committed by cow at large upon street without owner's fault or for so short a time that diligence would not have prevented the injury.

Necessity of proving allegations.

Cited in Neal v. Smith, 89 Me. 596, 36 Atl. 1058, holding that allegations of malice need not be proved in tort, when not part of description of offense.

Digitized by Google

Sufficiency of general allegations of negligence.

Cited in note in 59 L.R.A. 275, on sufficiency of general allegations of negligence.

Ownership of animals.

Cited in reference note in 92 A. D. 574, on ownership of animals generally.

Right to destroy dangerous animals.

Cited in note in 124 A. S. R. 603, on right of private person to destroy dangerous animals.

69 AM. DEC. 103, WHITNEY v. ATLANTIC & ST. L. R. CO. 44 ME. 362.

Liability of railroad lessor or lessee for injuries.

Cited in Murray v. Lehigh Valley R. Co. 66 Conn. 512, 32 L.R.A. 539, 34 Atl. 506, holding railroad company running train over road of another company under control of latter liable for injuries to party jumping from train to avoid threatened collision with train of latter road.

Cited in note in 66 L.R.A. 142, 145, on liability of railway company for acts of independent contractor where injuries result from employer's nonperformance of absolute duties in respect to operation of completed plant.

— Injury to property.

Cited in Wyman v. Penobscot & K. R. Co. 46 Me. 162, holding defendant company liable for injuries to plaintiff's horses by train operated on their tracks under their control, having failed to provide fences.

Cited in reference notes in 75 A. D. 212, on liability of railroad company for injury to animals trespassing on track where it is bound to fence and maintain cattle guards; 89 A. D. 539, on railroad's liability for injury to animals; 39 A. S. R. 138, on liability of railroad company for killing stock at place where fence is not maintained; 79 A. D. 396, on care required of railroad in fencing track.

Cited in note in 96 A. D. 681, on railroad company's liability for injury to animals trespassing on track when it is bound to fence.

— Liability of lessor railroad company for injuries.

Cited in Bean v. Atlantic & St. L. R. Co. 63 Me. 293; Stearns v. Atlantic & St. L. R. Co. 46 Me. 95,—holding lessors liable where plaintiff's buildings destroyed by fire communicated by one of lessee's engines; A. Backus, Jr. & Sons v. Detroit W. Transit & Junction R. Co. 71 Mich. 645, 40 N. W. 60, holding lessor of railroad liable in damages for unlawful use by the lessee of the road; Harden v. North Carolina R. Co. 129 N. C. 354, 85 A. S. R. 747, 55 L.R.A. 784, 40 S. E. 184, holding same where lessee negligent in the operation of the road.

Cited in reference note in 2 A. S. R. 487, on liability of lessor of railroad for negligence of lessee.

Cited in notes in 71 A. D. 297, on liability of railroads for torts of their lessees; 48 A. R. 580, on railroad's liability for lessee's negligence; 37 L.R.A. 83–85, on responsibility of grantee of public franchises for acts of servants of lessee in possession under unauthorized contract; 44 L.R.A. 747, on effect of authority to lease railroad on lessor's liability for injuries caused by negligence of lessee.

Distinguished in Mahoney v. Atlantic & St. L. R. Co. 63 Me. 68; Moorshead v. United Railways Co. 203 Mo. 121, 100 S. W. 611 (affirming 119 Mo. App. 541, 96 S. W. 261); Arrowsmith v. Nashville & D. R. Co. 57 Fed. 165,—holding

Digitized by Google

lessors of road leased by authority of law not liable for injuries to passenger due to negligence of lessees of road.

Disapproved in Illinois C. R. Co. v. Kanouse, 39 Ill. 272, 89 A. D. 307, holding lessees of road liable for injuries to stock because of failure to fence as required by law, though they only had right to run trains.

Duty of railroad company to fence track.

Cited in reference notes in 72 A. D. 702, on obligation of railroad to fence its track; 75 A. D. 212, on duty of railroad company to keep its tracks inclosed; 74 A. D. 728, on railroad's liability for failure to construct fences.

Cited in notes in 9 L.R.A.(N.S.) 355, on duty of railroad to fence right of way; 44 L.R.A. 755, 756, on effect of lease or other contract upon failure of lessee's duty to fence.

69 AM. DEC. 107, BERRY v. BILLINGS, 44 ME. 416.

Meaning of "premises" in deed.

Cited in Sands v. Kaukauna Water Power Co. 115 Wis. 229, 91 N. W. 679, on technical meaning of word "premises" as used in a deed.

Office of habendum clause of deed.

Cited in reference notes in 94 A. D. 369, on office of premises and habendum clauses of deed; 34 A. S. R. 164, on construction of habendum clause of deed.

Cited in note in 14 E. R. C. 787, 788, on necessity of habendum clause in deed of conveyance and right to resort to habendum to ascertain intention of grantor.

Sufficiency of deed.

Cited in Hardie v. Andrews, 13 N. Y. Civ. Proc. Rep. 413, holding deed omitting name of grantee from part preceding the habendum clause sufficient if stated in such clause.

Effect of habendum as qualifying the premises.

Cited in Utter v. Sidman, 170 Mo. 284, 70 S. W. 702, holding life estate created in grantee with remainder in her bodily heirs where the premises were "grant, bargain, sell and convey" to a named grantee and the habendum to her and "her bodily heirs;" McLeod v. Tarrant, 39 S. C. 271, 20 L.R.A. 846, 17 S. E. 773, on grantee named in habendum as true grantee where none named in premises.

Cited in reference note in 94 A. D. 369, on effect of repugnancy between premises and habendum clause in deed.

Cited in notes in 111 A. S. R. 774, on clause in premises controlling repugnant clause in habendum of deed; 12 L.R.A.(N.S.) 963, on effect of other language in deed to cut down estate conveyed by granting clause.

Appurtenances as passing without specific mention.

Cited in reference notes in 64 A. S. R. 110, on appurtenances passing by deed; 64 A. S. R. 110, on easements in other land passing by deed.

Cited in notes in 81 A. S. R. 765, on appurtenances passing without specific mention; 59 L.R.A. 832, on grant of right to dam back water of stream for purpose of flowage privileges.

69 AM. DEC. 111, CHILDS v. WYMAN, 44 ME. 433.

Liability of irregular indorser as an original promisor.

Cited in Burton & Co. v. Hansford, 10 W. Va. 470, 27 A. R. 571; Rothschild v.

Digitized by Google

Grix, 31 Mich. 150, 18 A. R. 171,—holding party indorsing note at request of maker, at its inception, to a third person liable thereon as an original promisor; Moore v. McKenney, 83 Me. 80, 23 A. S. R. 753, 21 Atl. 749, holding party signing note on back on blank, and not being the payee prima facie liable on the note; Bradford v. Prescott, 85 Me. 482, 27 Atl. 461, holding one not a party to a note and signing in blank without dating indorsement prima facie liable as original promisor signing at inception of note; Camp v. Simmons, 62 Ga. 73, on liability of indorser as an original promisor.

Cited in reference notes in 72 A. D. 89, on liability of party other than payee placing name on back of note before delivery; 91 A. D. 710, on liability of one indorsing note before delivery to payee; 92 A. D. 102, on effect of indorsement in blank of promissory note by person other than payee or holder.

Cited in notes in 3 A. D. 574, on presumption where note has blank indorsement of one not payee; 29 A. D. 298, on indorsement in blank, of note by person other than payee or holder; 71 A. D. 762, on liability as original promisor of person writing his name on back of note before delivery; 72 A. S. R. 677, on effect of indorsement by stranger before delivery; 18 L.R.A. 33, on liability of stranger who indorses commercial paper before delivery.

Presumption as to time of making of indorsement.

Cited in reference note in 96 A. D. 388, on presumption as to date of undated indorsement.

Cited in note in 18 L.R.A. 35, on presumption as to date of signature where indorsement of stranger is without date.

Distinguished in Good v. Martin, 95 U. S. 90, 24 L. ed. 341, 34 Phila. Leg. Int. 419, holding presumption that indorsement on back of note was made at time of making note might be rebutted by parol proof.

Disapproved in Johnston v. McDonald, 41 S. C. 81, 19 S. C. 65, holding name of a third person indorsed on a note from one party to another raises no presumption that such indorsement was written before delivery of the note.

Effect of endorsement "without recourse."

Cited in reference note in 84 A. D. 725, on effect of indorsement "without recourse."

Cited in notes in 87 A. D. 389, on effect of indorsement "without recourse;" 12 L.R.A. 371, on indorsement and transfer of commercial paper without recourse.

Order of liability of parties to note.

Cited in note in 4 E. R. C. 550, on order of liability of parties to bill or note.

69 AM. DEC. 112, SMALLEY v. WIGHT, 44 ME. 442.

Indorsement as necessary to recover on a note to order.

Cited in Tucker v. Tucker, 119 Mass. 79, holding assignment by payee of a promissory note of all his right therein, without indorsement does not prevent the maintenance of an action upon the note in the name of the payee; Jenkins v. Sherman, 77 Miss. 884, 28 So. 726, on indorsement being the act by which title to bills and notes is passed.

Cited in reference notes in 81 A. D. 311, on necessity for indorsement to validity of note payable to order or bearer and delivered to another; 92 A. D. 526, on how bills and notes payable to order negotiated; 95 A. D. 93, on necessity, sufficiency, and effect of indorsement.

Distinguished in Durgin v. Bartol, 64 Me. 473, holding in action by payee on note payable to his order indorsement not necessary to maintain action.

Digitized by Google

— Notes payable to maker's order.

Cited in Harnett v. Holdredge, 73 Neb. 570, 119 A. S. R. 905, 103 N. W. 277; Woodbury v. Woodbury, 47 N. H. 11, 90 A. D. 555; Stevens v. Parsons, 80 Me. 351, 14 Atl. 741,—holding endorsement necessary before action could be maintained on note payable to order of maker; Lowrie v. Zunkel, 49 Mo. App. 153, holding note payable to order of maker a nullity till negotiated by indorsement and delivery; Pettyjohn v. National Exch. Bank, 101 Va. 111, 43 S. E. 203, holding same where note by firm was made payable to order of one of firm; First Nat. Bank v. Payne, 111 Mo. 291, 33 A. S. R. 520, 20 S. W. 41, on necessity of indorsement of note made payable to maker.

Cited in reference note in 77 A. D. 174, on effect of making a note or bill payable to order of maker.

Negotiability of bills and notes.

Cited in reference notes in 85 A. D. 449, on negotiability of notes at common law; 89 A. D. 236, on negotiability of bill of exchange.

69 AM. DEC. 115, STATE v. LIBBY, 44 ME. 469.

Proof of marriage by admission.

Cited in Laughlin v. Eaton, 54 Me. 156, holding admissions of marriage by plaintiff competent evidence in support of plea in abatement for nonjoinder of husband.

Cited in note in 12 L.R.A. 838, on admissibility of declarations as to marriage.

— In trial for bigamy.

Cited in State v. Wylde, 110 N. C. 500, 15 S. E. 5; Dumas v. State, 14 Tex. App. 464, 46 A. R. 241; Miles v. United States, 103 U. S. 304, 26 L. ed. 481,—holding on indictment for bigamy the first marriage may be proved by admissions of the prisoner; State v. Hughes, 35 Kan. 626, 57 A. R. 195, 12 Pac. 28, holding same where coupled with cohabitation and repute.

Cited in note in 36 A. R. 24, on sufficiency of defendant's admissions to establish his first marriage in prosecution for bigamy.

Admissibility of circumstantial evidence to prove a prior marriage.

Cited in Camden v. Belgrade, 75 Me. 126, 46 A. R. 364, holding proof of the due solemnization of a marriage ceremony would not suffice in civil action to exclude circumstantial evidence of the existence of a previous marriage of one of the persons to third person still living.

Sufficiency of proof of former marriage in criminal case.

Cited in notes in 48 A. D. 116, on evidence of marriage in criminal cases; 47 A. S. R. 230, on sufficiency of proof of former marriage in prosecution for bigamy; 17 E. R. C. 176, on sufficiency in prosecutions for bigamy of showing that first marriage was valid common-law marriage.

Mode of proving marriage in prosecution for adultery.

Cited in reference note in 102 A. S. R 658, on mode of proving marriage in prosecution for adultery.

69 AM. DEC. 118, CROCKER v. GULLIFER, 44 ME 491.

Conversion by bailee.

Cited in Badger v. Hatch, 71 Me. 562, holding bailee liable for conversion where he appropriated note left in his care for particular purpose to his own use; DeVoin v. Michigan Lumber Co. 64 Wis. 616, 54 A. R. 649, 25 N. W. 552, holding

Digitized by Google

bailee liable for the loss of a team when the loss occurred while using them in a way in which he did not contract to do.

Cited in reference notes in 98 A. D. 441, on conversion by bailee; 73 A. D. 308, on right to maintain trover for bailed property which bailee has used for purpose not designated in contract of bailment; 80 A. D. 766, on liability of bailee in trover for improper use of bailed property; 89 A. D. 791, on pledgeor's remedies against pledgee for conversion of pledge; 35 A. S. R. 874, on sale of property by bailee.

Cited in note in 32 A. S. R. 723, on liabilities of holders of collateral security.

What amounts to conversion.

Cited in Daggett v. Davis, 53 Mich. 35, 51 A. R. 91, 18 N. W. 548, holding withholding of a certificate of stock may amount to a conversion of the certificate.

Cited in reference note in 73 A. D. 308, on bailee's unauthorized pledge or sale of another's property as conversion.

Cited in notes in 15 A. D. 153, on what constitutes conversion; 43 A. R. 518, on conversion by driving horse beyond point to which it was hired to go; 26 L.R.A. 366, on liability of hirer for driving team to place where it was not hired to go.

Effect of sale or return agreements.

Cited in Hotchkiss v. Higgins, 52 Conn. 205, 52 A. R. 582, holding title passed by delivery where innkeeper ordered quantity of liquor with agreement to account for part used, sending back the remainder; State v. Betz, 207 Mo. 589, 106 S. W. 64, holding delivery of an article at a fixed price to be paid for or returned constitutes a sale; Strauss Saddlery Co. v. Kingman, 42 Mo. App. 208, distinguishing between contract for sale or return and option to purchase; Re Landis, 151 Fed. 896, on treatment of contract of "sale or return" as present sale.

Cited in note in 94 A. S. R. 254, on contract of "sale or return."

Conditional sale.

Cited in reference notes in 93 A. D. 233, on effect of sale of goods reserving title in vendor until payment of price; 94 A. D. 677, as to when sale is conditional; 46 A. S. R. 295, on what constitutes a conditional sale.

Cited in note in 37 L. ed. U. S. 1094–1095, on conditional sale of personal property.

— Effect on title.

Cited in reference notes in 74 A. D. 313, on conditional sale as causing title to remain in seller; 77 A. D. 244, as to who has title in case of conditional sale of goods.

— Rights of purchaser from vendee.

Cited in reference note in 92 A. D. 317, on right of vendee in conditional sale to pass title to bona fide purchaser.

Cited in note in 3 A. S. R. 198, on effect of purchase of chattels from vendee in conditional sale.

Place where sale is deemed complete.

Cited in reference note in 30 A. S. R. 348, on place where sale is deemed complete.

Digitized by Google

69 AM. DEC. 123, BERRY v. GRIFFIN, 10 MD. 27.

Payment by promissory note as extinguishing debt.

Cited in Meek v. Parker, 63 Ark. 367, 58 A. S. R. 118, 38 S. W. 900, holding right to lien for materials furnished for improvement of land not lost by acceptance of note in settlement of the account; Hoopes v. Strasburger, 37 Md. 390, 11 A. R. 538, holding original debt extinguished where party takes note as absolute payment with agreement to run the risk of its being paid; H. F. Cady Lumber Co. v. Great American Exposition, 4 Neb. (Unof.) 268, 93 N. W. 961, holding receipt by cashier of creditor reciting that a certain note was taken "in payment on account" and amount thereof credited on the books, not conclusive of payment; Feanster v. Withrow, 12 W. Va. 611, holding debt not extinguished by the giving of a note with a receipt "in full;" Re Hurst, 1 Flipp. 462, Fed. Cas. No. 6925, on receipt by creditor from debtor of promissory note as extinguishment of antecedent debt.

Cited in reference notes in 71 A. D. 347, as to when taking of negotiable paper for pre-existing debt is a satisfaction thereof; 80 A. D. 149, on promissory note given for pre-existing debt as extinguishing original claim; 1 A. S. R. 485, on note for pre-existing debt as payment; 8 A. S. R. 841; 9 A. S. R. 842,— on taking note of debtor or of third person for pre-existing debt as payment.

—Renewal notes.

Cited in Hopkins v. Boyd, 11 Md. 107, holding party might maintain action on original note given though others were given in renewal thereof; Merriman v. Social Mfg. Co. 12 R. I. 175, on payment of notes by the giving of new ones with a surrender of the old notes.

—Note of third person generally.

Cited in Banty v. Basnett, 12 W. Va. 772; Haines v. Pearce, 41 Md. 221,— on the taking of a bill or order on a third person in payment of an antecedent debt as operating to extinguish the debt; First Nat. Bank v. Newton, 10 Colo. 161, 14 Pac. 428, holding old members of firm remained liable on a debt represented by a promissory note though new firm gave note in payment of such old note.

Cited in reference note in 35 A. S. R. 817, on acceptance of note of third person as payment.

Distinguished in Omaha Brewing Asso. v. Tillenburg, 2 Neb. (Unof.) 280, 96 N. W. 108, where making of note by third person was a part of the original agreement and holding other promisor not liable for amount of note.

—Notes of third person in renewal or substitution.

Cited in Mailhouse v. Frazier, 25 Md. 96, holding party relieved from liability on a debt where the security given was surrendered and the security of another party substituted as purchaser accepted in lieu thereof.

Refusal of instructions as error.

Cited in Boyden v. Fitchburg R. Co. 72 Vt. 89, 47 Atl. 409, holding court properly refused to give a charge part of which was unsound as a proposition of law.

Cited in note in 99 A. D. 128, on when instructions requested should be refused.

69 AM. DEC. 126, SASSCER v. WHITELY, 10 MD. 98.

Presumption as to residence of parties to negotiable paper.

Cited in Reier v. Strauss, 54 Md. 278, 39 A. R. 390, holding notary in

Digitized by Google

giving indorser notice of non-payment may presume that he is still resident of city where note executed and dated, it appearing he resided there for some time after and retained his sign at place of business and name in directory.

Place for demand of payment of note.

Cited in Selden v. Washington, 17 Md. 379, 79 A. D. 659, holding demand of payment of a note sufficient, being made payable at no particular place, when presented at bank in city where dated, the maker being a resident of another state; Staylor v. Ball, 24 Md. 183, holding court properly refused instruction requiring demand of payment of the maker at his place of business or residence independent of whether notary had knowledge of the same.

Cited in reference note in 74 A. D. 607, on where demand of payment of note must be made.

Necessity of diligence to learn residence of parties to dishonored paper.

Cited in Moore v. Hardcastle, 11 Md. 486, holding notice of protest insufficient where notice was sent to indorser at wrong postoffice, no inquiry having been made as to his address.

69 AM. DEC. 129, BUCKEY v. SNOUFFER, 10 MD. 149.

Property of bankrupt as in custody of law.

Cited in reference note in 73 A. D. 615, on property of applicant for benefit of insolvent law being in custody of law for benefit of creditors.

Distinguished in Dowler v. Cushwa, 27 Md. 358, holding property in hands of creditor not within custody of law where held prior to application for benefit of insolvency laws.

— Amenability to distress for rent.

Cited in Re Bishop, 153 Fed. 304, holding landlord precluded from enforcing his rent claim by distress on adjudication of bankruptcy against the tenant; Fox v. Merfeld, 81 Md. 80, 31 Atl. 583, holding property of tenant could not be taken under distress for rent due after application in insolvency; Re Appold, 6 Phila. 469, Fed. Cas. No. 499, on whether goods in the hands of assignee in bankruptcy are distrainable for rent.

Cited in reference note in 30 A. S. R. 367, on liability of insolvent for rent.

Distinguished in Re Gerson, 8 Pa. Dist. R. 277, holding landlord entitled out of proceeds of personal property in hands of receiver in bankruptcy to priority of payment for rent due at time of filing of petition in bankruptcy, though distress not levied until afterwards.

Rent as a lien on personalty.

Cited in Myers v. Smith, 27 Md. 91, holding rent no lien on personal property until the levying of the distress warrant; The Raleigh, 2 Hughes, 44, Fed. Cas. No. 11,539, on distress warrant as proceeding for obtaining or enforcing lien.

Subjection of personalty of tenant to rent.

Cited in Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, holding landlord has no such claim for rent as to enable to pursue removed property for rent subsequently becoming due.

69 AM. DEC. 133, KOECHLEPT v. HOOK, 10 MD. 173.

Validity of judgment uncertain as to which defendant was charged.

Cited in Hodges v. Robbins, 23 Tex. Civ. App. 57, 56 S. W. 565, on validity of judgment against two or more defendants when in terms against defendant in the singular only.

Digitized by Google

Partner's authority to confess judgment against firm.

Cited in reference note in 99 A. D. 277, on authority of partner to confess judgment against firm.

69 AM. DEC. 135, RIDER v. GRAY, 10 MD. 282.

Right to specific performance of contract.

Cited in Shriver v. Seiss, 49 Md. 384, refusing specific performance of contract for sale of land when nothing to show that defendant had no adequate remedy at law and rights of third parties having intervened; Wood v. Dickey, 90 Va. 160, 17 S. E. 818, refusing to decree specific contract for resale of land which was annexed to prior sale after compliance of vendee with terms of contract of sale.

Cited in reference notes in 72 A. D. 606, on specific performance of contracts uncertain in their terms; 88 A. D. 490, on mutuality of contract as condition precedent to specific performance; 90 A. D. 616, on decree of specific performance when remedy is not mutual, or one party only is bound by the agreement; 96 A. D. 590, on requisites to specific performance of contract.

Right to compensation on refusal of specific performance.

Cited in Powell v. Higley, 90 Ala. 103, 7 So. 440, holding on refusal of specific performance of contract for sale of land where purchaser had entered and made improvements and having no adequate remedy at law a decree for compensation may be made him; Powell v. Young, 45 Md. 494, holding same where bill for specific performance also prayed for general relief; McCurley v. McCurley, 61 Md. 436, holding on prayer for specific performance or alternative relief in money equivalent the latter would be granted when specific performance would be attended with difficulty.

Cited in reference note in 43 A. S. R. 803, on allowance of damages in suit for specific performance.

Right to question decree of lower court on appeal.

Cited in Powell v. Young, 45 Md. 494, holding appealing defendant could not question terms of decree decided against complainant.

Sufficiency of memorandum to satisfy statute of frauds.

Cited in Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790 (dissenting opinion), on sufficiency of memorandum to satisfy the statute of frauds.

Compliance with decree as precluding appeal.

Cited in note in 13 A. D. 550, on compliance with equitable decree as precluding appeal.

69 AM. DEC. 140, EICHELBERGER v. MURDOCK, 10 MD. 373.

Enforcement of contract for another's benefit.

Cited in note in 71 A. S. R. 184, 198, on third person's right to enforce contract for his benefit.

Application of collateral securities to items of general debt.

Cited in Mechanics & T. Bank v. Livingston, 6 Misc. 81, 26 N. Y. Supp. 25, holding negotiable note transferred as collateral security for a general account may be applied to any debt of the account.

Cited in notes in 49 A. D. 734, as to what obligations may be secured by pledge; 32 A. S. R. 717, for what purpose collateral security may be held.

Effect of order drawn on fund to work assignment.

Disapproved in First Nat. Bank v. Kimberland, 16 W. Va. 555, holding order

Digitized by Google

drawn on a particular fund for a sum not equal to such fund operated as an equitable assignment of the fund pro tanto.

69 AM. DEC. 145, ROBERTSON v. AMERICAN HOMESTEAD ASSO. 10 MD. 397.

Validity of mortgage uncertain as to amount and time when due.

Cited in Franz v. Teutonia Bldg. Asso. 24 Md. 259, holding mortgage to loan association not void because of uncertainty of amount and of time where mortgagor is member of association.

Meaning of word "mortgage."

Cited in Faust v. Twenty-Third German American Bldg. Asso. 84 Md. 186, 35 Atl. 890, holding amount advanced on mortgage by member of loan association upon the value of his shares not regarded as mortgage debt for purposes of taxation of mortgage debts; Salisbury Permanent Bldg. & L. Asso. v. Wicomico County, 86 Md. 615, 39 Atl. 425, holding investments in mortgages to loan associations not taxable; Lister v. Log Cabin Bldg. Asso. 38 Md. 115, on nature of mortgage executed by share holder to loan or building association.

Adjustments of accounts between borrowing stockholder and building and loan society.

Cited in Manorita v. Fidelity Trust & Loan Co. 101 Fed. 8, holding in adjusting accounts of a borrowing stockholder of insolvent trust and loan company, he will be credited with all payments made but required to contribute pro rata to the losses; Washington Nat. Bldg. & L. Invest. Asso. v. Stanley, 38 Or. 319, 84 A. S. R. 793, 58 L.R.A. 816, 63 Pac. 489; Baltimore Home Mut. Bldg. Asso. v. Thursby, 58 Md. 284,—holding amount of excessive interest already paid should be accounted to credit of borrower; Sawtelle v. North America Sav. Loan & Bldg. Co. 14 Utah, 443, 48 Pac. 211; People's Bldg. Loan & Sav. Asso. v. Fowble, 17 Utah, 122, 53 Pac. 999,—holding funds received in payment as premiums on the stock must be applied in reduction of the debt; Pfeister v. Wheeling Bldg. Asso. 19 W. Va. 676, on nature of redemption of a share of building association.

Annotation cited in Southern Bldg. & L. Asso. v. Anniston Loan & T. Co. 101 Ala. 582, 46 A. S. R. 138, 29 L.R.A. 120, 15 So. 123, holding stockholder of loan association pledging stock for loan with provision of forfeiture of stock on nonpayment of interest or instalments due on stock not entitled to have debt abated to extent of payments made prior to default; Randall v. National Bldg. Loan & Protection Union, 42 Neb. 809, 29 L.R.A. 133, 60 N. W. 1019, holding payments upon stock should, in an accounting of the amount due on the mortgage, be treated as payments pro tanto on the loan.

Cited in reference note in 54 A. S. R. 862, on application of forfeited stock on loan by building and loan association.

Cited in note in 29 L.R.A. 126, on right to apply payments made on stock in building and loan association on terminating plan on mortgage given by same member.

— Determination of present amount due in satisfaction of sums secured by mortgage.

Cited in Cincinnati German Bldg. Asso. No. 3 v. Flach, 1 Cin. Sup. Ct. Rep. 468; Haigh v. United States Bldg. Land & L. Asso. 19 W. Va. 792; Roberts v. American Bldg. & L. Asso. 62 Ark. 572, 54 A. S. R. 309, 33 L.R.A. 744, 36

Digitized by Google

S. W. 1085,—holding present value of sums to become payable plus averages accrued is amount due to association; Georgia State Bldg. & L. Asso. v. American Invest. & L. Co. 101 Ga. 413, 29 S. E. 299, holding in determination of amount due from borrower credit should be given him for instalments already paid; Shannon v. Howard Mut. Bldg. Asso. 36 Md. 383, on method of ascertaining the amount due on mortgage to building association; Laidley v. Cram, 96 Mo. App. 580, 70 S. W. 912, on methods of computing present amount due; Border State Perpetual Bldg. Asso. v. McCarthy, 57 Md. 555, on determination of amount due in settlement of mortgage to building association.

Cited in reference notes in 46 A. S. R. 145, on foreclosure and ascertaining amount due on mortgages to loan association; 54 A. S. R. 314, on ascertainment of amount due on mortgage to building and loan association.

Distinguished in Low Street Bldg. Asso. No. 6 v. Zucker, 48 Md. 448, holding in determining amount due where building association insolvent, the mortgagor can be charged only with sum advanced with interest to date of stating account less weekly dues with interest paid; Oak Cottage Bldg. Asso. No. 2 v. Eastman, 31 Md. 556, holding amount due is sum borrowed after deduction of dues paid in and the addition of bonus provided for.

— Determination of expiration of mortgage contract.

Explained in McCahan v. Columbia Bldg. Asso. 40 Md. 226, holding articles of incorporation and constitution of association might be examined for the purpose of determining when the mortgage contract terminated.

Sufficiency of verification of amount due in foreclosure bill.

Cited in Brooks v. Hays, 24 Md. 507, holding sworn statement of amount due, filed by the mortgagee with his petition after the forfeiture and before the time of sale sufficient verification of the amount due.

Contract between loan association and stockholder as usurious.

Cited in Baltimore Permanent Bldg. & Land Soc. v. Taylor, 41 Md. 409, holding mortgage usurious which provided for payment of interest on the par value of stock which was considerably in excess of the sum actually received; Commercial Bldg. & L. Asso. v. Mackenzie, 85 Md. 132, 36 Atl. 754, holding contract usurious where borrower was compelled to pay interest for full amount borrowed for a period before he received all of the loan; McDonnell v. De Soto Sav. & Bldg. Asso. 175 Mo. 250, 97 A. S. R. 592, 75 S. W. 438, holding loan subject to defense of usury where by-laws of loan association fixed arbitrary rate of interest; Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 293, on treatment of contract between loan association and stockholder thereof as usurious; Martin v. Nashville Bldg. Asso. 2 Coldw. 418, on effect of members of loan association being charged usurious interest on their loans.

Cited in reference notes in 70 A. S. R. 204, on usury by building and loan association; 82 A. S. R. 263, on usury by loan associations; 56 A. S. R. 822; 84 A. S. R. 811,—on usurious transaction by building and loan associations; 97 A. S. R. 609, on usury by building and loan association in exacting premiums; 108 A. S. R. 271, on exaction by loan association of the premiums in excess of lawful rate of interest as usury; 116 A. S. R. 791, on exaction of premiums in addition to interest by building and loan associations as usury.

Cited in notes in 46 A. S. R. 200, 201, on usury by building and loan associations; 83 A. D. 612, 613 on building and loan association contracts as usury; 18 L.R.A. 131, on contracts of building and loan associations held usurious.

Distinguished in Williar v. Baltimore Butchers' Loan & Annuity Asso. 45

Digitized by Google

Md. 546, holding mortgage usurious which provided for payment of interest on sum greater than that loaned.

Rights and liabilities of members of building and loan associations.

Annotation cited in Wohlford v. Citizens' Bldg. L. & Sav. Asso. 140 Ind. 662, 29 L.R.A. 177, 40 N. E. 694, on assessment of members of association for the payment of debts.

Cited in reference notes in 51 A. S. R. 794, on obligation of member to pay dues after building and loan association ceases to exist; 53 A. S. R. 590, on rights of members of building and loan associations; 64 A. S. R. 826, as to status of members of loan association; 53 A. S. R. 638, on members' duty to contribute for loss by building and loan association; 62 A. S. R. 379, on powers of officers and members of building and loan associations; 64 A. S. R. 415, on rights and liabilities of members of building and loan association; 69 A. S. R. 957, on rights and liabilities of different classes of members of loan association; 70 A. S. R. 227; 64 A. S. R. 157,—on effect of insolvency of building and loan associations on rights and liabilities of members; 53 A. S. R. 638, on member's right to withdraw from building and loan association; 49 A. S. R. 523, on rights of member withdrawing from building and loan association; 72 A. S. R. 239, on right to compel repayment on withdrawal from loan association.

Powers of loan associations.

Cited in reference notes in 54 A. S. R. 315, on right of building and loan association to impose fines; 71 A. S. R. 585, on powers of loan associations and rights of members; 72 A. S. R. 254, on purchase of realty by building and loan association; 87 A. S. R. 264, on notes by loan associations; 124 A. S. R. 267, on enforceability of note given by insolvent loan association for money borrowed to pay withdrawing members.

Cited in note in 35 L.R.A. 221, on provision in loan-association mortgage for payment of fine.

Character of payments by borrower from building associations.

Cited in reference note in 17 A. S. R. 345, on character of payments by borrower from building association.

Law of building and loan associations.

Cited in reference notes in 23 A. S. R. 201; 56 A. S. R. 375; 64 A. S. R. 694,—on law of building and loan associations; 109 A. S. R. 66, on features of law applicable to building and loan associations; 2 A. S. R. 645, on history and objects of building and loan associations.

Dissolution of building and loan associations.

Cited in reference note in 5 A. S. R. 611, on dissolution of building and loan associations.

Estoppel to deny corporate existence.

Cited in note in 81 A. D. 419, on estoppel to deny corporate existence by contracting with corporation.

69 AM. DEC. 166, KELLENBECK v. STATE, 10 MD. 431.

Sufficiency of indictment.

Cited in Kiefer v. State, 87 Md. 562, 40 Atl. 377, holding indictment for illegally selling liquors on Sunday insufficient in not negativing the exception that defendant was not a hotel keeper or if an hotel keeper that the liquor was

Digitized by Google

not drunk in the rooms; Gibson v. State, 54 Md. 447, holding that exceptions inhering in definition of the offense must be negatived.

Cited in reference notes in 85 A. D. 658, on use of words constituting part of description of crime in indictment; 94 A. D. 259, on necessity of indictment being explicit.

— Indictment for arson.

Cited in reference note in 8 A. S. R. 430, on sufficiency of indictment for arson.

Distinguished in Gibson v. State, 54 Md. 447, where one count was good though other failed to negative that burned building was a house.

Defects in indictment as ground for reversal.

Cited in Davis v. State, 39 Md. 355, holding writ of error did not properly lie, the errors assigned being subject to demurrer or arrest of judgment.

Cited in reference notes in 88 A. D. 75, on necessity that objection to indictment be made by demurrer; 48 A. S. R. 546, on objections to indictment.

What constitutes arson.

Cited in note in 81 A. D. 74, as to what constitutes arson.

69 AM. DEC. 170, ROSE v. BEVAN, 10 MD. 466.

Injunction against debtor disposing of his property.

Cited in reference note in 88 A. D. 235, as to when injunction against debtor disposing of his property will be granted.

Cited in note in 71 A. S. R. 373, on right to injunction and appointment of receiver.

Right to injunction to preserve mortgage or lien on property.

Cited in Ukiah Bank v. Moore, 106 Cal. 673, 39 Pac. 1071, holding injunction would lie to preserve mortgaged property from destruction though time of payment of mortgage had not arrived; Bruce v. Levering, 23 Md. 288, holding injunction would lie to restrain judgment creditor from selling property levied on, on which there was a prior mortgage.

Appointment of receiver.

Cited in Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169, holding receiver could be appointed for moneys of debtor paid into court when arising out of land.

Cited in notes in 64 A. D. 492, on right of debtor to have receiver appointed; 72 A. S. R. 61–63, on appointment of receiver in creditors' suit; 72 A. S. R. 78, on appointment of receiver for mortgaged property.

Chattel mortgage as affecting after acquired property.

Cited in Crocker v. Hopps, 78 Md. 260, 28 Atl. 99, holding mortgagee of chattels does not by virtue of his mortgage become entitled to the substituted or after acquired chattels; First Nat. Bank v. Lindenstruth, 79 Md. 136, 47 A. S. R. 366, 28 Atl. 807, holding provision in mortgage of chattels providing that it should cover after acquired property a nullity; Williams v. Briggs, 11 R. I. 476, 23 A. R. 518, holding mortgage of personal property to be afterwards acquired conveys no title to such property when acquired unless possession given to mortgagee after acquisition; Mallory v. Maryland Glass Co. 131 Fed. 111, on after acquired property as subject to mortgage lien; Rodes v. Haynes, 95 Tenn. 673, 33 S. W. 564, holding a substitution by unregistered agreement for personal property described in a trust deed of other property of like character not mentioned therein is void as to judgment creditors of maker of the deed.

Digitized by Google

Cited in reference note in 53 A. S. R. 154, on right to proceeds of sale of mortgaged personalty.

Cited in notes in 46 A. D. 712, 716, on mortgage of after-acquired property and of property having only potential existence; 76 A. D. 723, 724, on effect of mortgage on after-acquired personal property; 47 A. S. R. 370, on chattel mortgage as embracing after-acquired, substituted, or intermingled property; 109 A. S. R. 519, on invalidity as against creditors of mortgage of after-acquired stock of goods.

Distinguished in Armstrong v. Ford, 10 Wash. 64, 38 Pack. 866, holding under chattel mortgage upon stock of goods providing for payment of mortgage indebtedness out of the proceeds of the sale of the goods of which mortgagee enters into possession, the lien applies to after-acquired goods mingled with stock.

Rights of creditor in equitable interest of debtor.

Cited in Martin v. Jewell, 37 Md. 530; Mayer v. Wilkins, 37 Fla. 244, 19 So. 632,—holding equitable interest of party in personal property not subject to execution at law; Myers v. Amey, 21 Md. 302, holding equity of redemption not subject to seizure and sale under writ of fieri facias.

Cited in reference note in 50 A. S. R. 307, on levy of execution on mortgaged personal property.

Cited in notes in 32 A. D. 167, on equitable interests as not subject to execution; 11 E. R. C. 671, on right to seize equitable interest on legal process.

Distinguished in Shryock v. Morris, 75 Md. 72, 23 Atl. 68, holding by statutory enactment equitable interest of judgment debtor subject to sale on execution.

Right to assume averments of bill as true.

Cited in Haight v. Burr, 19 Md. 130, holding averments of bill on appeal must be taken as true.

Distinguished in Voshell v. Hynson, 26 Md. 83, holding court could not assume allegations of bill to be true on appeal, where answer had been filed and testimony taken.

Effect of confusion of mortgaged goods.

Cited in notes in 54 A. D. 595, on effect of confusion of mortgaged goods; 76 A. D. 727, on renewal, substitution, and commingling of mortgaged goods.

Sufficiency of description of goods in chattel mortgage.

Cited in reference note in 72 A. D. 483, on sufficiency of description of goods in chattel mortgage.

69 AM. DEC. 172, UHL v. DILLON, 10 MD. 500.

Lien or judgment as basis of right to restrain debtor from disposing of property.

Cited in Hubbard v. Hubbard, 14 Md. 356; Crowell v. Horacek, 12 Neb. 622, 12 N. W. 99; State Bank v. Chatten, 59 Kan. 303, 52 Pac. 893,—holding creditor must reduce his claim to judgment before equity would enjoin debtor from making a conveyance of his property; Balls v. Balls, 69 Md. 388, 16 Atl. 18, holding equity would not at request of holder of a promissory note upon which he had not obtained judgment enjoin maker of from conveying property; Frederick County Nat. Bank v. Shafer, 87 Md. 54, 39 Atl. 320, holding general creditor not entitled to order restraining the payment of money by third party to debtor, claim not being reduced to judgment.

Digitized by Google

Cited in reference notes in 88 A. D. 235, as to when injunction against debtor disposing of his property will be granted; 90 A. D. 296, on injunction and receiver in creditors' suit; 91 A. D. 757, on lien as foundation for injunction; 91 A. D. 782, on injunction to prevent debtor from disposing of his property before judgment at law and in fraud of creditors.

Cited in note in 71 A. S. R. 373, on right to injunction and appointment of receiver.

Right of general creditor towards debtor's property.

Cited in Frye v. Miley, 54 W. Va. 324, 46 S. E. 135, holding suit to set aside fraudulent conveyance could not be sustained by creditor at large before the debt on which predicated becomes due and payable.

Cited in reference note in 90 A. D. 288, on necessity of creditor's exhausting remedy at law before filing creditor's bill.

Cited in note in 66 A. S. R. 286, on who may maintain creditors' bill to set aside fraudulent conveyance.

Distinguished in Flack v. Charron, 29 Md. 311; Sanderson v. Stockdale, 11 Md. 563,—holding partnership creditor might without reducing claim to judgment proceed in equity to vacate disposal between the partners of the partnership effects.

Appointment of receiver in creditor's suit.

Cited in notes in 64 A. D. 491, on right of creditor to have receiver appointed; 72 A. S. R. 60–63, on appointment of receiver in creditors' suit.

69 AM. DEC. 174, GENERAL INS. CO. v. UNITED STATES INS. CO. 10 MD. 517.

Applicability of recording acts to conveyance of equities.

Cited in Edwards v. McKernan, 55 Mich. 520, 22 N. W. 20, holding conveyance of equitable interest in lands within the recording acts; Gray v. H. M. Loud & Sons Lumber Co. 128 Mich. 427, 54 L.R.A. 731, 87 N. W. 376, on effect of recording of conveyance as between purchasers of mortgaged real estate.

Cited in reference note in 4 A. S. R. 706, on equitable mortgages as affected by registry acts.

Notice and priority as between recorded and unrecorded mortgages and deeds.

Cited in Hoffman v. Gosnell, 75 Md. 577, 24 Atl. 28, holding creditors becoming such after execution of recorded deed not affected by unrecorded declaration of trust executed at same time; Brown v. Simons, 44 N. H. 475, holding previous conveyances of parcels of mortgaged property not recorded will be postponed to subsequent recorded conveyances on foreclosure sale of mortgaged property; Nelson v. Hagerstown Bank, 27 Md. 51, on effect of registery laws on rights of mortgagees; Sixth Ward Bldg. Asso. No. 5 v. Willson, 41 Md. 506, on preferences obtained by the recording of mortgages; Willard v. Ramsbury, 22 Md. 206, on priority of lien between mortgagee with actual notice and mortgagee who records.

Cited in reference notes in 54 A. D. 668, on constructive notice of prior title; 74 A. D. 178, on when subsequent purchaser is charged with notice; 83 A. D. 435, on sufficiency of unrecorded instrument between parties and purchasers.

Digitized by Google

with notice; 89 A. D. 171, on sufficiency of proof that subsequent purchaser had actual notice of prior unrecorded deed.

Cited in note in 13 L.R.A. 236, on registry of mortgage as notice.

Notice to officer or agent of corporation as notice to corporation.

Cited in Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 A. R. 319, holding notice to bank trustee in unofficial capacity not notice to bank; Mann v. Second Nat. Bank, 30 Kan. 412, 1 Pac. 579, holding bank not charged with notice of failure of consideration of note because director had such knowledge which he did not communicate; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88, holding bank not affected by notice of president of bank that note was accommodation one when such notice not communicated to it.

Cited in reference notes in 93 A. D. 577, on notice to director as notice to corporation; 34 A. S. R. 706, on effect of notice to directors to bind corporation.

Cited in notes in 36 A. D. 197, 198, on notice to directors as a body as notice to corporation; 39 A. R. 328, on effect of knowledge by agent of unrecorded deed as notice to corporation; 10 L.R.A. 705, on notice to agent as notice to principal.

Distinguished in Hayward v. National Ins. Co. 52 Mo. 181, 14 A. R. 400, holding principal bound by notice to agent during existence of agency and referring to business coming within the scope of his authority.

Relation of director to corporation.

Cited in Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115, holding corporation not bound by defence interposed by a single director.

Marshaling of assets.

Cited in Pope v. Baltimore Warehouse Co. 103 Md. 9, 62 Atl. 1119, holding prior creditor did not as against creditor having junior lien forfeit his right to appropriate securities to payment of debt by entering into compromise as to other securities of doubtful value; Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; Sanders v. Godley, 36 Ala. 50,—on when marshaling of assets will be compelled.

Cited in reference notes in 90 A. D. 607, as to when doctrine of marshaling securities is applicable; 94 A. D. 206, as to which of two possible funds on which he has lien, creditor must resort; 8 A. S. R. 29, on marshaling assets.

— Person entitled to.

Cited in Dirks v. Humbird, 54 Md. 399, holding purchaser of equity of redemption of debtor not so entitled; Citizens' Sav. Bank v. Wood, 134 Iowa, 232, 111 N. W. 929, on person at whose request assets will be marshaled.

Remanding of cause.

Cited in reference note in 77 A. S. R. 898, on remanding of cause by appellate court.

Agreed case as waiver of exceptions.

Cited in Rogers v. Citizens' Nat. Bank, 93 Md. 613, 49 Atl. 843, holding cause would not be remanded for purpose of showing stock irregularly issued when agreed statement of facts admitted the regularity of its issuance; Smith v. Hooper, 95 Md. 16, 51 Atl. 844, refusing to remand cause for amendment of pleadings and production of evidence where cause has been decided upon a bill and answer admitting allegations of bill to be true.

Digitized by Google

69 AM. DEC. 181, NEW ENGLAND CAR SPRING CO. v. BALTIMORE & O. R. CO. 11 MD. 81.

Statutory construction.

Cited in Shellabarger v. Jackson County, 50 Kan. 138, 32 Pac. 132, holding statute should be construed according to intent of legislators rather than to letter of statute; Austin v. State, 22 Ind. App. 221, 53 N. E. 481, holding statute prohibiting the giving away of liquor on legal holiday did not apply to private person giving away liquor to guests at private office; Baker v. Payne, 22 Or. 335, 29 Pac. 787 (dissenting opinion); Opinion of Justices, 66 N. H. 629, 33 Atl. 1076,—on construction of a statute.

Cited in reference notes in 74 A. D. 534, on legislative intent as governing construction of statutes; 79 A. D. 243, on legislative intent in construction of statutes.

Cited in note in 14 E. R. C. 832, on interpretation of statutes.

Applicability of mechanic's lien laws.

Cited in reference note in 78 A. D. 695, on what structures are subject to mechanics' liens.

— To cars.

Cited in Taylor v. Burlington, C. R. & M. R. Co. 4 Dill. 570, Fed. Cas. No. 13,783, as being doubtful whether mechanic has lien on cars furnished road.

Cited in note in 8 L.R.A. 702, on mechanic's lien law as applicable to railroads.

69 AM. DEC. 184, HAMILTON v. WHITRIDGE, 11 MD. 128.

Right to dissolution of injunction on bill and answer.

Cited in Bouldin v. Baltimore, 15 Md. 18, holding injunction will not be dissolved where equity of bill not denied in the answer.

Cited in notes in 32 A. D. 172; 29 A. S. R. 277,—on motion for dissolution of injunction.

Effect of answer to bill.

Cited in Voshell v. Hynson, 26 Md. 83, holding denial of allegations in bill conclusive when not overcome with testimony.

— Effect of evasion in answer.

Cited in Cooke v. Husbands, 11 Md. 492, holding averments of bill will be presumed or accepted as true where defendant fails to answer them.

Right to have public nuisance restrained or abated.

Cited in Texarkana v. Leach, 66 Ark. 40, 74 A. S. R. 67, 48 S. W. 807, holding private property owner might have the vacation of a public street enjoined when he would be injured thereby; Redway v. Moore, 3 Idaho, 312, 29 Pac. 104, holding party seeking to abate public nuisance must show affirmatively special injury; Fort v. Groves, 29 Md. 188, refusing to grant injunction to prevent extending of building on public street, no special damage being shown; Woodyear v. Schaefer, 57 Md. 1, 40 A. R. 419, enjoining defendant, owner of a slaughter house from using stream for dumping refuse where it injured the operation of a flour mill built on stream and the health of employees: Adams v. Michael, 38 Md. 123, 17 A. R. 516, on necessity of showing special damages in order to have public nuisance abated.

Cited in reference notes in 73 A. D. 785, on indictment as remedy for

Digitized by Google

public nuisance; 74 A. D. 484, on injunction against public nuisance at suit of private person.

Cited in notes in 73 A. D. 113–116, on injunctions against threatened nuisances; 118 A. S. R. 879, on injunction against, or abatement of, nuisance created or maintained by two or more persons; 4 L.R.A. 211, on right of action of one who suffers special injury from public nuisance; 7 L.R.A. 549, on equitable protection of abutter's rights; 13 L.R.A. 828, on equity's enforcement of rights of riparian owners; 1 E. R. C. 599, on right of action by individual against person causing public nuisance.

Injunction to restrain or abate house of prostitution.

Cited in Blagen v. Smith, 34 Or. 394, 44 L.R.A. 522, 56 Pac. 292; Weakley v. Page, 102 Tenn. 178, 46 L.R.A. 552 53 S. W. 551; Marsan v. French, 61 Tex. 173, 48 A. R. 272; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513, 1 A. & E. Ann. Cas. 35; Ledescki v. Berger, 150 Ala. 649, 11 L.R.A.(N.S.) 1060, 43 So. 960,—holding adjoining property owner entitled to injunction to abate house of prostitution; Givens v. Van Studdiford, 4 Mo. App. 498, upholding right in favor of owner of adjoining tenement suffering special damage.

Cited in notes in 48 A. R. 274, on relief for renting house for purposes of prostitution; 11 L.R.A.(N.S.) 1061, on right of owner or occupant of neighboring property to enjoin maintenance of house of prostitution.

Distinguished in Anderson v. Doty, 33 Hun, 160, holding continuance of house of prostitution would not be restrained by injunction at request of party whose property depreciated in value by it.

Disapproved in Neaf v. Palmer, 103 Ky. 496, 41 L.R.A. 219, 45 S. W. 506, holding injunction not the proper remedy to supress the keeping of a house of prostitution.

Injunction against practices offensive to sight or morals.

Cited in Farrell v. Cook, 16 Neb. 483, 49 A. R. 721, 20 N. W. 720, enjoining defendant from keeping stallions and standing them near and in plain view of plaintiff's dwelling; Northern P. R. Co. v. Whalen, 149 U. S. 157, 37 L. ed. 686, 13 Sup. Ct. Rep. 822, holding railroad company could not maintain suit for injunction against keepers of saloons near road where workmen got drunk and became unfitted for work; State ex rel. Vance v. Crawford, 28 Kan. 726, 42 A. R. 182, refusing to abate illegal liquor saloon where statute provided an adequate remedy.

Right to injunction generally.

Cited in Roberson v. Rochester Folding Box Co. 171 N. Y. 538, 89 A. S. R. 828, 59 L.R.A. 478, 64 N. E. 442 (dissenting opinion), on right to restrain the violation of a personal right; Rowland v. Miller, 29 Jones & S. 163, 18 N. Y. Supp. 793, granting injunction to enforce a covenant forbidding the use of property for trade or business to neighborhood, where defendant used the premises for undertaking and embalming purposes; Strickland v. Knight, 47 Fla. 327, 36 So. 363 (dissenting opinion), on relief by injunction being within the discretion of the court; State ex rel. Kenamore v. Wood, 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474 (dissenting opinion), on jurisdiction of equity to grant injunction.

Cited in reference notes in 72 A. D. 78, on injunction granted to restrain irreparable injury; 74 A. D. 554, on injunction to prevent irreparable damage; 53 A. S. R. 936, on injunction to restrain collection of taxes.

Digitized by Google

Cited in notes in 12 L.R.A. 754, on remedy by injunction to restrain monopoly; 3 L.R.A.(N.S.) 623, on injunction against commission of crime where property rights are invaded.

69 AM. DEC. 190, INLOES v. AMERICAN EXCH. BANK, 11 MD. 173.

Interpretation of nature of deed for creditors.

Distinguished in Fouke v. Fleming, 13 Md. 398, 74 A. D. 545, holding deed conveying specific articles in trust for payment of specified debts a quasi mortgage and not voluntary assignment for benefit of creditors generally.

Validity of assignment for creditors.

Cited in Sumner v. Hicks, 2 Black, 532, 17 L. ed. 355, holding assignment fraudulent and void where it provides trustee shall sell the property "on such terms and conditions as in his judgment may appear best and most for interest of parties concerned;" Maennel v. Murdock, 13 Md. 173, holding assignment not rendered void by preference of certain class of creditors; Whedbee v. Stewart, 40 Md. 414, holding deed in trust for such creditors who would accept and release grantors in certain time and with no provision for surplus after payment of such creditors fraudulent and void; Maughlin v. Tyler, 47 Md. 545, holding deed of trust for benefit of preferred creditors it not appearing that it conveyed all the property void.

Cited in reference notes in 74 A. D. 698, on invalidity of assignment for creditors giving assignee discretion to sell on credit; 74 A. D. 773, on validity of assignment for creditors giving assignee discretion to sell on credit; 75 A. D. 819, on assignment giving trustee power to sell on credit; 78 A. D. 125, on validity of assignment for creditors imposing unreasonable limitation on powers of trustee.

Cited in notes in 58 A. S. R. 78, as to invalidity, on their face of assignments for creditors; 58 A. S. R. 84, on effect of intent to hinder, delay, or defraud creditors on validity of assignment for creditors; 58 A. S. R. 98, on effect of fraud on assignment for benefit of creditors.

Admissibility of parol to correct void assignment for creditors.

Cited in Farrow v. Hayes, 51 Md. 498, holding evidence inadmissible to show deed of trust void on face had been so executed by mistake and contrary to intentions of grantor; Jones v. Syer, 52 Md. 211, 36 A. R. 366, holding assignment for creditors void as hindering and delaying could not be aided by extrinsic evidence; Landeman v. Wilson, 29 W. Va. 702, 2 S. E. 203, holding same in case of trust deed.

Questions of fact for jury.

Cited in Treadway v. Wilder, 12 Nev. 108, holding court had no right to try question of fact in action at law unless jury waived by consent of parties; Bell v. State, 57 Md. 108, holding court had a right to state to jury legal effect of evidence introduced and submitted to their consideration; Birney v. New York & W. Printing Teleg. Co. 18 Md. 341, 81 A. D. 607, on necessity of facts being left to the jury.

Cited in reference note in 86 A. D. 740, on relative functions of court and jury in criminal cases.

Assumption of truth of admissions.

Cited in Waters v. Biggin, 19 Md. 536, holding court in making a ruling against a party on admissions or proof by him may assume the truth thereof;

Digitized by Google

Parkhurst v. Northern C. R. Co. 19 Md. 472, 81 A. D. 648, holding unnecessary that cause be submitted to jury where defendant admits the charge.

Right to instructions.

Cited in notes in 39 A. D. 656, on right to instruction on part of evidence; 99 A. D. 127, on when instructions requested must be given.

69 AM. DEC. 195, HOLLAND v. BALTIMORE, 11 MD. 186.

Who is "owner" or "proprietor" within meaning of statute.

Cited in Baltimore v. Latrobe, 101 Md. 621, 61 Atl. 203, 4 A. & E. Ann. Cas. 1005, holding party owner of ground rent of land entitled to compensation where land taken under eminent domain; Baltimore v. Bouldin, 23 Md. 328, on estate or interest in land necessary to ownership or proprietorship within the meaning of the statute.

Necessity of land owner's consent in making local improvements.

Cited in Bouldin v. Baltimore, 15 Md. 18; Miller v. Amsterdam, 149 N. Y. 288, 43 N. E. 632; Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234,—holding failure to obtain consent of majority of land holders adjoining to improvement of a street fatal to proceedings to so improve; Thorn v. West Chicago Park Comrs. 130 Ill. 594, 22 N. E. 520, holding consent of adjoining land owners necessary to the validity of assessment of certain streets for park purposes; Roswell v. Dominice, 9 N. M. 624, 58 Pac. 342, holding petition by at least half of adjoining land owners necessary to validity of a special assessment for street improvements; Baltimore v. Bouldin, 23 Md. 328, on necessity of assent of majority of adjoining land owners to street improvements.

Cited in note in 16 E. R. C. 401, on right of lessee to petition for paving of street.

Jurisdiction of equity to remove clouds from title.

Cited in Whiteford v. Yellott, 104 Md. 191, 64 Atl. 936; Treadwell v. Brooks, 50 Conn. 262,—holding equity would remove cloud from title which could not be enforced in either law or equity.

Cited in reference notes in 89 A. D. 778, on equitable interference to prevent cloud on title; 93 A. D. 432, on removal or prevention of cloud on title in equity.

Cited in notes in 8 L.R.A. 729, on preventative remedy in equity against casting cloud on title.

Distinguished in Tome v. Merchants & M. Permanent Bldg. & L. Co. 34 Md. 12, refusing to enjoin a junior mortgagee who had obtained a decree for the sale of the mortgaged property at instance of prior mortgagee not a party to the proceedings, from proceeding to sell mortgaged property.

What constitutes cloud on title.

Cited in reference note in 8 A. S. R. 668, on what constitutes a cloud on title.

Right of injunction — Against collection of taxes or assessments generally.

Cited in reference notes in 73 A. D. 83; 74 A. D. 123, 124; 5 A. S. R. 558; 22 A. S. R. 357; 27 A. S. R. 451,—on injunction to restrain collection of assessments and taxes; 88 A. D. 725; 22 A. S. R. 143; 52 A. S. R. 776,— on injunction to restrain tax collection; 91 A. D. 460, on injunction to restrain enforcement of taxes or assessments against personal property; 47 A. S. R. 612, on injunc-

Digitized by Google

tion against collection of local assessment; 76 A. S. R. 433, on injunction against assessments.

Cited in notes in 76 A. D. 708, on injunctions to restrain collection of tax; 2 A. S. R. 95, on power of court of equity to restrain collection of tax affecting only particular individuals.

— To restrain enforcement of void tax or assessment.

Cited in Baltimore v. Porter, 18 Md. 284, 79 A. D. 686, holding equity would restrain the sale of property to pay an assessment where the statutory requirements were disregarded in proceeding with the work; Baltimore v. Grand Lodge, I. O. O. F. 44 Md. 436, holding same where city seeks to enforce void ordinance for opening of a street; Stewart v. Meyer, 54 Md. 454; Polk v. Rose, 25 Md. 153, 89 A. D. 773,—holding equity would cancel a void tax collector's deed which operated as a cloud on title of complainant; Friedenwald v. Shipley, 74 Md. 220, 21 Atl. 790, restraining sale of land for nonpayment of assessments for street improvements where the proceedings under which work was done were void; Collins v. Keokuk, 118 Iowa, 30, 91 N. W. 791, holding equity would not enjoin the collection of an overassessment; Joesting v. Baltimore, 97 Md. 589, 55 Atl. 456, granting relief against unauthorized tax levy where no other adequate remedy existed.

Annotation cited in Crawford v. Polk County, 112 Iowa, 118, 83 N. W. 825, holding equity would not relieve against discriminating taxation where statute provided for the procedure in such cases; Bardrick v. Dillon, 7 Okla. 535, 54 Pac. 785, holding collection of tax would be enjoined where property was assessed beyond its true cash value, where amount due or true value tendered; West Portland Park Asso. v. Kelly, 29 Or. 412, 45 Pac. 901, on right of equity to restrain the collection of a void tax.

Cited in reference notes in 99 A. D. 212, on injunction to restrain collection of illegal tax; 23 A. S. R. 752, on injunction against illegal taxation.

Cited in note in 22 L.R.A. 704, on relief granted in injunction to restrain collection of illegal taxes to avoid multiplicity of suits.

Distinguished in Gittings v. Baltimore, 95 Md. 419, 52 Atl. 937, holding equity would not enjoin the collection of an illegal tax when statute provided adequate remedy.

— To restrain acts under void ordinance or the like.

Cited in Deems v. Baltimore, 80 Md. 164, 45 A. S. R. 339, 26 L.R.A. 541, 30 Atl. 648; Baltimore v. Radecke, 49 Md. 217, 33 A. R. 239,—holding equity would restrain the enforcement of of a void ordinance; Chesapeake & P. Teleph. Co. v. Baltimore, 89 Md. 689, 43 Atl. 784, holding injunction would be granted to secure vested rights which municipal ordinance sought to destroy; Bennett v. Baltimore, 106 Md. 484, 68 Atl. 14, enjoining the performance of a paving contract where the advertisement asking for bids was not made in English language as required by statute; Page v. Baltimore, 34 Md. 558, on right of equity to enjoin the enforcement of provisions of a void ordinance."

Distinguished in Western Maryland R. Co. v. Patterson, 37 Md. 125, holding circuit court had no authority to enjoin proceedings objectionable on their face where superior court had special and competent authority to adjudge and determine them.

— Against execution sale.

Cited in State use of Board of Education v. Tiedemann, 69 Mo. 306, 33 A. R.

Digitized by Google

498, enjoining a sale on execution of property of a board of education held for school purposes.

Cited in reference note in 87 A. D. 583, on injunction against execution sale.

— To prevent multiplicity of suits.

Cited in reference notes in 84 A. D. 97; 89 A. D. 778; 90 A. D. 73,— on equitable interference to prevent multiplicity of suits.

69 AM. DEC. 206, ATWELL v. MILLER, 11 MD. 348.

Admissibility of declarations of third party.

Cited in Rosenstock v. Tormey, 32 Md. 169, 3 A. R. 125, holding declarations of agent not admissible to bind principal until fact of agency first established.

— Necessity of proof of agency as foundation.

Cited in National Mechanics' Bank v. National Bank, 36 Md. 5, holding that where there is evidence of agency though not entirely satisfactory declarations should be submitted to jury.

Admissibility of parol collateral to written contract.

Cited in Allen v. Sowerby, 37 Md. 410, holding parol evidence admissible to show subsequent parol agreement modifying written contract; Fusting v. Sullivan, 41 Md. 162, holding parol admissible to prove independent collateral fact about which the written contract is silent.

Right to modify bill of lading by subsequent parol agreement.

Cited in Mehrbach v. Liverpool & G. W. Steam Co. 12 Fed. 77, holding carrier not liable for return of freight paid under terms of bill of lading where by subsequent oral agreement shipper assumed the risk of failure to perform; Steidl v. Minneapolis & St. L. R. Co. 94 Minn. 233, 102 N. W. 701, holding contract of shipment as represented by bill of lading might be changed by subsequent parol agreement.

Cited in reference note in 93 A. D. 194, on variation of bill of lading by parol.

Cited in note in 56 A. S. R. 663, on subsequent parol agreement of carrier to vary writing.

Right to recover freight charges advanced.

Cited in Lee v. Barreda, 16 Md. 190, holding charterer may on failure of the voyage recover the sum advanced as freight charges with interest.

When freight is earned.

Cited in reference note in 40 A. S. R. 584, on when freight for shipping goods is earned.

69 AM. DEC. 212, PETTIGREW v. BARNUM, 11 MD. 434.

Right of party to testify in own behalf as to matters exclusively of his own knowledge.

Cited in reference note in 79 A. D. 79, on right of guest to testify to contents of trunk in action against innkeeper for loss.

Disapproved in Smith v. North Carolina R. Co. 60 N. C. (1 Winst. L.) 203, holding plaintiff in action against railroad for loss of trunk not competent witness to prove contents thereof, though he offer to swear that he has no other means of proving contents.

Liability of innkeeper for loss or destruction of guest's property.

Cited in Vance v. Throckmorton, 5 Bush, 41, 96 A. D. 327, holding inn-

Digitized by Google

keeper not responsible for articles belonging to family of boarders under special contract, lost by the burning of the hotel.

Cited in reference notes in 83 A. D. 592–765; 88 A. D. 412; 89 A. D. 628; 73 A. S. R. 616,—on liability of innkeepers; 73 A. D. 221, on liability of innkeeper for loss of goods entrusted to him as such; 86 A. D. 656, on liability of innkeepers and what negligence on part of guest will exempt innkeeper from liability; 98 A. D. 562, on innkeeper as insurer of goods of guest; 91 A. D. 670; 98 A. D. 562,—on goods of guest for which innkeeper is responsible; 1 A. S. R. 221, on liability of innkeeper for loss of baggage of guest; 19 A. S. R. 691, on liability of innkeeper for stolen goods of guest; 99 A. S. R. 577, as to what goods innkeepers are liable for.

Cited in notes in 88 A. D. 409, on innkeepers' liability; 99 A. S. R. 579, on liability of innkeepers as insurers for injury to or loss of property of guest; 99 A. S. R. 590, as to what goods innkeeper is liable for; 13 E. R. C. 130, on liability of innkeeper for goods brought to inn.

— Valuables not placed with innkeeper for safety.

Cited in Murchison v. Sergent, 69 Ga. 206, 47 A. R. 754, holding innkeeper liable for loss of guest's clothes, watch and money for traveling expenses though he had given notice that he would not be liable for valuables not deposited with him; Maltby v. Chapman, 25 Md. 310, holding same though statute provided that there should be no liability unless valuables were deposited with innkeeper.

For theft of guest's valuables not necessary for traveling.

Cited in Wilkins v. Earle, 3 Robt. 352, holding innkeeper only liable where sum of money was deposited with him without information as to amount, for as much thereof as necessary for plaintiff's ordinary traveling expenses; Giles v. Fauntleroy, 13 Md. 126, holding no liability to guest for a revolver, silver teaspoons and physician's instruments which were in the lost trunk.

Disapproved in Briggs v. Todd, 28 Misc. 208, 59 N. Y. Supp. 23, holding innkeeper liable for loss of silverware though not deposited with landlord for safe keeping.

Want of actual fault or negligence as excusing innkeeper or carrier.

Cited in State v. Baltimore & S. Steam Co. 13 Md. 181, holding defendants could not escape liability for violation in carrying a negro slave without permission of the master by pleading lack of knowledge of slave being on the boat.

What is baggage.

Cited in Yazoo & M. Valley R. Co. v. Baldwin, 113 Tenn. 205, 81 S. W. 599; Mississippi C. R. Co. v. Kennedy, 41 Miss. 671,—holding common carrier's liability for loss of passengers baggage extended only to such articles of necessity usually carried by passengers for their personal use, comfort and convenience; Treiber v. Burrows, 27 Md. 130, on what constitutes baggage of guest at hotel.

Sufficiency of general objections to evidence.

Cited in First Nat. Bank v. Rush, 29 C. C. A. 333, 56 U. S. App. 556, 85 Fed. 539, holding general objections to a deposition must be overruled where it appears that part thereof is admissible; Everett v. Neff, 28 Md. 176, holding

Digitized by Google

no error in overruling objection to admissibility of all and each and every part of certain evidence whe: part thereof was admissible; Day v. Raguet, 14 Minn. 273, Gil. 203; Hutzler v. Lord, 64 Md. 534, 3 Atl. 891,—holding same where objection general and part of evidence admissible; Mallonee v. Duff, 72 Md. 283, 19 Atl. 708, holding error to reject whole of evidence part of which admissible.

Instructions giving construction and effect of evidence.

Cited in note in 72 A. D. 549, on instructions giving construction and effect of evidence.

Refusal of requests for instructions already covered.

Cited in Philadelphia, W. & B. R. Co. v. Weaver, 34 Md. 431; Kershner v. Kershner, 36 Md. 309; Spencer v. Trafford, 42 Md. 19; Burgoon v. Bixler, 55 Md. 384, 39 A. R. 417; Baltimore & O. R. Co. v. Worthington, 21 Md. 275, 83 A. D. 578,— refusing to reverse a judgment on account of rejection of correct prayer when instructions given were correct and covered the entire case; Gerhauser v. North British & M. Ins. Co. 7 Nev. 174 (on petition for rehearing); Smith v. Wood, 31 Md. 293,— holding judgment would not be reversed for refusal to grant proper instructions where those granted covered the entire ground.

Cited in notes in 99 A. D. 132, on effect of failure to give correct instructions requested though full and correct instructions were given; 99 A. D. 127, on when instructions requested should be refused.

69 AM. DEC. 226, KELLER v. STATE, 11 MD. 525, Reversed on rehearing in 12 Md. 322.

Validity of statute as respects singleness of subject and title.

Cited in Dorchester County v. Meekins, 50 Md. 28; Annapolis v. State, 30 Md. 112,—holding act sufficient in embracing but one subject, described in title.

Cited in reference notes in 73 A. D. 217, on necessity that statute relate to but one subject, which shall be expressed in its title; 74 A. D. 534, on necessity that legislative act embrace but one subject which is expressed in title; 90 A. D. 284, on constitutional requirement as to subject and title of statute.

Cited in note in 61 A. D. 344, as to when statutes are constitutional or unconstitutional under provision that they shall contain but one subject to be expressed in the title.

Sufficiency of title of act.

Cited in Ballentyne v. Wickersham, 75 Ala. 533, holding act entitled "an act to establish inferior court of criminal jurisdiction and to define jurisdiction of said court and the criminal jurisdiction of said court" void as containing two subjects distinct and independent; Washington County v. Franklin R. Co. 34 Md. 159, holding "an act to provide for the general valuation and assessment of property in this state" sufficiently comprehensive to include a clause repealing exemptions; Second German Bldg. Asso. v. Newman, 50 Md. 62; Catholic Cathedral Church v. Manning, 72 Md. 116, 19 Atl. 599; State v. Young, 47 Ind. 150 (dissenting opinion),—on sufficiency of title of legislative act.

Cited in note in 64 A. S. R. 100, on sufficiency of title of statutes.

Right of state to exact license.

Cited in Woods v. State, 36 Ark. 36, 38 A. R. 22, holding state might in regulating sale of liquor compel druggist to procure a license to sell.

Cited in notes in 52 A. D. 332, on violation of constitutional requirements of

Digitized by Google

equality and uniformity of taxation in exaction of license; 3 L.R.A. 705, on license to hawkers and peddlers; 7 L.R.A. 667, on hawkers and peddlers as subject to state license; 9 L.R.A. 366, on validity of state taxes as affecting commerce.

Construction of statutes by intent.

Cited in Hardesty v. Taft, 23 Md. 512, 87 A. D. 584, holding laws to carry on the government are to receive a liberal construction to effectuate the objects designated; Anderson v. Baker, 23 Md. 531, on construction to be given.

— Penal laws.

Cited in Wedge v. State, 12 Md. 232, on how penal laws to be construed.

Cited in reference notes in 74 A. D. 534, on rule that penal statutes should be strictly construed; 91 A. D. 287, on necessity that penal statute be strictly construed; 10 A. S. R. 34, on construction of penal statutes.

Violation of prohibitive statute as crime.

Cited in United States v. Abbott, Fed. Cas. No. 14,416, holding that indictment will lie to recover penalty for failure to affix revenue stamp; Ransdell v. Patterson, 1 App. D. C. 489, holding indictment will lie to recover a penalty provided by statute for violating a law though the statute made a provision for its recovery in a civil action; People v. Smith, 118 Mich. 73, 76 N. W. 124, holding violation of state liquor law indictable offence, the statute not providing method of procedure exclusive of indictment.

Necessity of submission for judgment on agreed case.

Reversed on rehearing in 12 Md. 322, 71 A. D. 596, holding that agreed case made in reviewing court does not exclude appealable judgment.

Cited in Salfner v. State, 84 Md. 299, 35 Atl. 885, holding that either a plea or a stipulation for judgment by the court is necessary.

69 AM. DEC. 233, HOLLY v. BOSTON GASLIGHT CO. 8 GRAY, 123.

Followed without discussion in Hunt v. Lowell Gaslight Co. 1 Allen, 343.

What constitutes a trespass.

Cited in Suter v. Wenatchee Water Power Co. 35 Wash. 1, 102 A. S. R. 881, 76 Pac. 298, holding damages to realty by overflow from negligent construction of irrigating canal lawfully built, not a trespass.

Cited in reference notes in 102 A. S. R. 887, on what constitutes a trespass; 123 A. S. R. 937, as to when an injury is immediate so as to be a trespass.

Contributory negligence as a bar to recovery for a wrong.

Cited in Horrigan v. Clarksburg, 150 Mass. 218, 5 L.R.A. 609, 22 N. E. 897, holding negligence of traveller bars recovery for injury from defect in highway, the damages being incapable of apportionment; Steele v. Burkhardt, 104 Mass. 59, 6 A. R. 191, on contributory negligence, either on part of plaintiff or persons acting for him, as a bar to recovery; Underhill v. Manchester, 45 N. H. 214, on whether illegal keeping of saloon bars recovery for destruction of property by rioters assembled therein.

Cited in note in 29 L.R.A. 353, on contributory negligence in escape and explosion of gas.

— Negligent state of plaintiff's own property.

Cited in Martin v. Simpson, 6 Allen, 102, holding improper construction of plaintiff's roof precipitating water undermining neighbor's wall bars recovery for its falling.

Distinguished in Ft. Worth & R. G. R. Co. v. Glenn, 97 Tex. 586, 104 A. S. R.

Digitized by Google

894, 65 L.R.A. 818, 80 S. W. 992, 1 A. & E. Ann. Cas. 270, where right to sue for sickness from nuisance on adjacent property, without averment of ownership, was involved.

— Effect of remaining in house after inflow of gas.

Cited in Hunt v. Lowell Gaslight Co. 1 Allen, 343, holding failure to move after reasonable opportunity bars recovery.

Contributory exposure to gas leak as jury question.

Cited in Richmond v. Gay, 103 Va. 320, 49 S. E. 482, holding it is for jury.

Cited in note in 29 L.R.A. 353, on questions for and instructions to jury in actions for negligence in escape and explosion of gas.

Negligence of custodians imputable to persons in their charge.

Cited in Carlisle v. Sheldon, 38 Vt. 440, holding negligence of husband driving with wife imputable to latter.

— Negligence imputable to infants.

Cited in Leslie v. Lewiston, 62 Me. 468; Munn v. Reed, 4 Allen, 431; Fitzgerald v. St. Paul, M. & M. R. Co. 29 Minn. 336, 43 A. R. 212, 13 N. W. 168,— holding negligence of parent having care of child imputable in action by latter; Wright v. Malden & M. R. Co. 4 Allen, 283; Gibbons v. Williams, 135 Mass. 333,— holding same in action by child's administrator; Pittsburgh, Ft. W. & C. R. Co. v. Vining, 27 Ind. 513, 92 A. D. 269, holding averment that child was on track without fault on part of parents sufficient in action by administrator; Delaware, L. & W. R. Co. v. Devore, 52 C. C. A. 77, 114 Fed. 155, holding both negligence of father, driving, and mother, holding child, imputable in action by latter; Stillson v. Hannibal & St. J. R. Co. 67 Mo. 671, holding negligence of father in directing child to cross railroad imputable in action by child; Brown v. European & N. A. R. Co. 58 Me. 384, on negligence by those in charge of infant as a bar to recovery for its injuries.

Cited in reference notes in 86 A. D. 587; 98 A. D. 185; 99 A. D. 104,— on whether parent's negligence is imputable to child.

Cited in notes in 55 A. D. 677, on parent's negligence in permitting child to be at large in the streets or on railroad track as defense against action for personal injury; 5 A. R. 149, on negligence of parent or guardian as defense to action by infant; 57 A. R. 474, on imputation of parent's negligence to child; 6 L.R.A. 545, on imputing to child the contributory negligence of parent or guardian; 21 L.R.A. 76, on contributory negligence of parent for injuries to child as bar to action.

Distinguished in Nashville R. Co. v. Howard, 112 Tenn. 107, 64 L.R.A. 437, 78 S. W. 1098, holding negligence of parent not imputable in action by child there being no negligence on its own part; Mahoney v. R. Co. 6 Phila. 242, 24 Phila. Leg. Int. 253, holding negligence of person having child in charge but without authority not imputable in action by child; Atlanta & C. Air Line R. Co. v. Gravitt, 93 Ga. 369, 44 A. S. R. 145, 26 L.R.A. 553, 20 S. E. 550, holding negligence of person authorized by father to care for child not imputable in statutory action by mother; Carter v. Towne, 98 Mass. 567, 96 A. D. 682, where neither child nor his parents were negligent; Murray v. Boston Ice Co. 180 Mass. 165, 61 N. E. 1001, where adult passengers on vehicles were involved.

Criticized in Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399, 98 A. D. 175, holding negligence of sister in charge of child not imputable in action by latter; Winters v. Kansas City Cable R. Co. 99 Mo. 509, 17 A. S. R. 591, 6 L.R.A.

Digitized by Google

536, 12 S. W. 652, holding negligence of mother in allowing child on street not imputable in action by child; Smith v. O'Connor, 48 Pa. 218, 86 A. D. 582, 22 Phila. Leg. Int. 28, holding rule of mutual negligence between adults inapplicable to an infant of tender years; Battishill v. Humphreys, 64 Mich. 494, 31 N. W. 894, on nonimputability of parent's negligence in action by child.

What constitutes negligence.

Cited in notes in 18 E. R. C. 629, as to what constitutes negligence as ground of legal liability; 29 L.R.A. 343, on evidence as to negligence in escape and explosion of gas.

Care required in dealing with dangerous agencies.

Cited in Simonton v. Loring, 68 Me. 164, 28 A. R. 29, denying absoluteness of upper tenant's liability for leaving open a water faucet.

— Care required in maintenance of a gas system.

Cited in Siebrecht v. East River Gas Co. 21 App. Div. 110, 47 N. Y. Supp. 262; Wichita Gas, Electric Light & P. Co. v. Wright, 9 Kan. App. 730, 59 Pac. 1085,—holding efficient system of inspection required; Sipple v. Laclede Gaslight Co. 125 Mo. App. 81, 102 S. W. 608, upholding duty to exercise extraordinary degree of watchfulness and skill; Indiana Natural & Illuminating Gas. Co. v. Long, 27 Ind. App. 219, 59 N. E. 410, upholding continuing duty to exercise highest degree of supervision; Pine Bluff Water & L. Co. v. Schneider, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547; Koelsch v. Philadelphia Co. 152 Pa. 355, 34 A. S. R. 653, 18 L.R.A. 759, 25 Atl. 522, 31 W. N. C. 341, 23 Pittsb. L. J. N. S. 228; District of Columbia v. Washington Gaslight Co. 9 Mackey, 39,—upholding duty to exercise a reasonable supervision; Greaney v. Holyoke Water Power Co. 174 Mass. 437, 54 N. E. 880; Gould v. Winona Gas Co. 100 Minn. 258, 10 L.R.A.(N.S.) 889, 111 N. W. 254,—denying that liability was determined by doctrine of insurance against harm; Hutchinson v. Boston Gaslight Co. 122 Mass. 219, holding system adequate to all reasonable exigencies of the business sufficient.

Cited in reference notes in 85 A. D. 700, on actions against gas company for injuries caused by escape of gas and evidence therein; 28 A. S. R. 205, on liability of gas companies for negligence.

Cited in notes in 70 A. D. 488, on care required of gas company in its business; 29 L.R.A. 338, on liability for negligence in escape and explosion of gas; 15 L.R.A.(N.S.) 540, on liability for injury by escape of gas stored on one's premises.

Evidence to show care as to maintenance of a gas system.

Cited in Powers v. Boston Gaslight Co. 158 Mass. 257, 33 N. E. 523, holding printed notice to consumers requesting compliance with certain rules competent.

Burden of proving negligence.

Cited in note in 29 L.R.A. 345, on burden of proof as to negligence in escape and explosion of gas.

Necessity of care as correlative to danger.

Cited in Simonton v. Loring, 68 Me. 164, 28 A. R. 29; Caven v. Bodwell Granite Co. 99 Me. 278, 59 Atl. 285; Fletcher v. Boston & M. R. Co. 1 Allen, 9, 79 A. D. 695; Sullivan v. Scripture, 3 Allen, 564; Cunningham v. Hall, 4 Allen, 268; Chicago, B. & Q. R. Co. v. Dougherty, 12 Ill. App. 181,—holding it dependent on the subject-matter and the particular circumstances of each case;

Digitized by Google

Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 A. R. 360, 31 Phila. Leg. Int. 277, on necessity of care proportionate to relations of parties.

Who may maintain action for nuisance.

Cited in reference note in 104 A. S. R. 898, on who may maintain an action for nuisance.

69 AM. DEC. 239, BROWN v. TYLER, 8 GRAY, 135.

Effect of realization on pledged paper.

Cited in Whipple v. Blackington, 97 Mass. 476, holding pledged note operates as payment at time of its conversion into money; Buffington v. Chase, 152 Mass. 534, 10 L.R.A. 123, 25 N. E. 977, holding taking of drawee's note by pledgee of a draft operates as a payment; Lathrop v. Atkisson, 87 Ga. 339, 13 S. E. 517, holding taking of land and cancellation of notes by pledgee of a bond for title does not operate as a payment.

— Effect of foreclosure of realty mortgage held as collateral.

Cited in Munson v. American Sav. Bank & T. Co. 43 Wash. 549, 86 Pac. 1047; Montague v. Boston & A. R. Co. 124 Mass. 242,—holding land becomes substituted for note and mortgage as collateral security; Stevens v. Dedham Inst. for Savings, 129 Mass. 547, holding pledgee holds land in trusts to sell for his benefit and other persons entitled to proceeds; Blood v. Shepard, 69 Kan. 752, 77 Pac. 565, holding land becomes the subject of pledge so as to entitle pledgee to decree quieting title after reasonable default of pledgor; First Nat. Bank v. Ohio Falls Car & Locomotive Works, 20 Fed. 65, holding by analogy that second pledgor of notes, secured by a bond, is not affected by action to foreclose first pledgor in which he was not joined.

Cited in note in 7 L.R.A.(N.S.) 1095, as to whether assignee of mortgage has collateral security, who forecloses the same and purchases the property, holds title subject to trust in favor of assignor.

Distinguished in Jennings v. Wyzanski, 188 Mass. 285, holding foreclosure of realty mortgage by sale precludes right of pledgor to redeem though pledgee became the purchaser; Plucker v. Teller, 174 Pa. 529, 34 Atl. 208, 38 W. N. C. 93, holding no trust relation exists between pledgor and pledgee where latter gave notice that his purchase was for his own benefit; Mount v. Manhattan Co. 43 N. J. Eq. 25, 9 Atl. 114, holding same where price bid was conclusive as to the value of the premises.

Rights of pledgee on default in payment of debt.

Cited in Hancock v. Franklin Ins. Co. 114 Mass. 155, holding default gives right to sell bond, pledged as collateral, on giving of notice to pledgor.

Cited in note in 4 L.R.A. 586, on right of pledgee to sell securities.

Effect of sale of premises under foreclosure decree.

Cited in Poweshiek County v. Dennison, 36 Iowa, 244, holding sale under foreclosure of vendor's lien transfers title notwithstanding accrual of subsequent installments.

Cited in note in 4 L.R.A. 205, on effect of foreclosure of mortgage.

Assignment of mortgage as collateral security.

Cited in note in 13 L.R.A. 295, on assignment of mortgage as collateral security.

Digitized by Google

69 AM. DEC. 242, SHEPHERD v. YOUNG, 8 GRAY, 152.

Validity of subsequent promise to pay a claim not legally binding.

Cited in Massachusetts Mut. L. Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202, denying liability on promise to repay amount of taxes paid by mistake; Forbis v. Inman, 23 Or. 68, 31 Pac. 204, upholding liability on promise to pay for beneficial labor performed by mistake.

Cited in note in 53 L.R.A. 375, on moral obligation as consideration for promise to pay for past services.

Administrator's power to bind estate.

Cited in reference notes in 79 A. D. 297, on administrator's power to bind estate; 79 A. D. 297, on effect of administrator's promise to pay invalid claim.

Cited in note in 52 A. S. R. 123, on liability of decedent's estate for executor's or administrator's declaration and admission.

69 AM. DEC. 244, SWAIN v. MIZNER, 8 GRAY, 182.

Right of officer to enter dwelling in order to execute civil process.

Cited in Hillman v. Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788, denying right to climb through open window.

Cited in reference note in 99 A. D. 556, on breaking open doors to execute writs.

Cited in notes in 95 A. S. R. 128, on liability of sheriff, constables, and marshals for use of force; 11 E. R. C. 643, on right of sheriff to break into a house to execute process.

— What constitutes a dwelling.

Cited in Stearns v. Vincent, 50 Mich. 209, 45 A. R. 37, 15 N. W. 86, holding part of building used for domestic use constitutes the dwelling other portions being used as a store.

Right to maintain trespass for breaking and entering apartments in building.

Cited in Nelson v. Garey, 114 Mass. 418; Waldo v. Waldo, 52 Mich. 94, 17 N. W. 710,—upholding the right.

Distinction between lodger and tenant.

Cited in Roberts v. Lynn Ice Co. 187 Mass. 402, 73 N. E. 523, holding exclusive possession establishes tenancy while licensee occupying under owner is a lodger; White v. Maynard, 111 Mass. 250, 15 A. R. 28, holding agreement to board man and his family and furnish them three specified rooms establishes character as a lodger.

69 AM. DEC. 248, SHEPHERD v. CHAMBERLAIN, 8 GRAY, 225.

Sufficiency of demand on note at bank after banking hours.

Cited in Salt Springs Nat. Bank v. Burton, 58 N. Y. 430, 17 A. R. 265, upholding demand on cashier found at bank after business hours.

69 AM. DEC. 248, COM. v. TIVNON, 8 GRAY, 375.

Averment of intent in indictment for being possessed of burglar's tools.

Cited in Scott v. State, 91 Wis. 552, 65 N. W. 61; People v. Edwards, 93 Mich. 636, 53 N. W. 778,—holding it unnecessary to aver the particular building intended to be burglarized.

Digitized by Google

Cited in note in 2 A. S. R. 396, on allegation of intent to use in charge for having burglarious tools in possession.

Proof of possession in joint prosecution for being possessed of burglar's tools.

Cited in Com. v. Conlin, 188 Mass. 282, 74 N. E. 351, holding possession by one person, he and another intending to use them in a joint undertaking, insufficient.

When declarations of one conspirator are competent against another.

Cited in Cuyler v. McCartney, 40 N. Y. 221 (dissenting opinion), on applicability of rule to cases where no technical conspiracy is charged.

Cited in reference notes in 8 A. S. R. 876, on admissions of accomplice as evidence; 3 A. S. R. 685; 40 A. S. R. 801,—on acts and declarations of conspirator as evidence against others.

69 AM. DE. 252, COM. v. TOLLIVER, 8 GRAY, 386.

Materiality of allegations as to place in criminal prosecutions.

Cited in Jenks v. State, 63 Ark. 312, 39 S. W. 361, holding charge of escape for penitentiary sustained by proof of escape from any part of county; Carlisle v. State, 32 Ind. 55, holding charge that murder was committed "at and in said county" sustained by proof of commission on river opposite thereto; Com. v. Snell, 189 Mass. 12, 3 L.R.A.(N.S.) 1019, 75 N. E. 75, holding it sufficient in prosecution for murder to prove commission of offense within territorial jurisdiction of court; Com. v. Lavery, 101 Mass. 207, holding charge of simple larceny at particular place sustained by proof of commission anywhere in county; Com. v. Kern, 147 Mass. 595, 18 N. E. 566, holding same as to charge of keeping intoxicating liquors for illegal sale; Ledbetter v. United States, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774, holding it sufficient to name merely the county in prosecution for selling liquors without a license; Com. v. Reily, 9 Gray, 1, holding complaint charging conveyance of liquor from place to place at particular location in county insufficient.

Distinguished in Com. v. Heffron, 102 Mass. 148, holding illegal keeping of house for sale of liquor must be proved as laid; State v. Kelley, 66 N. H. 577, 29 Atl. 843, holding same as to a charge of house breaking in the daytime.

— In prosecutions for assault.

Cited in Com. v. Creed, 8 Gray, 387, holding proof of commission at any place in county sufficient though particular place was charged.

69 AM. DEC. 253, WARNER v. BACON, 8 GRAY, 397.

Necessity of pleading special damages.

Cited in Harron, Rickard & McCone v. Wilson, L. & Co. 4 Cal. App. 483, 88 Pac. 512; Myer v. Davies, 17 Ill. App. 228; Adams v. Barry, 10 Gray, 361,—holding it essential to plead them.

When entire damages may be recovered in one action.

Cited in Gulf, C. & S. F. R. Co. v. Moseley, 88 C. C. A. 231, 161 Fed. 72, holding entire damages from permanent dikes deflecting current of stream recoverable in one action; Ridley v. Seaboard & R. R. Co. 118 N. C. 996, 32 L.R.A. 708, 24 S. E. 730, holding same as to permanent construction of railroad causing ponding of water; Duryea v. New York, 26 Hun, 120, holding same in action brought to recover damage for wrongful discharge of sewage; Mears v. Dole, 135 Mass. 508, holding damage from enlargement of excavation after date of writ cannot be re-

Digitized by Google

covered in action already commenced; Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347, holding damages between dates of action and trial not recoverable in action for trespass upon a mine.

Cited in reference note in 100 A. D. 467, on measure of damages for breach of contract to convey realty.

Cited in notes in 28 A. S. R. 589; 53 A. S. R. 135,—on recovery for prospective damages.

— Breaches of contract after action brought.

Cited in Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010, holding entire damages for breach of contract of hiring can be recovered in action brought before expiration of contract period; Fay v. Guynon, 131 Mass. 31, holding damages should be assessed only to date of writ in action for breach of contract to furnish home as long as sobriety continues; Phelps v. New Haven & N. Co. 43 Conn. 453, denying recovery of prospective damages in action for breach of contract to keep cattle passes in repair.

Cited in note in 106 A. S. R. 977, on damages accruing subsequent to breach of contract to convey land.

Acceptance of performance after commencement of action as a bar to damages.

Cited in Davis v. Harrington, 160 Mass. 278, 35 N. E. 771, holding acceptance of full payment of debt for rent bars recovery of interest by way of damages.

When former judgment is bar to subsequent action.

Cited in Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 34 L. ed. 784, 11 Sup. Ct. Rep. 185, upholding later action for damages caused by new injury from continuance of nuisance; Indiana, B. & W. R. Co. v. McBroom, 103 Ind. 316, 2 N. E. 760, holding one assessment of damages for grading of street bars later action for fresh damages; Fowle v. New Haven & N. Co. 107 Mass. 352, holding one assessment of damages for locating railroad so as to deflect course of stream has same effect; Fowle v. New Haven & N. Co. 112 Mass. 334, 17 A. R. 106, holding same though fresh damages were caused by an unusual freshet; Knowlton v. New York & N. E. R. Co. 147 Mass. 606, 1 L.R.A. 625, 18 N. E. 580, holding one recovery of damages from single act causing fire is a bar to recovery of additional damages; New York Elev. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 34 L. ed. 231, 10 Sup. Ct. Rep. 743, on former judgment assessing damages to time of trial as a bar to recovery for injury suffered before that time.

— New breach of contract.

Cited in Just v. Greve, 13 Ill. App. 562, upholding later action for new breach of an agreement not to engage in business in a certain town.

Injury and damages as elements in a cause of action.

Cited in Fields v. Daisy Gold Min. Co. 26 Utah, 373, 73 Pac. 521, on necessity of presence of both elements.

69 AM. DEC. 262, POWELL v. BAGG, 8 GRAY, 441.

Acquirement of easement by adverse user.

Cited in Fells v. Chesapeake & O. R. Co. 49 W. Va. 65, 87 A. S. R. 787, 38 S. E. 479, holding user must be acquiesced in by owner; Cobb v. Davenport, 32 N. J. L. 369; Chicago & N. W. R. Co. v. Hoag, 90 Ill. 339,—holding user must be adverse, uninterrupted and with acquiescence of owner; Edson v. Munsell, 10

Digitized by Google

Allen, 557, holding easement cannot be acquired by user as against an insane person; Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083, holding same as to power of husband to acquire easement from wife; Tracy v. Atherton, 36 Vt. 503, holding descent of servient estate to infant does not interrupt the user.

Cited in reference notes in 50 A. S. R. 96; 83 A. D. 693,—on creation of easement by adverse enjoyment; 100 A. D. 609, on requirement of knowledge and acquiescence of owner of land.

Cited in notes in 35 A. D. 311, on nature of adverse user by which easement is acquired; 10 L.R.A. 486, on necessity for continuous and uninterrupted possession to create prescriptive right; 10 E. R. C. 93–95, on acquisition of easement by prescription; 16 E. R. C. 342, on sufficiency of entry to stop running of prescription.

— Verbal nonlitigious protests as tolling prescription.

Cited in Lehigh Valley R. Co. v. McFarlan, 30 N. J. Eq. 180, holding user exercised in face of protests and defiance ineffective; Brayden v. New York, N. H. & H. R. Co. 172 Mass. 225, 51 N. E. 1081, holding obstruction operates as an interruption; Reid v. Garnett, 101 Va. 47, 43 S. E. 182; Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370,—holding effect of user defeated by oral remonstrance; Harrison v. Dolan, 172 Mass. 395, 52 N. E. 513, on sufficiency of assertion of right as an interruption.

Distinguished in Kimball v. Ladd, 42 Vt. 747, holding user not affected by verbal remonstrances where there was power of interruption.

Explained in Connor v. Sullivan, 40 Conn. 26, 16 A. R. 10, holding effect of oral remonstrance and attempt to erect fence should be left to jury.

Criticized in Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605, holding user not affected by mere denials not amounting to a disturbance.

— Actions as tolling prescription.

Cited in Workman v. Curran, 89 Pa. 226, 7 W. N. C. 101, 36 Phila. Leg. Int. 278, holding effect of user defeated by pendency of action of trespass; Cobb v. Smith, 38 Wis. 21, holding same where both an action for damages and for an injunction was commenced.

Presumption of grant as basis of doctrine of prescription.

Cited in Edson v. Munsell, 10 Allen, 557, on presumption of grant from long lapse of time as the usual theory of the doctrine.

Cited in reference note in 100 A. D. 608, on presumption of grant as basis of prescription.

69 AM. DEC. 264, COM. v. FOGERTY, 8 GRAY, 489.

Sufficiency of indictment for rape.

Cited in State v. Harris, 150 Mo. 56, 51 S. W. 481, holding indictment charging assault and ravishment by force and without consent sufficient; People v. Willett, 105 Mich. 110, 62 N. W. 1115, holding word "ravish" implies force and violence in the man and want of consent in the woman; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440, holding allegation that assault was without consent unnecessary the girl being under age; State v. Muller, 85 Wis. 203, 55 N. W. 165, holding words "violently and against her will feloniously did ravish and carnally know" sufficient; Com. v. Burke, 105 Mass. 376, 7 A. R. 531, on sufficiency of words "feloniously did ravish and carnally know;" Beard v. State, 79 Ark. 293, 97 S. W. 667, 9 A. & E. Ann. Cas. 409 (dissenting opinion), on

Digitized by Google

necessity of words "against her will;" Com. v. McCarty, 165 Mass. 37, 42 N. E. 336, on sufficiency of averments to establish intent to ravish.

Cited in reference notes in 2 A. S. R. 732; 40 A. S. R. 281; 70 A. S. R. 761,—on sufficiency of indictment for rape.

Cited in notes in 80 A. D. 373, on words "force," "fraud," and "ravish," in indictments for rape; 80 A. D. 374, on alleging sex in indictment for rape.

—Necessity of alleging an "assault."

Cited in Beard v. State, 79 Ark. 293, 97 S. W. 667, 9 A. & E. Ann. Cas. 409 (dissenting opinion), on its needlessness.

—Necessity of allegation that prosecutrix was not wife of prisoner.

Cited in State v. Williamson, 22 Utah, 248, 83 A. S. R. 780, 62 Pac. 1022; State v. Williams, 9 Mont. 179,—holding it unnecessary.

Distinguished in Parker v. Territory, 9 Okla. 109, 59 Pac. 9; Young v. Territory, 8 Okla. 525, 58 Pac. 724,—holding it necessary under statute making that fact an element in the crime; Com. v. Murphy, 2 Allen, 163, holding it necessary where conviction for fornication was attempted.

Relationship of husband to woman as defense in rape.

Cited in Frazier v. State, 48 Tex. Crim. Rep. 142, 122 A. S. R. 738, 86 S. W. 1024, 13 A. & E. Ann. Cas. 497, holding it is an absolute bar.

Cited in note in 80 A. D. 363, on rape by husband upon his wife.

Necessity of charging crime in words of the statute.

Cited in Com. v. Thompson, 108 Mass. 461, holding words "maliciously and without any lawful justification" satisfy a statute requiring procurement of miscarriage to be "unlawful."

Aiders and abettors of rape as principals.

Cited in note in 8 L.R.A. 297, on aiders and abettors of rape guilty as principals.

69 AM. DEC. 266, PELHAM v. ALDRICH, 8 GRAY, 515.

Right to attack debtor's conveyance.

Cited in reference notes in 72 A. D. 384, on right of subsequent creditors to avoid voluntary settlement made without fraudulent intent; 75 A. D. 135, on right of subsequent creditors to impeach voluntary conveyance; 31 A. S. R. 665, on right of subsequent creditors to attack fraudulent conveyances.

Cited in note in 14 A. S. R. 753, on what creditors may attack voluntary transfer as fraudulent.

Accrual of debt for costs of a legal action.

Cited in State v. Dorland, 106 Iowa, 40, 75 N. W. 654; Dows v. Griswold, 122 Mass. 440; Stevens v. Works, 81 Ind. 445,—holding it accrues at time judgment is rendered.

Cited in note in 52 A. D. 119, on protection of claim for costs of suit against fraudulent conveyances.

69 AM. DEC. 267, MACK v. PARKS, 8 GRAY, 517.

Exemption from seizure under writ.

Cited in notes in 38 A. D. 709, on levy of execution on property in use or possession of debtor; 47 A. R. 192, on what is exempt from process as tools.

—Articles on person.

Cited in Maxham v. Day, 16 Gray, 213, 77 A. D. 409, holding an article of

Digitized by Google

personal ornament cannot be taken on writ of replevin though worn to defeat effect of process.

Distinguished in Richards v. Heger, 122 Mo. App. 512, 99 S. W. 802, holding money being held in hands of debtor subject to seizure on execution.

Jewelry as wearing apparel.

Cited in Re Smith, 96 Fed. 832, holding diamond stud worth $250 exempt as "wearing apparel" under bankrupt act; Stewart v. McClung, 12 Or. 431, 53 A. R. 374, 8 Pac. 447, holding watch exempt from execution as "necessary wearing apparel;" Re Steele, 2 Flipp. 324, Fed. Cas. No. 13,346, on exemption of watch as "wearing apparel" under bankrupt act; Re H. L. Evans & Co. 158 Fed. 155, holding bankrupt entitled to various personal jewelry worth $444.50 under statute exempting " all wearing apparel" of family.

Cited in reference notes in 97 A. D. 668, on what exempt as wearing apparel; 96 A. S. R. 355, on rings as wearing apparel within exemption laws.

Explained in Re Turnbull, 106 Fed. 667, holding watch not exempt as "necessary wearing apparel" under bankrupt act.

Attachment procured by fraud.

Cited in Ex parte Hurn, 92 Ala. 102, 25 A. S. R. 23, 13 L.R.A. 120, 9 So. 515, on its nullity.

Cited in reference note in 93 A. D. 466, on validity of levy effected by unlawful or fraudulent means.

Right of personal liberty.

Cited in Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, holding court cannot compel plaintiff in personal injury action to submit to a surgical examination.

69 AM. DEC. 270, STARKS v. SIKES, 8 GRAY, 609.

Effect of subsequent ratification of an agent's acts.

Cited in Lyons v. Wait, 51 N. J. Eq. 60, 26 Atl. 334, holding it has same effect as original express authority.

Cited in reference notes in 86 A. D. 158, on ratification of unauthorized acts; 93 A. D. 56, on effect of subsequent ratification of agency; 28 A. S. R. 790, on retroactive effect of ratification of acts done as agent.

Necessity that act be ratified as an entirety.

Cited in Spiegelberg v. Sterbach, 50 Ill. App. 476, holding it essential.

Right of cotenant to sue in assumpsit for proceeds of insurance on joint estate.

Distinguished in Weinrich v. Wolf, 24 W. Va. 299, holding where right to maintain bill in equity for accounting from trustee was involved.

Rebuttal of witness's declaration of nonhostility on cross-examination.

Distinguished in Day v. Stickney, 14 Allen, 255, where evidence offered related to subject of suit then in question.

69 AM. DEC. 272, GREENWOOD v. MURDOCK, 9 GRAY, 20.

Grant of buildings as signifying land attached.

Cited in Snow v. Orleans, 126 Mass 453, holding grant of academy and surrounding fence includes ground enclosed by it; Scanlan v. Geddes, 112 Mass. 15, holding agreement to convey house calls for land thereunder and as much more as is necessary to the beneficial enjoyment; Powers Lumber Co. v. Wade,

Digitized by Google

15 Tex. Civ. App. 295, 39 S. W. 158, holding land included under contract to give material man a lien on a certain store house; Strang v. Pray, 89 Tex. 525, 35 S. W. 1054, holding statute giving mechanic's and materialmen liens on buildings includes lands enjoyed and necessary thereto.

Distinguished in Hanson v. Blake, 155 Fed. 342, holding owner of land taking mortgage of mill thereon does not become a real estate mortgagee notwithstanding oral agreement to convey; Owen v. Field, 102 Mass. 90, holding grant of exclusive right to use of four springs not equivalent to a grant of land in fee.

69 AM. DEC. 274, SMITH v. SLOCOMB, 9 GRAY, 36, Later action between same parties in 11 Gray, 280.

Construction of boundaries on ways and streets.

Cited in Boston v. Richardson, 13 Allen, 146, holding record in Book of Possessions "as bounded with street" shows title to center thereof; Crocker v. Cotting, 166 Mass. 183, 33 L.R.A. 245, 44 N. E. 214, holding boundary "westerly by a five feet passageway" does not include any part of the passage; Gould v. Wagner, 196 Mass. 270, 82 N. E. 10 (dissenting opinion), on extension of boundary to opposite side of private way where grantor owned it and there was no restriction.

Cited in reference note in 30 A. S. R. 853, on highways or streets as boundaries.

Cited in notes in 54 A. D. 794, on when boundary on street or highways includes same; 4 L.R.A. 624, on right of grantee fronting on street.

Distinguished in Gouverneur v. National Ice Co. 134 N. Y. 355, 30 A. S. R. 669, 18 L.R.A. 695, 31 N. E. 865, where construction of grant on a pond was involved.

— Calls for edge of road as monument.

Cited in Holt v. Somerville, 127 Mass. 408, holding highway excluded where park extended only to side of street; Holmes v. Turner's Falls Co. 142 Mass. 590, 8 N. E. 646; Smith v. Slocomb, 11 Gray, 280; Brooks v. Morrill, 92 Me. 172, 42 Atl. 357,—holding boundary on one of side lines of street does not extend to center thereof; Clayton v. County Court, 58 W. Va. 253, 2 L.R.A.(N.S.) 598, 52 S. E. 103, holding same as to boundary calling for line of a private road; Cattle v. Young, 59 Me. 105; Hamlin v. Atty. Gen. 195 Mass. 309, 81 N. E. 275; Kings County F. Ins. Co. v. Stevens, 87 N. Y. 287, 44 A. R. 361; Lee v. Lee, 27 Hun, 1; Kennedy v. Mineola, H. & F. Traction Co. 77 App. Div. 484, 78 N. Y. Supp. 937; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 A. R. 306,—holding same as to boundary, beginning and terminating in one of side lines of street; Tag v. Keteltas, 16 Jones & S. 241, holding road excluded where boundary began at one side and ran "along said road;" White's Bank v. Nichols, 64 N. Y. 65, holding street excluded where boundary began at intersection of exterior lines of two streets and ran along them; McKenzie v. Gleason, 184 Mass. 452, 100 A. S. R. 566, 69 N. E. 1076, holding boundary from "a stake and stones near an old road leading to shore; thence by said road . . . to stake by a pair of bars" extends to centre.

Cited in reference notes in 75 A. D. 589, on grantee of land bounded on highway taking to center; 88 A. D. 701, on monuments or natural objects as controlling courses, distances, quantity, and description; 39 A. R. 305-307, on effect of description with road as one boundary as conveyance of title in roadbed; 39 A. S. R. 825, on monuments and natural objects prevailing over courses and distances.

Digitized by Google

Distinguished in Peck v. Denniston, 121 Mass. 17, holding boundary "to" a certain avenue extends to centre thereof.

Criticized in Low v. Tibbetts, 72 Me. 92, 37 A. R. 303, holding mere mention of monument on side of road as beginning or ending of description does not overthrow presumption that title extended to center.

Right of public in land taken for highway.

Cited in reference note in 85 A. D. 650, on right of public in land taken for highway.

69 AM. DEC. 276, BROWN v. HOWE, 9 GRAY, 84.

Liability of lunatics for consequences of their acts.

Cited in Morain v. Devlin, 132 Mass. 87, 42 A. R. 423, upholding liability for injury from defective condition of real estate under control of guardian; Williams v. Hays, 143 N. Y. 442, 42 A. S. R. 743, 26 L.R.A. 153, 38 N. E. 449, upholding liability for negligent loss of vessel unless insanity was caused from attempt to save vessel in storm.

Cited in note in 26 L.R.A. 154, on civil liability of insane person for torts or negligence.

Suits by guardian against ward.

Cited in McLane v. Curren, 133 Mass. 531, 43 A. R. 535, dismissing suit for necessaries though there was no property of ward in possession of the guardian.

69 AM. DEC. 278; COM. v. CASTLES, 9 GRAY, 121.

Proving attested instruments.

Cited in notes in 35 L.R.A. 324, on necessity of calling witnesses to prove attested instruments; 35 L.R.A. 350, on necessity of calling subscribing witnesses to prove attested instruments which are used collaterally.

Evidence of guilty intent.

Cited in note in 25 A. S. R. 388, on evidence of guilty intent in crime of obtaining money under false pretenses.

69 AM. DEC. 279, MARLBOROUGH BRANCH R. CO. v. ARNOLD, 9 GRAY, 159.

Stock subscription book as evidence of subscription.

Cited in State ex rel. Biddle v. Superior Court, 44 Wash. 108, 87 Pac. 40, holding it prima facie evidence of actual subscription in eminent domain proceeding by the corporation.

69 AM. DEC. 281, WHITNEY v. BACON, 9 GRAY, 206.

Competency of declarations as to boundary by deceased owner.

Cited in High v. Pancake, 42 W. Va. 602, 26 S. E. 536, holding mere general statement as to land being in boundary without reference to corners or marked lines incompetent.

Cited in reference notes in 84 A. D. 664; 85 A. D. 682; 86 A. D. 721,—on admissibility of declarations as to boundaries.

Cited in notes in 42 A. D. 632, as to when declarations of vendor are evidence against vendee to show fraud; 94 A. S. R. 670, on admissibility of declarations of persons since deceased as to private boundaries.

Digitized by Google

What controls boundaries of land.

Cited in reference note in 7 A. S. R. 475, on what controls boundaries of land.

69 AM. DEC. 281, CHAPIN v. MARLBOROUGH, 9 GRAY, 244.

Competency of declarations as to mental or bodily feeling.

Cited in Winter v. Central Iowa R. Co. 74 Iowa, 448, 38 N. W. 154, holding statement as to extent of injury made long after the accident incompetent; Chicago & N. R. Co. v. Howard, 6 Ill. App. 569, holding narration of manner of accident to bystander after accident incompetent; Ashland v. Marlborough, 99 Mass. 47, holding statement to non-expert as to what physician said, just before enlistment, incompetent to show disease at that time.

Cited in reference notes in 84 A. D. 348, on admissibility of declarations of person injured as to cause and extent of injuries; 10 A. S. R. 306, on declarations of injured part as part of res gestæ.

Cited in notes in 95 A. D. 67, on admissibility of exclamations of plain declarations respecting injuries; 33 A. R. 829, on admissibility of complaints made by injured party in suit for damages; 58 A. R. 185, as to when declarations are part of the res gestæ.

— Statements to physicians and attendants.

Cited in Grangers' L. Ins. Co. v. Brown, 57 Miss. 308, 34 A. R. 446, holding statements to physician incompetent unless relating to then present symptoms; Taylor v. Grand Trunk R. Co. 48 N. H. 304; Field v. State, 57 Miss. 474, 34 A. R. 476,—holding same as to statements to nonprofessional attendant; People v. Murphy, 3 N. Y. Crim. Rep. 338, holding statements to physicians, limited to feelings and condition, competent; Indiana Union Traction Co. v. Jacobs, 167 Ind. 85, 78 N. E. 325, holding statement as to location of injury to physician called for treatment competent; Roosa v. Boston Loan Co. 132 Mass. 439, holding statement to physician as to cause of accident incompetent; Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437 (dissenting opinion), on same point; Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, 54 A. R. 312, holding expressions of present existing pain to physician after commencement of action competent.

Cited in reference note in 89 A. S. R. 810, on physicians as witnesses.

Incompetency of declarations as to past facts in general.

Cited in Thayer v. Lombard, 165 Mass. 174, 52 A. S. R. 507, 42 N. E. 563, holding dying declarations as to completeness of ones account books incompetent; Mayes v. State, 64 Miss. 329, 60 A. R. 58, 1 So. 733, holding statement by injured person made five minutes after affray that certain person had inflicted injury, inadmissible; Elmer v. Fessenden, 151 Mass. 359, 5 L.R.A. 724, 22 N. E. 635, holding declarations by workmen that their quitting was caused by slanderous statements in question incompetent.

Cited in note in 40 L. ed. U. S. 534, on dying declarations.

69 AM. DEC. 282, LANE v. BRYANT, 9 GRAY, 245.

Declarations competent as part of res gestae.

Cited in Burbank v. Hammond, 189 Mass. 189, 75 N. E. 102, holding statement by broker regarding employment then ended incompetent; First Nat. Bank v. North, 6 Dak. 136, 41 N. W. 736, holding declaration by mortgagee's agent three days after execution of mortgage incompetent; Verry v. Burlington, C. R. &

Digitized by Google

M. R. Co. 47 Iowa, 549, holding declaration as to condition of cars by repair man not on duty at time incompetent.

Cited in reference notes in 10 A. S. R. 306, on declarations of injured party as part of res gestæ; 91 A. D. 463, on admissibility of agent's declarations, as against principal.

Cited in notes in 95 A. D. 75, on necessity that competent witness's declarations, to be admissible, be part of res gestæ; 58 A. R. 566, as to when declarations of agents are part of res gestæ; 19 L.R.A. 751, on how near the main transaction declarations must be made to constitute part of res gestæ.

— Narratives and explanations after accident.

Cited in Williamson v. Cambridge R. Co. 144 Mass. 148, 10 N. E. 790, holding declaration by street car conductor immediately after accident incompetent; Tyler v. Old Colony R. Co. 157 Mass. 336, 32 N. E. 227, holding declaration by flagman after accident incompetent; Eastman v. Boston & M. R. Co. 165 Mass. 342, 43 N. E. 115, holding statement as to manner of accident by victim awaiting removal to hospital incompetent; Chicago & N. R. Co. v. Howard, 6 Ill. App. 569, holding declarations as to manner of accident by injured person after removal to hotel incompetent; Bellefontaine R. Co. v. Hunter, 33 Ind. 335, 5 A. R. 201, holding declarations by fireman as to manner of accident after arrival at another station incompetent; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118, holding declaration by engineer between ten and thirty minutes after accident incompetent; Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 A. R. 835, holding same as to declaration one hour after accident; Cole v. New York, N. H. & H. R. Co. 174 Mass. 537, 55 N. E. 1044, holding same as to declarations later in the day; Ohio & M. R. Co. v. Stein, 133 Ind. 243, 19 L.R.A. 733, 31 N. E. 180, holding statement by engineer to injured brakeman one or two minutes after accident and within car's length of engine competent; Lissak v. Crocker Estate Co. 119 Cal. 442, 51 Pac. 688, holding declaration by operator after elevator had stopped in its fall incompetent; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, holding admission of negligence by agent while elevator was burning incompetent; Edwards v. Foote, 129 Mich. 121, 88 N. W. 404, holding declaration by driver of vehicle in collision not made at or immediately after accident incompetent; Virginia & T. R. Co. v. Sayers, 26 Gratt. 328, holding statements by brakesman and section master after accident incompetent; Kehan v. Washington R. & Electric Co. 28 App. D. C. 108, on incompetency of declarations by bystander after occurrence of the accident.

Criticized in Sample v. Consolidated Light & R. Co. 50 W. Va. 472, 57 L.R.A. 186, 40 S. E. 597, holding declarations by motorman while car was still on body of victim competent.

Opinions of witnesses as to cause of accident.

Cited in Williamson v. Cambridge R. Co. 144 Mass. 148, 10 N. E. 790, holding evidence that driver of street car said that accident was his fault incompetent; Rafter v. Chicago City R. Co. 139 Ill. App. 81, holding testimony that accident would not have happened if victim had done as told incompetent; Saunders v. City & Suburban R. Co. 99 Tenn. 130, 41 S. W. 1031, holding evidence that daughter said that accident was her father's fault incompetent; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, holding testimony that fire must have been caused by tightening of chain incompetent; Teal v. Meravey, 12 Ill. App.

Digitized by Google

32, holding testimony by driver that collision was as much the fault of one party as another incompetent.

Impeachment of witness.

Cited in note in 82 A. S. R. 43, on impeachment of witness by proof of prior contradictory statements.

Contributory negligence as bar to recovery.

Cited in note in 11 L.R.A. 34, on contributory negligence as bar to recovery for collision on highway.

Burden of proving contributory negligence.

Cited in reference note in 78 A. D. 706, on burden of proof of contributory negligence.

69 AM. DEC. 284, DURELL v. HAYWARD, 9 GRAY, 248.

Rights and duties as to burials.

Cited in notes in 14 L.R.A. 85, on right to control and disposition of dead body; 8 E. R. C. 477, on right of burial or to change place of burial.

— Of wife's or husband's body.

Cited in Galloway v. McPherson, 67 Mich. 546, 11 A. S. R. 596, 35 N. W. 114; Smyley v. Reese, 53 Ala. 89, 25 A. R. 598,—holdng expenses for funeral of wife not chargeable against her separate estate by husband; Ford v. Fargason, 120 Ga. 606, 48 S. E. 180, holding husband primarily liable for burial expense of wife; Weld v. Walker, 130 Mass. 422, 39 A. R. 465, on right and duty of husband to bury deceased wife; O'Donnell v. Slack, 123 Cal. 285, 43 L.R.A. 388, 55 Pac. 906, upholding right of widow to bury husband, the will being silent on the subject; Enos v. Snyder, 131 Cal. 68, 82 A. S. R. 330, 53 L.R.A. 222, 63 Atl. 170, upholding right of widow to bury husband, not withstanding provision in will to the contrary; Hackett v. Hackett, 18 R. I. 155, 49 A. S. R. 762, 19 L.R.A. 558, 26 Atl. 42, holding widow can control burial of husband in absence of consent or other waiver; Re Richardson, 29 Misc. 367, 60 N. Y. Supp. 539, holding non-objection to place of burial by widow in great grief on account of accidental death does not preclude removal by her.

Cited in reference note in 11 A. S. R. 597, on husband's liability for funeral expenses of deceased wife.

Distinguished in Pulsifer v. Douglass, 94 Me. 556, 53 L.R.A. 238, 48 Atl. 118, holding body of wife buried in lot of another by consent of husband not removable by him.

Rights of relatives as to corpses and burial.

Cited in Burney v. Children's Hospital, 169 Mass. 57, 61 A. S. R. 273, 38 L.R.A. 413, 47 N. E. 401, holding father can maintain action for autopsy performed on body of dead child without his consent; Koerber v. Patek, 123 Wis. 453, 68 L.R.A. 956, 102 N. W. 40, holding son may maintain action for mutilation of dead body of his mother.

Cited in note in 82 A. D. 512, on rights and duties of relatives and others respecting bodies of dead.

69 AM. DEC. 285, COM. v. HALL, 9 GRAY, 262.

Executive warrant for arrest of fugitive from justice as evidence.

Cited in Ex parte Devine, 74 Miss. 715, 22 So. 3, holding it is prima facie evidence of compliance with all necessary legal prerequisites; Davis's Case,

Digitized by Google

122 Mass. 324, holding same and that is conclusive of right of removal if previous proceedings appear to be regular; State ex rel. Munsey v. Clough, 71 N. H. 594, 53 Atl. 1086, holding it need not aver character as a fugitive from justice.

Constitutionality of proceedings for arrest of fugitive.

Cited in reference note in 1 A. S. R. 179, on constitutionality of warrant issued by governor for arrest of fugitive.

Cited in note in 57 A. D. 392, on constitutionality of proceedings for arrest and surrender in one state of fugitives from justice in another.

Validity of state statutes regarding fugitives from justice.

Cited in Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173, upholding their validity provided there is no violation of federal constitution.

Cited in notes in 32 A. R. 357, on constitutionality of statute authorizing governor to issue warrant for apprehension of fugitive; 41 L. ed. U. S. 1048, on international and interstate extradition.

Power of state courts to test legality of arrest preparatory to extradition.

Cited in Com. v. Trach, 3 Pa. Co. Ct. 65; Re Mohr, 73 Ala. 503, 49 A. R. 63,—upholding power by issuance of writ of habeas corpus.

Who are fugitives from justice.

Cited in note in 57 A. D. 398, 399, on who are fugitives from justice.

69 AM. DEC. 288, PHINNEY v. WATTS, 9 GRAY, 269.

Construction of boundaries in deeds.

Cited in Boston v. Richardson, 13 Allen, 146, holding record in book of possessions "as bounded with street" shows title to the centre thereof.

Cited in reference note in 21 A. S. R. 839, on conveyance of land lying adjacent to non-navigable waters.

Cited in note in 51 L.R.A. 179, on boundary on pond.

— Calls for artificial ponds and lakes.

Cited in Paine v. Woods, 108 Mass. 160, holding deeds "to" or "on" pond, raised to artificial height in winter but not in summer, convey to low water mark in natural state; Roberts v. Decker, 120 Wis. 102, 97 N. W. 519, holding deed of land bounded by mill pond which is mere enlargement of river passes title to thread of stream.

Distinguished in Jenkins v. Palmer, 72 N. H. 592, 58 Atl. 42, on tendency to limit boundary to margin of pond where description "on . . . mill pond" was followed by qualifying words.

69 AM. DEC. 289, COM. v. SOWLE, 9 GRAY, 304.

Sufficiency of indictment for malicious destruction of animals.

Cited in Com. v. Falvey, 108 Mass. 304, holding averment as to means used unnecessary in indictment for poisoning hens; Com. v. Brigham, 108 Mass. 457, on whether like averment is necessary in indictment for malicious torture of a horse.

69 AM. DEC. 290, POTTER v. GREENE, 9 GRAY, 309.

Liability as partner.

Cited in Parsons on Partnership, 4th ed. p. 103, on liability as partner of one suffering himself to be held out to world as a partner.

Digitized by Google

69 AM. DEC. 291, WRIGHT v. MORSE, 9 GRAY, 337.

Liability of party indorsing note before delivery to payee.

Cited in Rothschild v. Grix, 31 Mich. 150, 18 A. R. 171, holding him an original promisor; Chaddock v. Vanness, 35 N. J. L. 517, 10 A. R. 256, holding liability dependent on understanding of parties at time of transaction; Stack v. Beach, 74 Ind. 571, 39 A. R. 113, on absence of any defined contract liability.

Cited in reference notes in 72 A. D. 89, on liability of party other than payee placing name on back of note before delivery; 91 A. D. 710, on liability of one indorsing note before delivery to payee; 35 A. S. R. 469, on liability of indorser before delivery to payee.

Cited in notes in 29 A. D. 298, on indorsement in blank, of note by person other than payee or holder; 70 A. D. 148, on extent of liability of person writing name on back of note before delivery to payee or before negotiation by him; 71 A. D. 762, on liability as original promisor of person writing his name on back of note before delivery.

Parol evidence as to liability on commercial paper.

Cited in Davis v. Randall, 115 Mass. 547, 15 A. R. 146, holding it incompetent to show that acceptance of draft was conditional; Minnesota Mfg. Co. v. Grant City Lumber & Hardware Co. 81 Mo. App. 255, holding it incompetent to make similar change in guaranty on note; Doolittle v. Ferry, 20 Kan. 230, 27 A. R. 166, holding it incompetent to change an unqualified indorsement into one with out recourse.

Cited in reference notes in 45 A. D. 242, on parol evidence to vary writing or annex conditions thereto; 72 A. D. 88, on parol evidence to explain or vary effect of indorsement; 84 A. D. 568, on right of one whose name is signed to or upon negotiable instrument to show, by parol, his true relation to other parties.

Distinguished in Baxter Nat. Bank v. Talbot, 154 Mass. 213, 13 L.R.A. 52, 28 N. E. 163, holding it competent under laws of a different state to show that indorsement was conditional; Toole v. Crafts, 196 Mass. 397, 82 N. E. 22, holding it competent to explain ambiguity in a waiver of demand, notice, and protest by an indorser.

— As to liability of indorser before delivery.

Cited in Gilson v. Stevens Mach. Co. 124 Mass. 546; Essex Co. v. Edmands, 12 Gray, 273, 71 A. D. 758,—holding it incompetent.

— As to time or order of indorsements.

Cited in Brow v. Butler, 99 Mass. 179; Way v. Butterworth, 108 Mass. 509; Redden v. Lambert, 112 La. 740, 36 So. 668,—holding it competent.

Immateriality of place of signature intended to operate as execution of note.

Cited in Rodocanachi v. Buttrick, 125 Mass. 134, holding placing of signature on back of note after maturity creates liability as maker when accompanied by payments of interest.

69 AM. DEC. 294, HAYDEN v. SNELL, 9 GRAY, 365.

Joinder in action on joint promise.

Cited in Slaughter v. Davenport, 151 Mo. 26, 51 S. W. 471, holding all promisees must join in action on contract payable to one or the other.

Grammatical meaning as an element in interpretation.

Cited in Potter v. Berthelet, 20 Fed. 249, holding literal construction of words will not be followed in manifest violation of intention.

Digitized by Google

69 AM. DEC. 295, BENT v. COBB, 9 GRAY, 397.

Auctioneer as agent of both parties.

Cited in reference notes in 96 A. D. 271, on auctioneer as agent for buyer and seller; 100 A. D. 388, on auctioneer as agent of both parties.

Cited in note in 4 L.R.A. 393, on character of agency of broker.

Authority of interested auctioneer to make memorandum of sale.

Cited in Wingate v. Herschauer, 42 Iowa, 506, holding memorandum by administrator acting as auctioneer ineffective against purchaser; Tull v. David, 45 Mo. 444, 100 A. D. 385, holding same as to like memorandum by a trustee; Dunham v. Hartman, 153 Mo. 625, 77 A. S. R. 741, 55 S. W. 233, holding same as to like memorandum by sheriff substituted as a trustee; Johnson v. Buck, 35 N. J. L. 338, 10 A. R. 243, holding memorandum by clerk of agent acting as auctioneer effective against purchaser.

Cited in reference note in 84 A. D. 346, on powers of auctioneer.

Cited in note in 13 A. D. 400, on who may sign memorandum of auction sale to satisfy the statute of frauds.

Necessity of memorandum of judicial sale of lands.

Cited in Sanborn v. Chamberlin, 101 Mass. 409, holding memorandum in writing and signed by party to be charged or by his authorized agent essential; Capehart v. Hale, 6 W. Va. 547, on necessity of memorandum signed by party to be charged or auctioneer or other agent.

Cited in reference note in 76 A. D. 306, on application of statute of frauds to auction sales.

69 AM. DEC. 297, FORD v. TIRRELL, 9 GRAY, 401.

Competency of usages of trade as evidence.

Cited in Morningstar v. Cunningham, 110 Ind. 328, 59 A. R. 211, 11 N. E. 593, holding usage as to meaning of term "product" in packing house business competent; Fairly v. Wappoo Mills, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108, holding usage to allow brokerage for actual amount of fertilizer delivered rather than contract weight incompetent.

Cited in reference notes in 86 A. D. 371, on admissibility of evidence of custom or usage to explain or control written or other express contract; 33 A. R. 422, on usage to prevent deduction from teacher's wages for holidays.

Cited in notes in 42 A. R. 680, on parol evidence of custom to explain contract; 11 A. S. R. 632, on admissibility of evidence of custom or usage to explain technical expressions in contract or to disclose intention of parties; 4 L.R.A. 392, on usage of trade to aid interpretation of contract; 14 E. R. C. 671, on admissibility of parol evidence to interpret written contracts and to show usage of trade.

— As to measurements of space or surface or quantity.

Cited in Morgan v. Glendy, 92 Va. 86, 22 S. E. 854, holding usage to determine number of bricks laid by cubical measurement competent; Pucci v. Barney, 2 Misc. 354, 21 N. Y. Supp. 1099, holding usage to make allowance to excavators for deeper work than that specified in contract competent; Hoeger v. Citizens' Street R. Co. 25 Ind. App. 289, 73 N. E. 1095, holding usage that weight of paper was to be determined as wrapped competent; Walls v. Bailey, 49 N. Y. 464, 10 A. R. 407, holding usage not to deduct for doors and windows in measurement of plastering competent; Rastetter v. Reynolds, 160 Ind. 133,

Digitized by Google

66 N. E. 612, holding usage that dimensions of certain lumber were to be taken at time of sawing in green competent.

Interest recoverable on money due for labor.

Cited in Wyman v. Wicker, 179 Mass. 276, 60 N. E. 612, holding time of commencement is date of writ in absence of fixed demand of earlier date.

69 AM. DEC. 299, GURNEY v. HOWE, 9 GRAY, 404.

Competency of public or official records as evidence.

Cited in Pells v. Webquish, 129 Mass. 469, holding return of overseers competent to show that certain persons were not proprietors; State v. Gorham, 65 Me. 270, holding revenue collectors book of persons paying special taxes competent as a prima facie case; Evanston v. Gunn, 99 U. S. 660, 25 L. ed. 306, holding weather record kept by signal service officer competent though not authorized by statute; Priddy v. Boice, 201 Mo. 309, 119 A. S. R. 762, 9 L.R.A.(N.S.) 718, 99 S. W. 1055, 9 A. & E. Ann. Cas. 874, holding federal census records competent to show age and date of birth of inhabitants.

Liability between debtor and creditor as to loss of money remitted by mail.

Cited in Fleming & A. Co. v. Evans, 9 Kan. App. 858, 61 Pac. 603; Crane v. Pratt, 12 Gray, 348,—holding risk of loss assumed by debtor unless remittance was authorized by creditor's consent or course of dealing; Morgan v. Richardson, 13 Allen, 410, holding creditor assumes risk of loss in remittance authorized by him; Kenyon v. Knights Templar & M. Mut. Aid Asso. 122 N. Y. 247, 25 N. E. 299, holding member of benefit association does not assume risk of forfeiture in remitting by mail pursuant to custom; Hollowell v. Life Ins. Co. 126 N. C. 398, 35 S. E. 616, holding same as to an assured in a regular insurance company; Supreme Lodge K. of P. v. Withers, 32 C. C. A. 182, 59 U. S. App. 177, 89 Fed. 160, holding deposit of dues in mail by local secretary of benefit society pursuant to course of dealing operates as a payment; Shea v. Massachusetts Ben. Asso. 160 Mass. 289, 39 A. S. R. 475, 35 N. E. 855, holding by analogy that benefit association assumes risk in mailing notice that acceptance of assessment was conditional.

Cited in reference note in 97 A. D. 59, on direction of creditor to remit money as authorizing remittance by mail.

Cited in note in 21 E. R. C. 16, on remitting money by mail as payment.

Distinguished in Campbell v. Supreme Lodge K. of P. of the World, 168 Mass. 397, 47 N. E. 109, holding laws of beneficiary association did not make mailing of money for reinstatement effective until actual receipt; Buell v. Chapin, 99 Mass. 594, 97 A. D. 58, where an agent employed to collect debt and remit proceeds was involved.

69 AM. DEC. 301, ROBINSON v. ROBINSON, 9 GRAY, 447.

Deed conditioned for another's support as mortgage.

Cited in reference note in 77 A. D. 706, as to whether deed conditioned for support of another is a mortgage.

Bonds for support as consideration for conveyances.

Cited in Winch v. Bean, 62 N. H. 427, on their frequent ending in litigation.

Cited in reference note in 72 A. D. 302, on effect of bond by grantee in consideration of conveyance and conditioned for support of grantor.

Digitized by Google

Power of equity to devise means to reach property.

Cited in McCann v. Randall, 147 Mass. 81, 9 A. S. R. 666, 17 N. E. 75, on power to benefit creditors by reaching unindorsed draft in hands of third person.

69 AM. DEC. 303, BROWN v. STONE, 10 GRAY, 61.

Rights of owner of right of way.

Cited in Rotch v. Livingston, 91 Me. 461, 40 Atl. 426, holding grantee has right to use entire width of specified right of way; Wheeler v. Wilder, 61 N. H. 2, holding in absence of restrictions in grant, grantee of easement entitled to make such use of adjoining land as is reasonably necessary for enjoyment of easement.

Cited in reference note in 33 A. S. R. 57, on rights and remedies of parties entitled to private ways.

Cited in note in 88 A. D. 281, on use of private ways.

— Repair of way.

Cited in Sarcoxie v. Wild, 64 Mo. App. 403, holding owner of private way can repair it to suit his convenience, short of injuring servient estate.

Cited in note in 95 A. S. R. 329, on right and duty of owner of private way to construct and repair.

69 AM. DEC. 305, McGREGOR v. WAIT, 10 GRAY, 72.

Operation of estoppel against incompetent person.

Cited in Pells v. Webquish, 129 Mass. 469, holding deed from one incapable of contracting does not work an estoppel to claim title in such grantor.

Cited in note in 61 A. D. 453, as to when married woman is estopped.

Distinguished in Knight v. Thayer, 125 Mass. 25, holding under statute, deed by married woman binding on her as though she were unmarried.

Title by prescription against wife.

Cited in Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083, holding title by adverse use to right of way cannot be acquired by husband against wife during coverture.

Necessity of proving execution of instruments.

Cited in note in 35 L.R.A. 349, on necessity of calling subscribing witnesses to instruments produced on notice.

Title to land taken for public use.

Cited in note in 3 L.R.A. 176, on title to land taken for public use.

69 AM. DEC. 306, PHILLIPS v. TUDOR, 10 GRAY, 78.

Effect of deed in severalty by cotenant.

Cited in Richardson v. Miller, 48 Miss. 311, holding joint tenant cannot convey distinct portion by metes and bounds so as to prejudice co-tenants; Boggess v. Meredith, 16 W. Va. 1, holding co-tenant cannot by deed conveying by metes and bounds make grantee co-tenant with other tenants, Donworth v. Sawyer, 94 Me. 242, 47 Atl. 521, holding deed of unspecified part of land owned in severalty to be selected, renders grantee tenant in common of whole tract until selection.

Cited in reference note in 75 A. D. 172, on conveyance of his interest by tenant in common.

Digitized by Google

Cited in notes in 100 A. S. R. 650, on validity of conveyance by one cotenant of specific part of common property; 11 L.R.A. 278, on conveyance by tenant in common by metes and bounds.

Distinguished in Jewett v. Foster, 14 Gray, 495, holding in grant of land, lying in common and undivided, out of larger tract, grantee takes in common in the proportion his grant bears to whole.

69 AM. DEC. 308, HEEBNER v. EAGLE INS. CO. 10 GRAY, 131.

"Total loss" as including constructive total loss.

Cited in Burnham v. Boston Marine Ins. Co. 139 Mass. 399, 1 N. E. 837, holding in action for advances dependent on venture free from average, insured may recover for actual total loss or constructive total loss of venture; Pierce v. Columbian Ins. Co. 14 Allen, 322, holding insurance against total loss only, covers constructive total loss; Greene v. Pacific Mut. Ins. Co. 9 Allen, 217, holding under policy against total loss only, constructive as well as actual total loss may be recovered; Snow v. Union Mut. M. Ins. Co. 119 Mass. 592, 20 A. R. 349, holding allegation of total loss in proof covers constructive as well as actual total loss; Insurance Co. of N. A. v. Canada Sugar Ref. Co. 31 C. C. A. 65, 58 U. S. App. 22, 87 Fed. 491, holding under policy against "total loss only," insured may recover for constructive total loss; Searles v. Western Assur. Co. 88 Miss. 260, 114 A. S. R. 741, 40 So. 866, on proof of constructive total or partial loss by proof of total loss.

Cited in reference notes in 117 A. S. R. 749, on constructive total loss of insured ship; 23 A. S. R. 818, on total and partial loss in case of marine insurance.

— Effect of warranty against partial loss.

Cited in Mayo v. India Mut. Ins. Co. 152 Mass. 172, 23 A. S. R. 814, 9 L.R.A. 231, 25 N. E. 80, holding insurance on cargo of fertilizer "free from partial loss" covered constructive total loss followed by abandonment.

Disapproved in Washburn & M. Mfg. Co. v. Reliance M. Ins. Co. 27 C. C. A. 134, 50 U. S. App. 231, 82 Fed. 296, holding insurer not liable for constructive total loss, except on consent to abandonment, under policy containing warranty against partial loss.

Sufficiency of notice of abandonment.

Cited in Northwestern Transp. Co. v. Thames & M. Ins. Co. 59 Mich. 214, holding unless so required by policy, abandonment need not be in writing; Thwing v. Washington Ins. Co. 10 Gray, 443, holding cause of loss need not be distinctly stated if assured in making abandonment refers to intelligence he possesses and puts it in reach of underwriter.

Cited in reference note in 71 A. D. 662, on notice of abandonment.

What law governs in construction of insurance policy.

Cited in Pace v. Pace, 19 Fla. 438, holding policy will be construed according to law of state where finally executed and delivered; Great Western Ins. Co. v. Thwing, 111 Mass. 93, holding contract delivered and accepted in one place and payment made thereon at such place, is made in that place and subject to its laws; Desmazes v. Mutual Ben. L. Ins. Co. Fed. Cas. No. 3,821, holding where contract is issued at home office of company and transmitted to agent in another state, who had no authority to contract, contract is made in state of company; Re Insurance Co. 22 Fed. 109, holding where property in one state is insured by foreign company, note for premium executed and payable in that

Digitized by Google

state, and policy containing receipt for premium delivered in that state, contract is made in that state and construed by its laws; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93; Queen Ins. Co. v. Jefferson Ice Co. 64 Tex. 578,—holding foreign company doing business in another state under statutory permission, held to have assented to be governed by laws of that state, and its contracts construed same as domestic companies.

Cited in notes in 99 A. D. 671, on where contract of insurance is deemed to have been made; 63 L.R.A. 840, as to where insurance contract is deemed to have been made when local agent has no authority to accept application but is required to countersign policy; 63 L.R.A. 869, on choice of laws as to contract of insurance; 20 L.R.A. 407, on effect of right to recovery on policy where statute regulating business of foreign insurance companies has not been complied with.

— When policy is to be countersigned or delivered by agent in another state.

Cited in Cromwell v. Royal Canadian Ins. Co. 49 Md. 366, 33 A. R. 258; Continental L. Ins. Co. v. Webb, 54 Ala. 688,—holding where policy is not to become effective until countersigned by agents, law of residence of agents controls its construction; Todd v. State Ins. Co. 11 Phila. 355, 33 Phila. Leg. Int. 239; Meade v. St. Louis Mut. L. Ins. Co. 51 How. Pr. 1,—holding where policy is not to be effective until countersigned and delivered by agents, law of place of residence of agents governs; Galloway v. Standard F. Ins. Co. 45 W. Va. 237, 31 S. E. 969, holding where policy was not to be valid until countersigned, contract not completed until countersigned, and construed by law of state where countersigned.

Restriction of insurer's liability to loss from causes specified.

Cited in Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co. 12 Wall. 194, 20 L. ed. 378, holding where damages from concurrence of two causes of loss have been discriminated, insurer liable only for loss from peril insured against.

Cited in reference notes in 75 A. D. 563, on liability of insurance company under exemption in policy that insurer shall not be liable for breaking of machine; 88 A. D. 248, on insurance company's liability under exemption in policy.

Burden of proof of cause of loss under policy.

Cited in Paddock v. Commercial Ins. Co. 104 Mass. 521, holding burden on insured to show loss from cause and amount for which underwriter is liable; Cory v. Boylston F. & M. Ins. Co. 107 Mass. 140, 9 A. R. 14, holding burden of proving loss and amount, for which insurer is liable, on insured; Borland v. Mercantile Mut. Ins. Co. 14 Jones & S. 433, holding where policy contains excepted risks, burden is on insured to show amount of loss by peril insured against; Soelberg v. Western Assur. Co. 55 C. C. A. 601, 119 Fed. 23, holding burden on insured to show loss occurred by peril insured against.

Disapproved in Allemania F. Ins. Co. v. Fred, 11 Tex. Civ. App. 311, 32 S. W. 243, holding burden on insurer to show warranty set up as defense has been broken.

Conclusiveness of report of assessor of damages.

Cited in Carew v. Stubbs, 161 Mass. 294, 37 N. E. 171, holding specific exceptions must be taken and request for evidence relevant thereto, necessary to obtain review of assessors findings; Paddock v. Commercial Ins. Co. 104 Mass. 521, holding report of referee has weight of verdict and will not be set aside unless clearly erroneous.

Digitized by Google

Cited in note in 14 E. R. C. 231, on conclusiveness of valuation placed upon property contained in valued policy of insurance as standard of indemnity.

Abandonment of insured vessel.

Cited in notes in 29 A. D. 576, on abandonment of insured vessel; 1 E. R. C. 45, on right to abandon vessel if difficulty of recovering her great.

Losses covered by marine insurance policy.

Cited in reference note in 86 A. D. 500, as to what losses are or are not within marine policy of insurance.

69 AM. DEC. 315, SMITH v. PHILBRICK, 10 GRAY, 252.

Place for presentment of bill or note.

Cited in Hazard v. Spencer, 17 R. I. 561, 23 Atl. 729, holding where note is made payable at bank in certain place presentment must be made there although holder knows maker's residence is elsewhere; Bank of Orleans v. Whittemore, 12 Gray, 469, 74 A. D. 605, holding where holder knows residence of maker, failure to send note there for presentment relieves indorser; Davis v. Eppler, 38 Kan. 629, 16 Pac. 793, holding in absence of knowledge after inquiry of known or reputed residence of maker, presentment at place of date, although known not to be his residence, sufficient; Luning v. Wise, 64 Cal. 410, 1 Pac. 874 (dissenting opinion), on necessity of presentment at residence when known if different from place of date of instrument.

Cited in reference notes in 45 A. D. 467, as to place of demand of payment of note when maker does not live at place of date; 74 A. D. 607, on where demand of payment of note must be made; 80 A. D. 327, on what is sufficient presentment.

Cited in notes in 13 A. D. 347, on place of presentment of note where maker is resident of another state; 15 A. D. 644, on place of presentment.

Presumption of residence of parties to bill or note.

Cited in Hefflebower v. Detrick, 27 W. Va. 16, holding place of date of instrument prima facie evidence of maker's residence and place of business; Herrick v. Baldwin, 17 Minn. 209, Gil. 183, 10 A. R. 161, holding presumption is maker resides at place where note is made; Farnsworth v. Mullen, 164 Mass. 112, 41 N. E. 131, holding placing address in date of note raises presumption of residence or place of business of maker at such address; Ex parte Heidelback, 2 Low. Dec. 526, Fed. Cas. No. 6,322, holding place of date presumptive evidence of domicile; Demond v. Burnham, 133 Mass. 339, holding presumption of residence at place of date of note, not controlled or weakened by proof of former place of business there recently abandoned.

69 AM. DEC. 317, CAYZER v. TAYLOR, 10 GRAY, 274.

Ordinary care, what constitutes.

Cited in International & G. N. R. Co v. Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772, holding it to be that care and prudence which reasonable men exercise under like circumstances; Lusby v. Atchison, T. & S. F. R. Co. 41 Fed. 181, holding ordinary care the caution and vigilance which reasonable men exercise under like circumstances; Carter v. Chambers, 79 Ala. 223, holding circumstances may require a higher degree of diligence in one person than another; Flynn v. Kansas City, St. J. & C. B. R. Co. 78 Mo. 195, 47 A. R. 99, holding ordinary care measured by nature of work to be done, instruments to

Digitized by Google

be used and hazard of situation; Johnson v. Union P. Coal Co. 28 Utah, 46, 67 L.R.A. 509, 76 Pac. 1089, holding reasonable care must be measured by character, exposure and risk of business; Caven v. Bodwell Granite Co. 99 Me. 278, 59 Atl. 285, holding reasonable care is such care as reasonable and prudent men use under like circumstances; Central R. & Bkg. Co. v. Ryals, 84 Ga. 420, 11 S. E. 499, holding ordinary care varies according to circumstances dependent on degree of danger; Maynard v. Buck, 100 Mass. 40, holding ordinary care to be such care as men of ordinary prudence exercise over their own property under given circumstances.

Cited in reference note in 87 A. D. 682, as to what constitutes reasonable care.

Cited in note in 16 L.R.A.(N.S.) 137, on furnishing for servant's use article in general use as measure of master's duty.

Liability of master for injuries of servants.

Cited in Johnson v. Boston Tow-Boat Co. 135 Mass. 209, 46 A. R. 458, holding where master supplies suitable appliances and competent servant, he is not liable for negligence of latter; Schwarzschild & S. Co. v. Weeks, 72 Kan. 190, 4 L.R.A.(N.S.) 515, 83 Pac. 406, holding master liable if he expose servant to danger which the master could have avoided by exercise of reasonable care; Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440, holding master who uses ordinary care in maintenance in good condition of appliances not liable for injury in their use; Hill v. Gust, 55 Ind. 45, holding failure to exercise faculty of sight by infant employee not of itself proof of contributory negligence where employer has failed to give instruction and explanation of hazards of the work; St. Louis & S. E. R. Co. v. Valirius, 56 Ind. 511, holding employee not held to higher degree of intelligence and capacity than his youth and want of judgment known to employer, would warrant, and employer liable for supplying unsuitable appliance whose dangers were not known to inexperienced employee.

Cited in reference note in 13 A. R. 164, on master's duty as to safety of servants.

Cited in notes in 36 A. D. 286, on recovery by servant for personal negligence of master; 17 E. R. C. 241, on liability of master for injuries to servant; 19 E. R. C. 57, on liability of employer neglecting statutory duty for protection of employee; 39 L. ed. U. S. 465, on master's duty and liability as to warning servants.

— From defective machinery, appliance, or place for work.

Cited in Lawless v. Connecticut River R. Co. 136 Mass. 1, holding master liable for injury caused by use of unsuitable machine; Gibson v. Pacific R. Co. 46 Mo. 163, 2 A. R. 497, holding master liable for injury caused by improper or defective appliances in prosecution of work; Snow v. Housatonic R. Co. 8 Allen, 441, 85 A. D. 720, holding master liable for injury caused by use of defective instrumentality in prosecution of work; Coombs v. New Bedford Cordage Co. 102 Mass. 572, 3 A. R. 506, holding master liable for negligence in failing to provide safe place to work; Walsh v. Peet Valve Co. 110 Mass. 23, holding master liable for defective instrumentality if he knew or ought to have known of the defect and gave no warning to servant; Adams v. West Roxbury, 1 Haskell, 576, Fed. Cas. No. 67, holding master who knowingly furnishes a dangerous instrumentality is negligent; Shanny v. Androscoggin Mills, 66 Me. 420, holding same where he knew, or in exercise of ordinary care should have known; Green & C. Street Pass. R. Co. v. Bresmer, 97 Pa. 103, 38 Phila. Leg.

Digitized by Google

Int. 440, 10 W. N. C. 379, holding master negligent in failing to provide suitable place for servant to do his work; Quinn v. Johnson Forge Co. 9 Houst. (Del.) 338, 32 Atl. 858, holding master liable for negligence if he maintain defective instrumentalities.

Cited in reference notes in 85 A. D. 730, on master's care and duty in supplying servants, instrumentalities and appliances; 85 A. D. 730, on liability of master for injuries to servant from defective machinery or material.

Cited in notes in 77 A. D. 219, on liability of master for injuries to servant from defective machinery or material; 92 A. D. 221, on employer's duty to provide safe machinery and appliances; 16 A. R. 502, on master's duty to furnish sufficient and proper machinery and materials.

Distinguished in Morse v. Glendon Co. 125 Mass. 282, holding in absence of proof of negligence in purchase of machine, or in selection of fellow servant, master not liable for injury in putting machine in working order.

— Due to negligence of fellow servants.

Cited in reference notes in 71 A. D. 304, on nonliability of master for injury to servant through negligence of fellow servant; 75 A. D. 310, on employer's liability to servant for injuries resulting from negligence or misconduct of fellow servant; 87 A. D. 400, on master's liability for injuries to servant through negligence of fellow servant; 38 A. D. 340; 40 A. S. R. 884,—on master's liability for fellow servants' negligence.

Cited in notes in 36 A. S. R. 846; 4 L.R.A. 795,—on liability of master for injury resulting from negligence of coservant.

— Due to incompetent fellow servant.

Cited in McMahon v. Davidson, 12 Minn. 357, Gil. 232, holding master liable for selection or retention of incompetent servants, or employment of unsafe machinery; Holden v. Fitchburg R. Co. 129 Mass. 268, 37 A. R. 343, holding master liable for negligence in failing to furnish suitable structures and appliances and selection of competent fellow servants; Gilman v. Eastern R. Corp. 10 Allen, 233, 87 A. D. 635, holding master liable for negligence in providing proper appliances, or selecting competent fellow servants.

Cited in reference notes in 87 A. D. 640, on liability of railroad for injury caused by negligence of incompetent fellow servants; 1 A. S. R. 200, on master's liability to servant for injuries due to negligence of incompetent fellow servant.

Cited in notes in 25 L.R.A. 710, on liability of master for injuries caused by employing incompetent fellow servant; 41 L.R.A. 47, on employer's liability to injured servant predicated from constructive knowledge as to the capacity of servants; 48 L.R.A. 370, on master's duty with respect to employment of servants as creating exception to doctrine of common employment; 14 L.R.A. (N.S.) 758–759, on evidence of specific instances to prove character of servant in action against master for injury to fellow servant.

Liability of master for negligence concurring with that of coservant.

Cited in McMahon v. Henning, 1 McCrary, 516, 3 Fed. 353, holding master liable for negligence in use of defective appliance whereby servant is injured although fellow servant's negligence contributes to the injury; Elmer v. Locke, 135 Mass. 575, holding where negligence of master is proximate cause of injury, he is not relieved by contributing negligence of fellow servant; Matthews v. Clough, 70 N. H. 600, 49 Atl. 637, holding master liable where his negligence co-operates with that of fellow servant; Klaffke v. Bettendorf Axle Co. 125 Iowa, 223, 100 N. W. 1116; Sherman v. Menominee River Lumber Co. 72 Wis.

Digitized by Google

122, 1 L.R.A. 173, 39 N. W. 365, holding contributing negligence of fellow servant will not relieve master for injury caused by his own negligence; Sprong v. Boston & A. R. Co. 58 N. Y. 56, holding negligence of coservant does not relieve master where injury would not have occurred but for negligence of latter; Franklin v. Winona & St. P. R. Co. 37 Minn. 409, 5 A. S. R. 856, 34 N. W. 898, holding master liable where his negligence combines with that of fellow servant to cause the injury; Clyde v. Richmond & D. R. Co. 59 Fed. 394; Denver & R. G. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093; Richmond & D. R. Co. v. George, 88 Va. 223, 13 S. E. 429; Chicago, R. I. & P. R. Co. v. Sutton, 11 C. C. A. 251, 27 U. S. App. 310, 63 Fed. 394; Terre Haute & I. R. Co. v. Mansberger, 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196; Guthrie v. Maine C. R. Co. 81 Me. 572, 18 Atl. 295,—holding where negligence of master is proximate cause of accident, master liable though negligence of fellow servant contributed; New York, C. & St. L. R. Co. v. Perriguay, 138 Ind. 514, 34 N. E. 233, holding master liable for negligence which is immediate cause of injury though negligence of fellow servant concur therein; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285; Atchison, T. & S. F. R. Co. v. Holt, 29 Kan. 149; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210,—holding master liable for negligence in causing injury though negligence of fellow servant concur therein; Cincinnati, I. St. L. & C. R. Co. v. Lang, 118 Ind. 579, 21 N. E. 317, holding where master's negligence is principal cause of injury, he is not relieved by concurring negligence of fellow servant; Chicago, St. P. & R. C. R. Co. v. Chambers, 15 C. C. A. 327, 32 U. S. App. 253, 68 Fed. 148, holding stranger who negligently injures servant of another not relieved by concurring negligence of that other, or of fellow servant of injured; Wilson v. Willimantic Linen Co. 50 Conn. 433, 47 A. R. 653, holding master liable for injury caused by combined negligence of himself and fellow servant; Fisk v. Central P. R. Co. 72 Cal. 38, 1 A. S. R. 22, 13 Pac. 144, holding if negligence of fellow servant combines with that of master, latter liable; Berns v. Gaston Gas Coal Co. 27 W. Va. 285, 55 A. R. 304, holding where master is negligent but negligence of fellow servant is the proximate cause of injury, master not liable; Choctaw, O. & G. R. Co. v. Holloway, 52 C. C. A. 260, 114 Fed. 458, holding where negligence of wrong doer is proximate cause of injury, he is not relieved because wrongful act of third person contributed to injury; Griffin v. Boston & A. R. Co. 148 Mass. 143, 12 A. S. R. 526, 1 L.R.A. 698, 19 N. E. 166, holding master liable for injury caused by negligent failure to supply suitable appliances, although negligence of fellow servant contributed; Boyce v. Fitzpatrick, 80 Ind. 526, holding master who fails to provide and maintain suitable instrumentalities responsible for injury thereby, though negligence of fellow servant concur; Gilman v. Eastern R. Co. 13 Allen, 433, 90 A. D. 210, on liability of master where his negligence concurs with that of fellow servant to produce injury; Lutz v. Atlantic & P. R. Co. 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912 (dissenting opinion), on liability of master for negligence where negligence of fellow servant contributes.

Cited in reference note in 98 A. S. R. 320, on contributory negligence of master and fellow servant as bar to recovery for injury by defective machinery and appliances.

Cited in notes in 4 L.R.A. 851, on liability of master for injury to servant when his negligence concurred with that of others; 16 L.R.A. 824, on existence of master's liability for injury to servant by combined negligence of master and

Digitized by Google

fellow servant when master's negligence was essential element; 54 L.R.A. 167, on master's liability where his own antecedent negligence and the subsequent delinquency of coservant are both efficient causes of the injury; 54 L.R.A. 169, on master's liability in case of his own negligence concurring with negligence of the coservant with regard to nonperformance of a statutory duty.

Burden of proving negligence.

Cited in note in 18 E. R. C. 712, on burden of proving negligence and showing that it was proximate cause of injury alleged.

69 AM. DEC. 320, DUNLAP v. BARTLETT, 10 GRAY, 282.

Right to bail.

Cited in reference note in 17 A. S. R. 574, on accused's right to bail.

69 AM. DEC. 321, ALDERMAN v. PEOPLE, 4 MICH. 414.

Privileged communication with counsel.

Cited in State v. Russell, 83 Wis. 330, 53 N. W. 441, holding communications made to state's attorney under representations that he was prisoner's attorney, so privileged as to render him incompetent to prosecute; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594, holding communications to counsel not privileged which are for an unlawful purpose; House v. House, 61 Mich. 69, 1 A. S. R. 570, 27 N. W. 858, holding conversation with third person, in presence of attorney, not made to obtain legal advice, not privileged communication; Ewers v. White, 114 Mich. 266, 72 N. W. 184, holding where attorney acts as friend to both parties under express refusal to act for either in event of difficulty, relation of attorney and client does not exist and communications not privileged; Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245, holding where person consults attorney for purpose of obtaining advice, and latter accepts advices and confidences, relation of attorney and client established, and former incompetent to disclose privileged matter as basis of opinion on client's sanity; Lange v. Perley, 47 Mich. 352, 11 N. W. 193, on admissibility of communications to law officer of county of public nature, not private and confidential.

Cited in reference notes in 73 A. D. 549, as to when communication to attorney is privileged; 83 A. D. 117, on privileged communications; 86 A. D. 394; 97 A. D. 418, on when communication by client to attorney privileged.

Cited in notes in 66 A. S. R. 216, on attorney as witness to facts communicated by client; 67 L.R.A. 924, on admissibility in evidence of communications made to persons serving in judicial capacity.

Waiver of privilege of witness.

Cited in notes in 21 A. D. 61, on waiver of privilege of witness; 66 A. S. R. 242, on waiver of privilege as to confidential communications to attorney.

— By turning state's evidence.

Cited in People v. Gallagher, 75 Mich. 512, 42 N. W. 1063, holding accomplice who turns state's evidence cannot claim right of privileged communication in regard to statements to counsel; Jones v. State, 65 Miss. 179, 3 So. 379, holding accomplice, by turning state's evidence, waives privilege against disclosing communication to counsel; Hamilton v. People, 29 Mich. 173, holding witness on turning state's evidence waives all privileges in regard to facts in controversy; Re Taylor, 8 Misc. 159, 28 N. Y. Supp. 500, holding where witness before grand

Digitized by Google

jury has been promised exemption from prosecution, he cannot refuse to testify on ground of incrimination.

Cited in note in 40 A. S. R. 775, on agreements concerning state's evidence.

Distinguished in Youngs v. Youngs, 5 Redf. 505, holding witness does not lose privilege of refusal to testify for incrimination on cross-examination when matter on which he was being examined had not been disclosed on direct examination.

Disapproved in Sutton v. State, 16 Tex. App. 490, holding accomplice who turns state's evidence does not lose right of privileged communication with counsel.

What constitutes indictable conspiracy.

Cited in reference notes in 80 A. D. 550, on what constitutes indictable conspiracy; 4 A. S. R. 77, on criminal conspiracy.

Cited in notes in 51 A. D. 82, 85, on nature of conspiracy; 3 A. S. R. 475, on what constitutes indictable conspiracy; 11 L.R.A. 547, on conspiracy without act as ground for action.

Criminality of conspiracy.

Cited in People v. Saunders, 25 Mich. 119, holding on charge of conspiracy to violate the law the unlawful conspiracy itself constitutes the crime, and not acts done in its pursuit.

Particularity in description of criminal acts in indictments.

Cited in State v. Savoye, 48 Iowa, 562, holding indictment for commiting seduction, which by statute was a felony, need not allege woman was unmarried or of previously chaste character; United States v. Lehman, 39 Fed. 768, holding indictment for violation of statute, alleging knowledge of fraud in so doing, must state acts constituting the fraud; State v. Parkersburg Brewing Co. 53 W. Va. 591, 45 S. E. 924, holding indictment for violating law must set forth particular acts as constituting the violation.

Cited in reference notes in 85 A. D. 658, on what description of offense charged in indictment sufficient; 94 A. D. 259, on necessity of indictment being explicit.

Indictment for conspiracy.

Cited in United States v. Walsh, 5 Dill. 58, Fed. Cas. No. 16,636, holding indictment for conspiracy to defraud the United States must clearly allege every ingredient of the offense.

Cited in reference note in 38 A. D. 361, on sufficiency of indictment for conspiracy.

Cited in note in 3 A. S. R. 480, 481, on general averments in indictment for conspiracy.

— Description of manner or means of conspiracy.

Cited in People v. Arnold, 46 Mich. 268, 9 N. W. 406, holding where purpose is lawful but means are unlawful, such means must be set out in indictment; State v. Parker, 43 N. H. 83, holding indictment for conspiracy to cheat and defraud by unlawful means must state the means; Cole v. People, 84 Ill. 216 (dissenting opinion), on necessity of setting forth means when object is not in itself unlawful; People v. Barkelow, 37 Mich. 455, holding when means enters into criminality of conspiracy to defraud, though in themselves not within legal definition of crime, information must show what they are; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588, holding indictment for unlawful

Digitized by Google

combination to prevent enjoyment of right secured by constitution must show that acts, if proved, will support conviction for offense alleged.

Cited in reference note in 90 A. D. 654, as to setting out in indictment facts constituting conspiracy.

— Description of purpose.

Cited in People v. Willis, 24 Misc. 537, 54 N. Y. Supp. 129, 13 N. Y. Crim. Rep. 346, holding indictment for conspiracy to commit unlawful act, must set forth facts and circumstances constituting intended act.

Office of bill of exceptions on writ of error in criminal case.

Cited in Shannon v. People, 5 Mich. 36, holding bill of exceptions in criminal case when case is brought to appellate court by writ of error, becomes part of record.

69 AM. DEC. 333, NILES TWP. HIGHWAY COM. v. MARTIN, 4 MICH. 557.

Liability of public and quasi corporations for negligence of officers.

Cited in Hollenbeck v. Winnebago County, 95 Ill. 148, 35 A. R. 151, holding that county is not liable at common law for negligence of officer while performing corporate duty enjoined by statute; Granger v. Pulaski County, 26 Ark. 37, holding in absence of statute county not liable for injury resulting from nonperformance of corporate duty by its officers; Nicholson v. Detroit, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695, holding in absence of statute, city not liable for negligence of officer in performance of statutory duty; Hill v. Boston, 122 Mass. 344, 23 A. R. 332, holding in absence of statute, city not liable for injury from unsafe condition of staircase in public school.

Cited in reference notes in 74 A. D. 487, on liability of quasi corporations as distinguished from that of other corporations; 81 A. D. 152, on quasi corporation's liability; 25 A. S. R. 369, on distinction between liability of municipal corporations proper and other quasi corporations, for negligence.

Cited in note in 5 A. D. 44, on liability of cities, towns, etc., for torts.

Distinguished in McAskill v. Hancock Twp. 129 Mich. 74, 55 L.R.A. 738, 88 N. W. 78, holding municipal corporation liable for negligently diverting water from its natural course and discharging it on private property.

— For negligent nonrepair of highways and bridges.

Cited in Detroit v. Blackeby, 21 Mich. 84, 4 A. R. 450, 2 Legal Gaz. 337, holding in absence of statute, incorporated city not liable for neglect in keeping streets in repair; Leoni Twp. v. Taylor, 20 Mich. 148, holding in absence of statute imposing duty on township to maintain and repair highways, township not liable for damages occasioned by neglect to keep highway in repair; Soper v. Henry County, 26 Iowa, 264, holding county not liable for injury caused by neglect of its officers in maintenance of public highway, in absence of statute; Bailey v. Lawrence County, 5 S. D. 393, 49 A. S. R. 881, 59 N. W. 219; Jasper County v. Allman, 142 Ind. 573, 39 L.R.A. 58, 42 N. E. 206,—holding in absence of statute, county not liable for injuries from defective bridge, by reason of negligence of its officers.

Cited in reference notes in 79 A. D. 337, on municipal liability for defective sewers or neglect to repair streets; 79 A. D. 379, on liability of cities and towns for injuries by defective sidewalks, streets, and highways.

Cited in notes in 63 A. D. 350, on municipal liability for failure to repair

Digitized by Google

streets and highways; 12 E. R. C. 692, on liability of counties for repairs of public bridges.

Distinguished in Burnham v. Byron Twp. 46 Mich. 555, 9 N. W. 851; Merkle v. Bennington Twp. 58 Mich. 156, 55 A. R. 666, 24 N. W. 776,—holding under statute, township liable for injuries caused by defective bridge; Woodruff v. Glendale, 23 Minn. 537, holding under statute, giving town corporate capacity as respects laying out highways, its supervisors in that respect are agents of town.

Liability of public trust for act of trustee.

Cited in Fordyce v. Woman's Christian Nat. Library Asso. 79 Ark. 550, 7 L.R.A.(N.S.) 485, 96 S. W. 155, holding property of charitable trust not subject to sale under execution on judgment rendered for wrongful acts of its trustees.

Individual liability of officers of quasi corporation for negligence.

Cited in Sells v. Dermody, 114 Iowa, 344, 86 N. W. 325, holding township officer liable to individual for damages from negligence in performance of ministerial duties.

Cited in reference note in 90 A. D. 731, on liability of public highway and road officers for injuries occasioned by their neglect of duty.

Cited in note in 22 L.R.A. 832, on personal liability of highway officers for negligence.

Power and authority over highways.

Cited in Highway Comrs. v. Chaffee, 1 Mich. N. P. 147, holding body in whom legislature has vested power of repair of highways, proper party plaintiff in action for injury to highway.

Remedy for official nonfeasance.

Cited in Marathon Twp. v. Oregon Twp. 8 Mich. 372, on issuance of mandamus to compel performance of ministerial duty by town officers.

69 AM. DEC. 338, PEOPLE v. DENNIS, 4 MICH. 609.

Effect of omission of principal's name from recognizance.

Cited in State v. Quattlebaunn, 67 S. C. 203, 45 S. E. 162, holding in absence of statute, recognizance binding without signature of principal.

Cited in reference note in 84 A. S. R. 248, on discharge of bail.

Sufficiency of description of offense in recognizance.

Cited in Daniels v. People, 6 Mich. 381, holding where crime is named by well understood term, facts constituting offense need not be set out; Foote v. Gordon, 87 Ga. 277, 13 S. E. 512, holding recognizance to answer crime of well known general name, not limited to simplest form of that crime; United States v. Eldredge, 5 Utah, 161, 13 Pac. 673, holding recognizance describing offense in words of complaint, sufficient, as charging crime of unlawful cohabitation with more than one woman as wife.

Necessity of allegation of jurisdiction in recognizance.

Cited in Daniels v. People, 6 Mich. 381, holding recognizance, allowed on application of defendant, need not show jurisdiction of committing magistrate; Eddy v. Moulton, 12 R. I. 105, holding where magistrate has jurisdiction in case of like general description, recognizance prima facie valid though it do not set forth particular facts to give jurisdiction.

Cited in note in 81 A. D. 364, on requisites of recognizance.

Digitized by Google

Recognizance, when forfeited.

Cited in People v. Phalen, 49 Mich. 492, 13 N. W. 830, holding under statute recognizance forfeited by non-appearance at adjourned day of hearing, taken at request of prisoner.

Secondary evidence.

Cited in reference note in 72 A. D. 57, on when secondary evidence admissible.

Cited in note in 11 E. R. C. 505, as to whether there are degrees of secondary evidence.

69 AM. DEC. 343, BREWSTER v. WAKEFIELD, 1 MINN. 352, GIL. 260, Reversed by United States Supreme Court, 22 How. 118, 16 L. ed. 301.

Rate of interest after maturity.

Cited in Mason v. Callender, 2 Minn. 350, 72 A. D. 102, Gil. 302, holding where attempt is made to provide stipulated damages by increased interest after maturity, recovery will be at rate provided before maturity; Bowman v. Neely, 32 Ill. App. 356, holding provision in promissory note that upon default in interest it should bear interest as on principal, within contracting powers of parties.

Cited in reference notes in 72 A. D. 116, on whether rate of interest specified in note continues after maturity; 90 A. D. 484, as to rate of interest on note after maturity.

Reversed in Brewster v. Wakefield, 22 How. 118, 16 L. ed. 301, holding stipulated rate not applicable after maturity.

Cited as reversed in Union Inst. for Savings v. Boston, 129 Mass. 82, 37 A. R. 305, holding that under statute mortgage will bear stipulated rate of interest after maturity.

Interest as damages.

Cited in note in 76 A. D. 602, on interest as damages.

Recovery of interest to time of verdict.

Cited in note in 92 A. D. 630, on recovery of interest to time of verdict.

69 AM. DEC. 349, ROGERS v. SAMPLE, 33 MISS. 310.

Validity of agreement to pay damages on breach of contract.

Cited in Taylor v. Buzard, 114 Mo. App. 622, 90 S. W. 126, holding provision in contract that if installment of payment did not amount to certain sum, it should be applied as rent and be forfeited, not usurious; Broadbent v. Brumback, 2 Idaho, 366, 16 Pac. 555, holding stipulation in mortgage to pay attorney's fee in case of foreclosure, not usury.

Cited in notes in 81 A. D. 737, as to what contracts are usurious; 46 A. S. R. 193, on penalty for taking usury only when agreement to pay is absolute.

— Agreement for greater interest after maturity.

Cited in McKay v. Belknap Sav. Bank, 27 Colo. 50, 59 Pac. 745, holding where note provides that upon failure to pay principal when due, increased interest shall be payable from date, such increase recoverable; Hamilton v. Fowler, 40 C. C. A. 47, 99 Fed. 18, on effect of stipulation to pay greater rate of interest after maturity than before.

Cited in reference notes in 83 A. D. 244; 95 A. D. 763,—as to when interest is

Digitized by Google

not usurious; 95 A. D. 763, as to whether stipulation to pay interest from date of note, if note is not paid at maturity, renders same usurious.

Cited in notes 91 A. S. R. 588, on validity of agreements for higher or exorbitant rate of interest after default; 49 L.R.A. 552, on usury in provision for interest only in case of default in payment.

Distinguished in Krutz v. Robbins, 12 Wash. 7, 50 A. S. R. 871, 28 L.R.A. 676, 40 Pac. 415, holding where mortgage to secure note provided that on default in payment of principal or interest, principal would bear increased interest from its date, such provision a penalty and unenforceable.

69 AM. DEC. 351, MILLER v. STATE, 33 MISS. 356, 2 Morr. St. Cas. 1042.

Betting on election, when an offense.

Cited in State v. Griggs, 34 W. Va. 78, 11 S. E. 740, holding bet after vote is closed but before a legal declaration of result, an offense.

Cited in note in 18 L.R.A. 862, on legality of betting on elections.

— Indictment for.

Cited in Com. v. Avery, 14 Bush, 625, 29 A. R. 429, holding indictment sufficient though it do not name candidate bet on, nor describe crime in words of statute, if words used are synonymous therewith.

Necessity of allegation of time in indictment.

Cited in McCarty v. State, 37 Miss. 411, 2 Morr. St. Cas. 1330, holding time immaterial where not of essence of offense; Miazza v. State, 36 Miss. 613, 2 Morr. St. Cas. 1205, holding time may be laid any day previous to indictment when not a necessary ingredient in describing offense or of its essence.

Cited in reference note in 74 A. D. 320, on when time of commission of offense is immaterial.

Variance as to time stated in indictment.

Cited in reference notes in 71 A. D. 481, on necessity of proving time as alleged in indictment, when of essence of offense; 41 A. S. R. 264, on variance as to time stated in indictment.

Validity of indictment returned by defective grand jury.

Cited in State v. Ostrander, 18 Iowa, 435, holding indictment valid when found by essential number of jurors, although entire panel not present and voting; Box v. State, 34 Miss. 614, 2 Morr. St. Cas. 1080, holding indictment returned by grand jury composed of more than statutory number, invalid; Eastham v. Holt, 43 W. Va. 599, 27 S. E. 883, on validity of indictment by body not a grand jury; People v. Wintermute, 1 Dak. 63, 46 N. W. 694, to point that presence of disqualified grand juror vitiates whole panel.

Cited in reference notes in 9 A. S. R. 743, on illegality of grand jurors as ground of arrest of judgment; 60 A. S. R. 56, on irregularities in impaneling grand jury, rendering indictment void.

Procedure on attacking legality of grand jury.

Cited in O'Byrnes v. State, 51 Ala. 25, holding objection to indictment because of defects in grant jury available on motion in arrest of judgment or on error; Wilson v. People, 3 Colo. 325, holding where record discloses defect in grand jury, advantage thereof may be taken by motion in arrest of judgment.

Distinguished in Barron v. People, 73 Ill. 256, holding under statute, where

Digitized by Google

illegality in organization not apparent on record, mode of questioning is by motion to quash or challenge to array.

Disapproved in Peck v. State, 63 Ala. 201, holding irregularity in selection, drawing and summoning grand jurors not open to collateral attack.

Number of grand jurors necessary or proper to act.

Cited in notes in 27 L.R.A. 846, on number of grand jurors necessary or proper to act; 27 L.R.A. 851, on power of legislature to change number of grand jurors required at common law.

69 AM. DEC. 355, KIRKLAND v. LOWE, 33 MISS. 423.

Extraterritorial rights of assignee.

Cited in reference note in 88 A. D. 308, on right of assignee of choses in action to sue in another state.

Cited in note in 23 L.R.A. 42, on right of assignee under insolvency statutes to sue in other state for personal property.

What law governs as to right to maintain action.

Cited in Tully v. Herrin, 44 Miss. 626, holding syndic appointed in one state cannot in his own name maintain action in courts of another in absence of statute; Stoneman v. Erie R. Co. Sheldon, 286, to point that lex fori governs remedy.

Cited in note in 13 L.R.A. 458, as to when lex fori governs.

Effect of foreign bankruptcy or insolvency assignment.

Cited in note in 17 L.R.A.(N.S.) 175, on effect of foreign bankruptcy or insolvency assignment on personal property where no rights of creditors are involved.

69 AM. DEC. 358, HAMBLEN v. HAMBLEN, 33 MISS. 455.

Validity of execution sale.

Cited in reference notes in 86 A. D. 700, on effect of absence or irregularities in return of execution; 90 A. D. 382, on necessity of levy to sustain execution sale.

Cited in notes in 33 A. D. 698, on necessity of levy to sustain sale; 21 L.R.A. 42, on title of purchaser at execution or judicial sale as affected by judgment and execution and levy.

Necessity of endorsement of levy on execution against land.

Cited in Herr v. Broadwell, 5 Colo. App. 467, 39 Pac. 70, holding in absence of statute endorsement of levy on writ unnecessary where return contains copy of notice of sale reciting levy.

Levy of execution on land.

Cited in Shoonover v. Osborne Bros. 111 Iowa, 140, 82 A. S. R. 496, 82 N. W. 505, holding indorsement of the fact on writ constituted levy.

69 AM. DEC. 362, MOUNT v. BROWN, 33 MISS. 566.

Liability of defaulting bidder at judicial sale.

Annotation cited in Hammond v. Cailleaud, 111 Cal. 206, 52 A. S. R. 167, 43 Pac. 607, holding purchaser under decree in equity becomes quasi party to suit; Stout v. Philippi Mfg. & Mercantile Co. 41 W. Va. 339, 56 A. S. R. 843, 23 S. E. 571, holding court may order resale with provision for responsibility of

Digitized by Google

bidder for deficiency therein; Allred v. McGahagan, 39 Fla. 118, 21 So. 802, holding sale must be confirmed before right accrues to enforce contract.

Cited in reference notes in 70 A. D. 586, on remedies against purchasers at judicial sale; 73 A. D. 134, on remedies against purchasers at judicial sales to enforce payment of bids; 27 A. S. R. 766, on right to recover for deficiency resulting from resale; 44 A. S. R. 747, on equity of purchaser at judicial sale to relief; 64 A. S. R. 726, on compelling completion of purchase at judicial sale.

Cited in notes in 70 A. D. 586, on questions affecting liability of purchaser at judicial sale on his contract; 52 A. S. R. 176, on remedies against purchasers at judicial sales; 52 L.R.A. 258–259, on loss of profits of sale of land as damages on breach by vendee.

Distinguished in Campe v. Saucier, 68 Miss. 278, 24 A. S. R. 273, 8 So. 846, holding where sale is not complete until confirmation, a resale by commissioner and its confirmation relieves defaulting bidder on first, also citing annotation on this point.

Resale at judicial sale.

Cited in reference notes in 20 A. S. R. 507, on setting aside judicial sale and ordering resale; 52 A. S. R. 179, on resale of property upon first purchaser failing to comply with terms of first sale; 57 A. S. R. 134, on terms of resale at judicial sale; 65 A. S. R. 717, on resale on failure to complete purchase at judicial sale.

Judicial sales under statute of frauds.

Cited in reference note in 64 A. S. R. 726, on judicial sales under statute of frauds.

69 AM. DEC. 375, SHIRLEY v. FEARNE, 33 MISS. 653.

Effect of filing amendment after demurrer.

Cited in Tittle v. Bonner, 53 Miss. 578, holding filing of substituted plea a confession of demurrer to first.

Proof of attested instruments.

Cited in note in 35 L.R.A. 341, on proof of attested instruments by one subscribing witness.

Acknowledgment by partnership.

Cited in note in 108 A. S. R. 577, on defects or matters relating to certificates of acknowledgment by partnership.

Necessity of acknowledging and attesting deed.

Cited in note in 4 L.R.A. 334, on necessity of acknowledging and attesting deed.

Power of partner to bind firm.

Cited in reference note in 80 A. D. 797, on validity of deed executed by partner in name of firm.

Cited in notes in 37 A. S. R. 205, on power of partner to bind firm by sealed instrument; 8 E. R. C. 632, on ratification of unauthorized deed by partner.

Conclusiveness of judgment on parties and privies.

Cited in Roby v. Eggers, 130 Ind. 415, 29 N. E. 365, holding one who as attorney prosecutes suit to final judgment, is estopped in subsequent suit involving identical matters of former, to deny result of former litigation; Edmonston v. Carter, 180 Mo. 515, 79 S. W. 459, holding judgment binding on privy of party whose rights were determined therein.

Digitized by Google

Impeachment of record by parol.

Cited in Murrah v. State, 51 Miss. 652, holding record of court cannot be impeached by parol evidence; McMicken v. Com. 58 Pa. 213, 25 Phila. Leg. Int. 340, holding sheriff's recognizance duly recorded in proper office, cannot be impeached by parol evidence.

Cited in reference notes in 71 A. D. 460, on right to impeach record by parol evidence; 74 A. D. 138, on contradiction of record by parol.

Right to sue upon negligence of fiduciary.

Cited in Pittman v. McClellan, 55 Miss. 299, holding distributees of estate may sue where administrator fails so to do.

69 AM. DEC. 381, HUNT v. CRANE, 33 MISS. 669.

Refusal of abstract instructions.

Cited in reference note in 80 A. D. 354, on refusal to give instruction correct as abstract proposition but not stating rule with reference to case.

Recovery in case of nonperformance of contract.

Cited in reference notes in 74 A. D. 136, on servant's right to compensation in case of nonperformance of special contract; 98 A. D. 507, on recovery for services rendered under incompleted special contract; 30 A. S. R. 57, on amount of recovery for services.

Measure of damage on breach of contract of employment.

Cited in Birdsong v. Ellis, 62 Miss. 418, holding it amount of compensation agreed on less what he earned or might have earned by due diligence in seeking other employment.

Cited in reference note in 44 A. S. R. 254, on measure of damages for wrongful discharge of servant.

Cited in notes in 6 L.R.A.(N.S.) 85, on actual loss, or value of contract, as measure of damages for wrongful discharge of servant; 6 L.R.A.(N.S.) 95–96, on measure of damages for wrongful discharge of servant in cases of other employment; 6 L.R.A.(N.S.) 107, on recall of wrongfully discharged servant for new and different employment in mitigation of damages.

Burden of proving damages sustained by wrongfully discharged servant.

Cited in note in 6 L.R.A.(N.S.) 109–110, on burden of proof as to other employment of wrongfully discharged servant in mitigation or reduction of damages.

Rights and remedies of wrongfully discharged servant.

Cited in reference notes in 72 A. D. 286, on remedy of employee for wrongful discharge before end of time of service; 82 A. D. 102, on rights and remedies of servant wrongfully discharged; 12 A. S. R. 859, on duty of employee wrongfully discharged to accept employment from others.

Waiver of objection to deposition.

Cited in Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759, holding voluntary participation in examination of witness not named in notice waiver of defect; Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484, holding mere silence by party and attorney after time of service not a waiver of defect.

Cited in reference note in 82 A. D. 658, on cross-examination of witness as waiver of objection to deposition for want of notice.

Digitized by Google

Necessity for reasonable notice of taking of deposition.

Cited in reference notes in 78 A. D. 751; 79 A. D. 350,—on necessity for reasonable notice of time and place of taking depositions.

69 AM. DEC. 385, EMANUEL v. WHITE, 34 MISS. 56.

What law governs negotiable instrument.

Cited in Harrison v. Pike Bros. 48 Miss. 46, holding commercial paper governed by law of place where payable; Coffman v. Kentucky Bank, 41 Miss. 212, 90 A. D. 371, holding rights of holder of negotiable instrument determined by law of state where instrument is payable.

Cited in reference notes in 77 A. D. 87, as to what law governs liability on promissory notes; 78 A. D. 263, on what law governs rate of interest on notes; 86 A. D. 374, as to what law governs contract; 90 A. D. 374, on law of place of payment as governing contract of acceptor of bill of exchange; 32 A. S. R. 296, on conflict of laws regarding negotiable instruments; 64 A. S. R. 254, as to law determining negotiability.

Cited in note in 61 L.R.A. 203-205, on conflict of laws as to character of holder of negotiable paper.

What constitutes bona fide purchaser for value.

Cited in Isom v. First Nat. Bank, 52 Miss. 902, holding purchaser who takes with knowledge of trust, holds as trustee.

Cited in reference notes in 71 A. D. 499, as to whether one taking negotiable instrument as collateral security is a bona fide holder for value; 42 A. S. R. 937, on protection of bona fide holder of negotiable instrument against equities.

— Taking for antecedent debt.

Cited in Pollock v. Simmons, 76 Miss. 198, 23 So. 626, holding giving new security in extinguishment of old constituted assignee bona fide holder; Dovey's Appeal, 97 Pa. 153, 10 W. N. C. 389, 38 Phila. Leg. Int. 348, holding taking of security as payment of antecedent debt makes assignee holder for value, with rights of bona fide purchaser; First Nat. Bank v. Strauss, 66 Miss. 479, 14 A. S. R. 579, 6 So. 232, holding under statute allowing indorser all defenses, indorsement of draft for collection on account did not render holder bona fide purchaser for value; McLeod v. First Nat. Bank, 42 Miss. 99, on transfer of commerical paper as constituting valuable consideration; Rock Springs Nat. Bank v. Luman, 6 Wyo. 123, 42 Pac. 874 (dissenting opinion), on payment of original demand as constituting consideration.

Cited in reference notes in 76 A. D. 131, on pre-existing debt as consideration; 73 A. D. 88, on payment of antecedent debt and release of parties collaterally liable as sufficient consideration to make transfer of note bona fide; 80 A. D. 615, on pre-existing debt as consideration for note or transfer thereof; 87 A. D. 366, on rights of holder taking note for pre-existing debt; 89 A. D. 411, on effect of taking negotiable paper before maturity in payment of or security for pre-existing debt.

Cited in note in 84 A. D. 405, on one taking negotiable paper as collateral security for pre-existing debt as bona fide holder.

Distinguished in Hinds v. Pugh, 48 Miss. 268, holding conveyance of land as security for antecedent debt will not operate as purchase for value.

Presumptions as to bona fide ownership of commercial paper.

Cited in reference notes in 80 A. D. 386, on presumption that holder of

Digitized by Google

negotiable paper is bona fide holder; 98 A. D. 369, on presumption that holder of note is bona fide; 100 A. D. 351, as to prima facie title of holder of negotiable promissory note indorsed in blank; 16 A. S. R. 842, on presumptions in favor of bona fide holder.

Cited in note in 84 A. D. 404, on presumption that holder of negotiable instrument obtained it in good faith and for value.

Burden of proving bona fide ownership of negotiable paper.

Cited in note in 11 A. S. R. 323–324, on burden of proof as to bona fide ownership of negotiable instrument.

Rights of bona fide holder of commercial paper.

Cited in reference note in 90 A. D. 695, on rights of bona fide holder of commercial paper.

Note given for pre-existing debt as extinguishing original claim.

Cited in reference note in 80 A. D. 149, on promissory note given for pre-existing debt as extinguishing original claim.

69 AM. DEC. 387, JORDAN v. THOMAS, 34 MISS. 72.

Recovery in detinue.

Cited in Henry v. Moore, 1 Tex. App. Civ. Cas. (White & W.) 504, holding specific property itself is only recovery in detinue.

Cited in reference note 87 A. D. 457, on right of defendant in detinue to pay judgment and retain the property.

Negligence as bar to equitable relief against judgment.

Cited in reference notes in 53 A. S. R. 445, on negligence as bar to equitable relief against judgments; 53 A. S. R. 446, on negligence in pleading barring equitable relief against judgment.

Injunction against execution sale.

Cited in note in 30 L.R.A. 118, on injunction against execution sale of slaves.

69 AM. DEC. 389, BROWN v. BEATTY, 34 MISS. 227.

Right of eminent domain as attribute of sovereignty.

Cited in Spencer v. Point Pleasant & O. River R. Co. 23 W. Va. 406, holding right of eminent domain inherent without constitutional provision; Cherokee Nation v. Southern K. R. Co. 33 Fed. 900, holding right exists without provision therefor in organic law.

Cited in note in 102 A. S. R. 812, on nature of right of eminent domain.

— Delegation of power.

Cited in Cherokee Nation v. Southern Kansas R. Co. 33 Fed. 900, holding use of rights or privileges resulting from exercise of right of eminent domain may be granted by sovereign.

— Power of legislature to exercise right.

Cited in reference notes in 74 A. D. 555, on legislative power to take private property for public use without compensation; 90 A. D. 645, on power of state to appropriate private property to public use.

Railroad or road as public use.

Cited in New Orleans, M. & C. R. Co. v. Frederic, 46 Miss. 1, holding sovereign can grant private lands to railroad for public use; Varner v. Martin,

Digitized by Google

21 W. Va. 534, holding legislature can authorize condemnation of private lands for construction of public highway; Hanson v. Vernon, 27 Iowa, 28, 1 A. R. 215 (dissenting opinion), on grant of land to railroad as for a public use; Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co. 142 Pa. 587, 21 Atl. 902, 10 Pa. Co. Ct. 28, 48 Phila. Leg. Int. 186, 28 W. N. C. 111, holding test of character of public use is whether property is under control of public, or the public have a right to use it.

Cited in reference note in 33 A. S. R. 289, on taking property for railroad being for public use.

Cited in notes in 22 A. D. 695, on exercise of power of eminent domain for railroads; 2 L.R.A. 681, on criterion to judge character of use in eminent domain.

Land taken for public use.

Cited in note in 2 L.R.A. 682, on title to property taken by eminent domain for public use.

— Remedy of owner.

Cited in note in 5 L.R.A. 183, on remedy of owner for land taken for public use.

— Compensation.

Cited in Martin v. Dix, 52 Miss. 53, 24 A. R. 661, holding if property is taken for public use, compensation must be in money.

Cited in reference notes in 73 A. D. 584, on compensation as condition precedent to taking under power of eminent domain; 100 A. D. 577, as to measure of damages for taking private property for railroad purposes.

Cited in notes in 75 A. D. 615, on mode of ascertaining compensation to owner of land taken for public use; 88 A. D. 113–114, on damages in eminent domain cases.

Distinguished in Macon v. Patty, 57 Miss. 378, 34 A. R. 451, holding city may make assessment upon owner for repair and construction of sidewalk on his property, without paying compensation therefor.

— Resultant benefits.

Cited in New Orleans, J. & G. N. R. Co. v. Moye, 39 Miss. 374; Penrice v. Wallis, 37 Miss. 172,—holding compensation cannot be diminished by probable resulting advantages; Isom v. Mississippi C. R. Co. 36 Miss. 300, holding party entitled to cash value of land and damages not subject to set off for benefits to remaining property; Whitehead v. Arkansas C. R. Co. 28 Ark. 460, holding where constitution provides property shall not be taken until just compensation in money is first made, statute providing for deduction for benefits to be first made, invalid.

Cited in reference notes in 75 A. D. 616, as to whether benefits may be offset against damages in taking property for public use; 90 A. D. 645, as to setting off resulting and peculiar benefits against value of property taken under right of eminent domain.

Cited in note in 9 L.R.A. 824, on rule that neither general nor special benefits may be set off against value of land taken, or damages to remainder.

Exclusiveness of statutory authority.

Cited in Yazoo-Mississippi Delta Levee Comrs. v. Brooks, 76 Miss. 635, 25 So. 358, holding where statutee alone confers jurisdiction, proceedings in court not named in statute are void; Sublett v. Bedwell, 47 Miss. 266, 12 A. R.

Digitized by Google

338, on powers of justice of peace under statutory provision in contesting election; Lawson v. Jeffries, 47 Miss. 686, 12 A. R. 342, on powers of constitutional convention.

Disapproved in Dubuque v. Illinois C. R. Co. 39 Iowa, 56, holding where power is given by statute and special remedies given therein for its enforcement, general action at law not taken away without clear intendment of act.

Effect of entry under statutory authority.

Cited in Congdon v. Cook, 55 Minn. 1, 56 N. W. 253, holding peaceable entry by lessor under statutory authority does not constitute trespass.

Due process of law.

Cited in McCready v. Sexton, 29 Iowa, 356, 4 A. R. 214, holding statute declaring tax deed conclusive that all essential requirements of law relating to exercise of taxing power were complied with, unconstitutional.

Validity of statutes void in part.

Cited in reference notes in 97 A. D. 586, on statute being partly valid and partly void; 36 A. S. R. 663, on constitutionality of statutes void in part; 31 A. S. R. 601, on statutes unconstitutional in part.

69 AM. DEC. 397, HARPER v. BIBB, 34 MISS. 472.

Purchaser of legal title as affected by liens outside chain of title.

Cited in Baker v. Griffin, 50 Miss. 158, holding purchaser not bound to take notice of registered incumbrance created by person other than one through whom he deraigns title; Bernardy v. Colonial & U. S. Mortg. Co. 17 S. D. 637, 106 A. S. R. 791, 98 N. W. 166 (dissenting opinion), on effect of lien lying outside purchaser's chain of title; Hart v. Gardner, 81 Miss. 650, 33 So. 442, on effect of lien not attached to record chain of title.

Cited in reference note in 79 A. D. 421, on title acquired by bona fide purchaser.

Notice to purchaser, what constitutes.

Cited in Learned v. Corley, 43 Miss. 687, holding registry of title deeds constructive notice equivalent to actual notice.

Cited in reference note in 96 A. D. 135, on registry of instrument as notice.

Cited in note in 23 L.R.A. 565, on doctrine of notice from registration of conveyance.

Protection of bona fide purchaser.

Cited in reference notes in 72 A. D. 152, on protection of bona fide purchaser of legal title without notice in equity; 72 A. D. 568, on protection of title of bona fide purchaser for valuable consideration without notice; 72 A. D. 663, on relief in equity against purchaser of legal title for valuable consideration.

69 AM. DEC. 399, HERNDON v. HARRISSON, 34 MISS. 486.

Measure of damage on breach of contract to convey.

Cited in Curtis v. Brannon, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073, holding it consideration paid and interest; Morgan v. Bell, 3 Wash. 554, 16 L.R.A. 614, 28 Pac. 925, holding where one contracts in good faith to convey, believing he has right to do so, on failure of title, damages are amount advanced and interest.

Cited in reference notes in 84 A. D. 346, on measure of damages for vendor's breach of contract to convey; 100 A. D. 467, on measure of damages for breach of contract to convey realty.

Digitized by Google

69 AM. DEC. 401, ABBEY v. COMMERCIAL BANK, 34 MISS. 571.

Judgment of United States court, when a lien in state.

Cited in Thompson v. Avery, 11 Utah, 219, 39 Pac. 829, holding judgment in United States court in territory a lien when judgments are so made by laws of territory.

Running of limitations against Federal judgment.

Cited in note in 47 L.R.A. 479, on running of limitations against lien of Federal judgment.

Fraudulent conveyances as binding upon parties thereto.

Cited in note in 3 A. S. R. 728, on validity as between parties of transactions in fraud of creditors.

69 AM. DEC. 406, FARR v. FARR, 34 MISS. 597.

Requisites of allegation of adultery.

Cited in reference note in 84 A. D. 168, on requisites of allegation of adultery as ground for divorce.

Pleading in equity.

Cited in reference note in 74 A. S. R. 43, on pleading in equity.

69 AM. DEC. 408, NIXON v. PORTER, 34 MISS. 697, Later appeal in 38 Miss. 401.

Record, how proved.

Cited in Phillips v. Cooper, 50 Miss. 722, holding record cannot be proven by parol or secondary evidence, unless its loss or destruction is shown.

Proof of public document by copy.

Cited in note in 11 E. R. C. 457, on proof of public document by copy.

Admissibility of ancient deeds.

Cited in notes in 9 A. S. R. 302, on what constitute "ancient deeds" and their admissibility in evidence; 9 A. S. R. 303, as to whether possession under ancient deed is essential to its admissibility.

Necessity for proving ancient document.

Cited in reference note in 88 A. D. 768, on need of proof of written document's execution where it is more than twenty years old.

Cited in note in 35 L.R.A. 341, on necessity of calling subscribing witnesses to prove ancient documents.

Sufficiency of description in deed.

Cited in reference note in 6 A. S. R. 280–489, on what is sufficient description in deed.

Effect of uncertainty in description in deed.

Cited in reference notes in 69 A. D. 751, on validity of conveyance of land in which description is uncertain; 92 A. D. 375, on when deed or grant is void for uncertainty of description; 92 A. D. 375, on effect of uncertainty in description in deed where land can be identified.

69 AM. DEC. 412, BULLITT v. TAYLOR, 34 MISS. 708.

Validity of voluntary conveyances.

Cited in reference notes in 72 A. D. 384, on right of subsequent creditors to avoid voluntary settlement made without fraudulent intent; 72 A. D. 384,

Digitized by Google

on when voluntary conveyances are fraudulent as to subsequent creditors; 73 A. D. 178, as to when voluntary conveyances are good; 73 A. D. 179, as to when voluntary conveyances are good as against subsequent creditors; 84 A. D. 163, on validity as to creditors of husband's voluntary conveyance to wife.

Cited in notes in 14 A. D. 703, on validity of voluntary conveyance as between the parties; 14 A. S. R. 751, on what creditors may attack voluntary transfer as fraudulent; 90 A. S. R. 514, on validity of postnuptial settlement as against husband's creditors.

Registration as evidence of delivery of instrument.

Cited in Claiborne v. Holmes, 51 Miss. 146, holding acknowledgment and registration of instrument presumptive evidence of delivery; Metcalfe v. Brandon, 60 Miss. 685, holding placing deed on record presumptive evidence of delivery which may be overcome by direct and negative proof; Kearny v. Jeffries, 48 Miss. 343, holding where deed is beneficial to grantee delivery and acceptance presumed by acknowledgment and registration, and enjoyment of estate; Le Roy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271, holding patent from government not delivered until passed under seal of government and recorded in land office.

Cited in reference notes in 83 A. D. 326, on recording of deed as evidence of delivery; 93 A. D. 459, on effect of recording deed as delivery; 38 A. S. R. 610, on registration of deed as delivery.

Cited in notes in 1 A. S. R. 242; 53 A. S. R. 537,—on delivery of deed; 53 A. S. R. 547, on recording deed as delivery; 5 L.R.A. 121, on registration as evidence of delivery of deed.

Vendor's retention of possession as evidence of fraud.

Cited in reference note in 71 A. D. 489, on retention of possession by vendor of personalty as prima facie evidence of fraud.

Cited in notes in 76 A. D. 504, on vendor's retention of possession as evidence of fraud; 90 A. S. R. 545, on retention of possession by husband as affecting validity, as against his creditors, of conveyance to wife.

Validity of chattel mortgage permitting mortgagor to retain possession.

Cited in reference note in 85 A. D. 187, on validity of chattel mortgage where it allows mortgagor to remain in possession and conduct business.

Subsequent creditors as affected by fraudulent conveyances.

Cited in Summers v. Roos, 42 Miss. 749, 2 A. R. 653, holding conveyance fraudulent as to existing creditors not open to attack by subsequent creditors unless made with intent to defraud them; Nelson v. Vanden, 99 Tenn. 224, 42 S. W. 5, holding where voluntary conveyance is at once put of record, subsequent creditor cannot set it aside though it be fraudulent as to prior creditors; Hilliard v. Cagle, 46 Miss. 309, holding subsequent creditors must show conveyance was made to defraud them.

Cited in reference notes in 30 A. S. R. 699, on right of creditor in case of fraudulent conveyances; 31 A. S. R. 665, on right of subsequent creditors to attack fraudulent conveyances.

Necessity for delivery of deed.

Cited in reference note in 74 A. D. 178, on necessity for delivery of deed to make it valid.

Necessity for acceptance of deed.

Cited in note in 54 L.R.A. 888, on necessity of acceptance of deed.

Digitized by Google

Presumption as to time of delivery of deed.

Cited in Savery v. Browning, 18 Iowa, 246, holding as between grantee and creditor of grantor, date of deed is prima facie evidence of its execution and delivery at that time.

Lien of judgment of United States court.

Cited in Chicago & A. Bridge Co. v. Fowler, 55 Kan. 17, 39 Pac. 727, holding under statute judgment of United States court rendered in state a lien on property of debtor in that state.

Suit in one court to satisfy judgment in another.

Distinguished in Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056, holding under statute requiring filing of transcript in higher court, creditor's bill cannot be maintained in that court to subject property to satisfaction of judgment of inferior court on which no transcript is filed.

When creditor's bill maintainable.

Cited in notes in 23 A. D. 792, on creditors' bill on judgment of Federal court; 66 A. S. R. 280, on sufficiency of foreign judgment and of federal and state judgments as basis for creditors' bill.

Object of creditor's suit.

Cited in note in 90 A. D. 293, as to object of creditors' suit.

69 AM. DEC. 420, DUNNICA v. COY, 24 MO. 167.

Resulting trust against fraudulent grantee.

Cited in reference note in 75 A. D. 135, on trust resulting in favor of creditors against fraudulent grantee.

Liability of equitable interest to execution.

Cited in Jones v. Howard, 142 Mo. 117, 64 A. S. R. 546, 43 S. W. 635, holding the grantor in a deed, fraudulent as to creditors, retains an interest subject to sale under execution; Slattery v. Jones, 96 Mo. 216, 9 A. S. R. 344, 8 S. W. 554, holding a judgment against the debtor may be enforced against a fraudulent grantee by execution; McIlvaine v. Smith, 42 Mo. 45, 97 A. D. 295, holding where a beneficiary has no seizin, or power to dispose of land, there is no interest which could pass under sheriff's sale.

Cited in reference note in 90 A. D. 354, on right to sell under execution property fraudulently conveyed, as that of grantor.

— Trusts resulting to execution debtor.

Cited in Hershy v. Latham, 42 Ark. 305, holding land purchased by husband and conveyed to wife in fraud of creditors may be sold under execution against husband; Rodgers v. Carey, 47 Mo. 232, 1 S. W. 150, holding a resulting trust for the use of creditors results, where fraudulent debtors procure conveyances to themselves or others, and this may be sold upon execution.

Cited in notes in 97 A. D. 308, on interest of beneficiary under resulting trust being subject to execution; 67 L.R.A. 886, on effect as to creditors on legal title of conveyance of land purchased and paid for by debtor, but conveyed to another in fraud of creditors.

— Equitable aid to execution purchaser.

Cited in Harman v. May, 40 Ark. 146, holding where a levy is made upon land, the title of which is in fraudulent grantee, resort may be had in equity to perfect and clear the title.

Digitized by Google

69 AM. DEC. 422, DUMEY v. SCHOEFFLER, 24 MO. 170.

Validity of devise or bequest conditioned against remarriage.

Cited in Dumey v. Sasse, 24 Mo. 177, holding a limitation over of personal property upon the second marriage of testator's widow valid; Vaughn v. Lovejoy, 34 Ala. 437, holding a restraint upon the re-marriage of a widow, annexed to a devise or bequest by the husband is valid; Knight v. Mahoney, 152 Mass. 523, 9 L.R.A. 573, 25 N. E. 971; Mansfield v. Mansfield, 75 Me. 509,—holding a devise to one so long as she remains testator's widow with limitation over upon termination of such estate, gives the widow a life estate determinable upon her re-marriage; Chrisman v. Linderman, 202 Mo. 605, 119 A. S. R. 822, 10 L.R.A.(N.S.) 1205, 100 S. W. 1090, on validity of provisions against remarriage.

Cited in reference notes in 53 A. D. 112, on bequests in restraint of marriage; 73 A. D. 250, on effect of conditions in will in restraint of marriage.

Cited in notes in 4 A. D. 115, on validity of devise in restraint of marriage; 38 A. D. 158, on validity of devises and conditions in restraint of marriage; 80 A. D. 493–494, on bequest of legatee while he or she remains unmarried; 6 E. R. C. 367, on validity of agreements in restraint of marriage.

Distinguished in Stilwell v. Knapper, 69 Ind. 558, 35 A. R. 240, holding a devise by a husband, during life or widowhood is an estate upon condition, void by statute.

69 AM. DEC. 427, CANEFOX v. CRENSHAW, 24 MO. 199.

Duty to fence against trespassing animals.

Cited in Demetz v. Benton, 35 Mo. App. 559, holding one must fence as required by statute before he can complain of injuries caused by the animals of another.

Distinguished in McLean v. Berkabile, 123 Mo. 647, 100 S. W. 1109, holding that adjoining proprietors of outwardly enclosed lands must fence them.

Liability for injuring trespassing animals.

Cited in note in 49 A. D. 260, on liability for killing or maiming trespassing animals.

Liability of owner of animals for resulting injuries.

Cited in Grimes v. Eddy, 126 Mo. 168, 47 A. S. R. 653, 26 L.R.A. 638, 28 S. W. 756; Bradford v. Floyd, 80 Mo. 207,—holding it only as to animals ferae naturae that the owner is held liable whether or not he knew they were dangerous.

What constitutes trespass by animals.

Cited in note in 49 A. D. 256, on what constitutes a trespass by animals.

69 AM. DEC. 430, BAKER v. HALDEMAN, 24 MO. 219.

Liability of parent for tort of infant child.

Cited in Paul v. Hummel, 43 Mo. 119, 97 A. D. 381; Needles v. Burks, 81 Mo. 569, 51 A. R. 251; Edwards v. Crume, 13 Kan. 348,—holding a father not liable in a civil action for the wrongful acts of his minor son, where he neither assented to nor ratified same.

Cited in reference notes in 74 A. D. 458, on parent's responsibility for acts of child performed under his direction; 97 A. D. 383, on liability of parent for torts of minor where he knows of vicious disposition.

Digitized by Google

Cited in notes in 74 A. D. 778, on parent's liability for torts of child; 50 A. R. 384–385, on liability of father for torts of minor child; 74 A. S. R. 801–807, on parent's liability for acts of his children; 10 L.R.A.(N.S.) 934, on parent's liability at common law for torts of minor child.

Master's liability for servant's criminal acts.

Cited in note in 25 E. R. C. 143, on liability of master for servant's act constituting crime.

Nonprejudicial error as ground for reversal.

Cited in reference notes in 75 A. D. 90, on nonprejudicial error as ground for reversal; 81 A. D. 56, on error not prejudicial to complaining party as ground for reversal of judgment; 92 A. D. 340, on error without prejudice as ground for reversal; 76 A. D. 117, on when party may complain of error; 73 A. D. 177, on cure of error where party is afterwards allowed benefit of what he claimed.

69 AM. DEC. 432, STATE v. CHANDLER, 24 MO. 371.

Indictment for assault with felonious intent.

Cited in State v. Wood, 124 Mo. 412, 27 S. W. 1114, sustaining an indictment which charged an assault, feloniously, with malice aforethought and with intent to kill; State v. Hendrickson, 165 Mo. 262, 65 S. W. 550, sustaining an indictment charging an assault, feloniously and willfully, without stating assault was committed with a felonious intent; State v. Neal, 178 Mo. 63, 76 S. W. 958, holding an information charging assault with intent to rape, sufficient where it names the person assaulted and the felonious intent to rape; State v. Smith, 80 Mo. 516, holding the general averment that an assault, with intent to commit a rape was made with the intent to ravish is sufficient.

Cited in reference note in 33 A. S. R. 604, on sufficiency of indictment in assault with intent to kill.

— Averment of manner or means.

Cited in State v. Miller, 25 Kan. 699; State v. Jackson, 37 La. Ann. 467,— holding it not necessary to an indictment for an assault with intent to murder, that the mode or means be set forth; State v. Steinemann, 162 Mo. 188, 62 S. W. 694, holding same where indictment charged an assault made feloniously with intent to kill without stating manner in which assault was made; State v. Temple, 194 Mo. 237, 92 S. W. 869, 5 A. & E. Ann. Cas. 954, holding same as to an information for assault with intent to kill; State v. Collyer, 17 Nev. 275, 30 N. W. 891, holding it unneccessary to describe the particular manner in which weapon is used in making the assault; State v. Vaughn, 26 Mo. 29, holding an averment that the defendant did shoot with the intent to kill necessarily implies that he did shoot at; State v. Payne, 194 Mo. 442, 92 S. W. 461, holding an indictment for assault with intent to rape need not charge the manner, means or mode of the assault; State v. Doyle, 107 Mo. 36, 17 S. W. 751; State v. Clayton, 100 Mo. 516, 18 A. S. R. 565, 13 S. W. 819,—holding an assault may be charged without specifying the manner.

— Averment as to deadly weapon.

Cited in State v. Webster, 77 Mo. 566, holding an indictment sufficient, charging an assault with a knife with the intent to kill.

Distinguished in State v. McDaniel, 94 Mo. 301, 7 S. W. 634, holding an indictment for murder need not charge that the weapon used was a deadly or dangerous one.

Digitized by Google

69 AM. DEC. 433, STATE v. BURGESS, 24 MO. 381.

Necessity of indorsements or signature of indictment.

Cited in State v. Bruce, 77 Mo. 193, holding an indictment without the signature of the prosecuting attorney is a nullity; State v. Orrick, 106 Mo. 111, 17 S. W. 176, holding all that is required by statute, is the usual signature of the foreman to the certificate.

— Mode of objection for want of indorsement.

Cited in State v. Hays, 78 Mo. 600; State v. Brooks, 94 Mo. 121, 7 S. W. 24; State v. Harris, 73 Mo. 287,—holding the objection that an indictment was not indorsed a true bill, comes too late after verdict; State v. Braman, 206 Mo. 636, 105 S. W. 602, holding where motion to quash indictment for the above reason is denied it must be raised by motion for new trial and not by motion in arrest; State v. Roy, 83 Mo. 268, holding failure to endorse names of witnesses upon the indictment ground for a motion to quash; State v. Murphy, 47 Mo. 274, holding the want of a certificate by the foreman of the grand jury can only be taken advantage of by motion to quash, or perhaps by demurrer.

Time for objection to indictment.

Cited in State v. Runzi, 105 Mo. App. 319, 80 S. W. 36, holding motion to quash information not supported by affidavit cannot be made for first time on appeal to court of appeals; State v. Davidson, 44 Mo. App. 513, holding objection comes too late in court of appeals; State v. Smallwood, 68 Mo. 192, holding the objection that grand jury was not empaneled, charged and sworn comes too late after verdict; State v. Brown, 181 Mo. 192, 79 N. W. 1111, holding an objection that an information was not supported by affidavit verified by prosecuting attorney, comes too late after verdict.

69 AM. DEC. 435, STATE v. McO'BLENIS, 24 MO. 402.

Admissibility of testimony at former trial or preliminary hearing.

Cited in State v. Johnson, 12 Nev. 121, holding that testimony of deceased witness given under oath in proceeding authorized by law, where there was opportunity of cross examination, is admissible; State v. Baker, 24 Mo. 437, admitting testimony of deceased witness before the recorder's court given in presence of accused; State v. Elliott, 90 Mo. 350, 2 S. W. 411; State v. Moore, 156 Mo. 204, 56 S. W. 883; State v. Carlisle, 57 Mo. 102,—holding same as to testimony taken upon the preliminary examination before a magistrate; State v. Able, 65 Mo. 357, holding same as to testimony given at former trial; Brown v. Com. 73 Pa. 321, 13 A. R. 740, 1 Legal Chron. 105, 30 Phila. Leg. Int. 117, holding same as to notes of the testimony on the hearing before a justice of the peace; State v. Kline, 109 La. 603, 33 So. 618, holding written testimony taken before the committing magistrate may be used in the trial itself where witness is permanently absent from state; Mattox v. United States, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337, admitting a properly certified copy of the reporter's notes of testimony of a witness given at former trial where witness died before second trial; Cline v. State, 36 Tex. Crim. Rep. 320, 61 A. S. R. 850, 37 S. W. 722 (dissenting opinion), on admissibility of testimony taken in the examining trial.

Cited in note in 61 A. S. R. 889–891, on admissibility in criminal trial of evidence of deceased witness.

Distinguished in Ely Walker Dry Goods Co. v. McLaughlin, 87 Mo. App. 105,

Digitized by Google

holding testimony in the form of an affidavit without cross-examination is not admissible under the statute authorizing use of competent evidence preserved in bill of exceptions; State v. Houser, 26 Mo. 431, holding a deposition taken before a committing magistrate, not admissible upon proof that witness is beyond jurisdiction of court merely.

Constitutional rule as to confrontation of witnesses.

Cited in Territory v. Evans, 2 Idaho, 652, 7 L.R.A. 646, 23 Pac. 232, holding the use of depositions taken in the presence of the accused is not forbidden by the United States constitution; State v. Harman, 27 Mo. 120, 72 A. D. 251; Johnson v. State, 1 Tex. App. 333,—holding written statement of testimony given on preliminary examination admissible within such guaranty; State v. Nelson, 68 Kan. 566, 75 Pac. 505, 1 A. & E. Ann. Cas. 468, holding the requirement that the accused shall be allowed to meet the witness face to face is complied with if at a former trial he confronted the absent witness; People v. Sligh, 48 Mich. 54, 11 N. W. 782, on the constitutional rule forbidding secondary evidence.

Right of accused to be present at trial.

Cited in State v. Warner, 165 Mo. 399, 88 A. S. R. 422, 65 S. W. 584, on right of accused to be present when grand jury is impaneled.

What constitutes a criminal prosecution.

Cited in Ex parte Bedard, 106 Mo. 616, 17 S. W. 693, holding the preliminary examination before the committing magistrate is a criminal prosecution.

69 AM. DEC. 441, PETERSON v. LAIK, 24 MO. 541.

Admission of ouster in ejectment by plea to title of plaintiff.

Cited in Amick v. Brubaker, 101 Mo. 473, 14 S. W. 627; Grant v. Paddock, 30 Or. 312, 47 Pac. 712,—holding a denial of plaintiff's title and right of entry is an ouster; Falconer v. Roberts, 88 Mo. 574, on a general denial as a confession of ouster; Carpenter v. Carpenter, 119 Mich. 167, 77 N. W. 703, holding a plea of ouster and notice coupled with possession for twelve years claiming entire title sufficient evidence of ouster.

— In action by cotenant.

Cited in Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 So. 760, holding that ouster is admitted where defendant sets up adverse holding; La Riviere v. La Riviere, 77 Mo. 512, holding the ouster is admitted by a general denial where action of ejectment is by one tenant in common against another.

Cited in note in 50 A. S. R. 845, on proof of ouster ejectment by one cotenant against another.

Distinguished in Llewellyn v. Llewellyn, 201 Mo. 303, 100 S. W. 40, holding ejectment will not lie against a cotenant out of possession.

Proof of ouster.

Cited in Watson v. Bissell, 27 Mo. 220, on proof of ouster.

Ouster as question of fact for jury.

Cited in reference note in 90 A. D. 454, on ouster as question of fact for jury.

Effect of infant's deed.

Cited in Caho v. Endress, 68 Mo. 224, holding infancy of a married woman makes her deed voidable; Shipley v. Bunn, 125 Mo. 445, 28 S. W. 754; Singer Mfg. Co. v. Lamb, 81 Mo. 221,—holding the deed of a minor is not void, but only voidable, after he reaches his majority.

Digitized by Google

Acquiescence as affirmance.

Cited in Huth v. Carondelet Marine R. & Dock Co. 56 Mo. 202, holding an affirmance of a lease made by an infant may be inferred from accepting rent on it after majority without regard to lapse of time.

Disaffirmance of deed by infant.

Cited in Harris v. Ross, 86 Mo. 89, holding the infant heir had the statutory period of three years after reaching majority to disaffirm a deed executed by an infant married woman and her husband.

Cited in reference notes in 76 A. D. 418, on disaffirmance of infant's deed; 87 A. D. 227, as to how infant's deed is disaffirmed; 93 A. D. 124, on when infant cannot disaffirm contract after coming of age; 26 A. S. R. 841, as to what amounts to disaffirmance by infant of his deed; 73 A. S. R. 473, on disaffirmance of deeds by minors.

Cited in notes in 18 A. S. R. 677, on disaffirmance of deeds within reasonable time after reaching majority; 12 L.R.A. 138, as to what acts are necessary to disaffirm an infant's contracts.

Disapproved in Goodnow v. Empire Lumber Co. 31 Minn. 468, 47 A. R. 798, 18 N. W. 283, holding a failure to disaffirm a real estate conveyance within a reasonable time after reaching majority bars his right.

— Second deed as disaffirmance.

Cited in Craig v. Van Bebber, 100 Mo. 584, 18 A. S. R. 569, 13 S. W. 906; Haynes v. Bennett, 53 Mich. 15, 18 N. W. 539,—holding making and recording of second deed sufficient to avoid earlier deed given while an infant; Ridgeway v. Herbert, 150 Mo. 606, 73 A. S. R. 464, 51 S. W. 1040, holding such disaffirmance is one of the legal effects of the deed and is for the court.

Cited in reference notes in 76 A. D. 217, on disaffirmance of infant's deed by subsequent conveyance of same land; 93 A. D. 124, on subsequent sale after reaching majority as disaffirmance of sale during minority.

Cited in notes in 18 A. S. R. 665, 667 on infant's disaffirmance by second deed, mortgage, or lease.

69 AM. DEC. 444, REY v. TONEY, 24 MO. 600.

Liability of agister.

Cited in reference notes in 75 A. D. 114, on agister of stock as insurer of their safety; 92 A. D. 185, on duty and liability of agister; 48 A. S. R. 352, on care required of agisters; 97 A. S. R. 171, on care and diligence required of agisters.

Cited in note in 2 E. R. C. 558, on liability of agister for negligence.

Distinguished in Cummings v. Mastin, 43 Mo. App. 558, holding upon demand and refusal the onus is upon the agister to show absence of negligence.

Disapproved in Crawford v. Cashman, 82 Mo. App. 554, holding where it is shown bailee received the property in good condition and failed to return it a prima facie case of negligence is made out.

69 AM. DEC. 446, THOMAS v. WYATT, 25 MO. 24, Opposite result on different state of facts on second appeal in 31 Mo. 188, which is reaffirmed on later appeal in 35 Mo. 127.

Effect of patent to fictitious person.

Cited in Thomas v. Boerner, 25 Mo. 27, holding a patent to a fictitious person is a nullity.

Digitized by Google

Cited in reference note in 77 A. D. 644, on validity of patent or deed to person not in existence.

Distinguished in Holman v. Winterboer, 107 Iowa, 270, 77 N. W. 1060, holding one may acquire title under an assumed name, though deed to fictitious person is void; White Oak Grove Benev. Soc. v. Murray, 145 Mo. 622, 47 S. W. 501, holding the rule that there can be no conveyance without some one capable of receiving a grant refers entirely to legal titles and does not touch equitable rights.

— To a person deceased.

Cited in Western Brass Mfg. Co. v. Boyce, 74 Mo. App. 343, holding no beneficiary is named in trust deeds where beneficiary named was the estate of a person deceased.

Distinguished in Davenport v. Lamb, 13 Wall. 418, 20 L. ed. 655, holding by reason of statutes, where patentee dies before patent is issued the title to the land enures to the heirs, devisee and assigns of the patentee.

— To an unincorporated town.

Cited in Miller v. Rosenberger, 144 Mo. 292, 46 S. W. 167, holding an unincorporated town or village cannot take and hold the legal title to land by deed, there being no grantee in whom title could vest.

Distinguished in Reinhard v. Virgina Lead Min. Co. 107 Mo. 616, 28 A. S. R. 441, 18 S. W. 17, holding one who deals with the officers of a corporation in the corporate name estopped to deny the capacity of such corporation to take title of land by reason of imperfect incorporation.

69 AM. DEC. 448, GARRISON v. SAVIGNAC, 25 MO. 47.

Persons subject to dispossession under judgment of ejectment.

Cited in Oakes v. Aldridge, 46 Mo. App. 11; Goerges v. Hufschmidt, 44 Mo. 179,—holding a tenant in possession before commencement of suit in ejectment can not be dispossessed by a judgment to which he was no party; Ritchie v. Johnson, 50 Ark. 551, 7 A. S. R. 118, 8 S. W. 942, holding a party holding by independent and paramount title will not be turned out; State ex rel. Planet Property & Financial Co. v. Harrington, 41 Mo. App. 439, holding a judgment in ejectment has no effect upon parties in possession at commencement of suit and not made parties.

Cited in reference notes in 95 A. D. 472, as to who is concluded by judgment in ejectment; 86 A. D. 622, as to persons who are bound by judgment.

Cited in notes in 39 A. D. 313, on who may be dispossessed under judgment in ejectment; 15 A. S. R. 61, on who may be removed under writ of restitution.

Right of party in possession of land.

Cited in note in 121 A. S. R. 384, on sufficiency of incomplete or scrambling possession to maintain forcible entry and detainer.

Distinguished in Richards v. Smith, 47 Mo. App. 619, holding children who remain on land that descended as homestead after reaching majority when their interests in property ceased cannot be held to be claiming a right there by remaining; Crain v. Murry, 76 Mo. App. 548, holding forcible entry and detainer may be maintained against one who enters against the will of one who has been eighteen months in possession whether such possession was right or wrong originally.

Digitized by Google

Possession of cotenants.

Cited in Bernecker v. Miller, 40 Mo. 473, 93 A. D. 309, holding where one of two tenants in common is turned out the possession of the other answers for both.

69 AM. DEC. 450, FAGIN v. CONNOLY, 25 MO. 94.

When construction of writing is question for jury.

Cited in Roberts v. Bonaparte, 73 Md. 191, 10 L.R.A. 689, 20 Atl. 918, holding where contract has to be proved from both writings and parol evidence it is for jury to determine the contract; Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. Rep. 553, holding where case turns upon the construction of a series of letters of a commercial character, together with other facts the case is properly one for the jury; Home Mut. Ins. Co. v. Roe, 71 Wis. 33, 36 N. W. 594, holding where ambiguity or conflicting inferences appear in language of policy the question may properly be submitted to jury; McNichol v. Pacific Exp. Co. 12 Mo. App. 401, holding where a writing contains technical terms, mercantile phrases or obscure expressions their meaning may be ascertained by the jury.

Annotation cited in Campbell v. Jimenes, 3 Misc. 516, 23 N. Y. Supp. 333, holding it for jury when meaning is to be derived from extrinsic evidence.

Cited in reference notes in 72 A. D. 539, on when construction of writings question for court and when for jury; 78 A. D. 269, on construction of deed as question of law; 2 A. S. R. 43, on construction of libel as question for jury; 85 A. S. R. 889, on construction of deed as question for court.

Cited in notes in 15 A. S. R. 713, on province of court and jury in construing written instruments; 55 A. S. R. 806, as to when construction of contract is a question of law; 60 A. S. R. 93, as to when construction of contract is for court.

69 AM. DEC. 460, HAMILTON v. SCULL, 25 MO. 165.

Rights of parties to fraudulent transaction.

Cited in Larimore v. Tyler, 88 Mo. 661 (affirming 19 Mo. App. 445), holding where the fraudulent act is not consummated, the law permits a party to the contract to set up the fraud as a defense; Second Nat. Bank v. Brady, 96 Ind. 498; Mitchell v. Henley, 110 Mo. 598, 19 S. W. 993; Taylor v. Von Schraeder, 107 Mo. 206, 16 S. W. 675,—holding where fraudulent act was not consummated a court of equity will leave the parties in the position in which they have placed themselves; Davis v. Sittig, 65 Tex. 497, holding fact that contract has been executed by one party furnishes no reason for compelling other to execute his part; Chapman v. Callahan, 66 Mo. 299, holding the purchaser at an administrator's sale may defend when action is brought to enforce vendor's lien by showing a conveyance was given without consideration for sole purpose of defrauding creditors; Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295, holding the administrator of a bailor may recover from the bailee money placed in bailment to defraud creditors of bailor; Harcrow v. Gardiner, 69 Ark. 6 (dissenting opinion), on contracts to defraud creditors.

Cited in notes in 82 A. D. 428, as to whether one can avoid his contract for fraud in which he participated; 3 A. S. R. 736, on rights and remedies of parties to contract founded in fraud; 3 A. S. R. 740, on grantee's right to lay claim to property on ground that conveyance to him was in fraud of creditors.

Digitized by Google

Fraud in contract as defense to note given in consideration.

Cited in Fenton v. Ham, 35 Mo. 409, holding where holder of note concurred in fraudulent act, no action will lie on note given to defraud payee's creditors; Parsons v. Randolph, 21 Mo. App. 353, holding where defendant pleads and proves contract was fraudulent there can be no recovery on a note founded upon it; Huttig Sash & Door Co. v. M'Mahon, 81 Mo. App. 440, holding where partner executes notes of the firm, one for his own debt and one for a firm debt, without knowledge of other members notes are void in hands of payee; Clay County Bank v. Keith, 85 Mo. App. 409, holding a note executed to defraud creditors is void though the maker participates in the fraud; McCausland v. Ralston, 12 Nev. 195, 28 A. R. 781, holding where notes were given to protect property from creditors such fact may be set up in defence to action on note.

Cited in reference notes in 84 A. D. 605, on avoidance of promissory note in payee's hands for fraud in inception; 86 A. D. 340, on fraud in obtaining note as defense in action thereon.

Exclusion of illegal evidence in deposition.

Cited in reference note in 78 A. D. 751, on exclusion of illegal evidence in deposition.

69 AM. DEC. 462, DRAPER v. SHOOT, 25 MO. 197.

Parol evidence to deny consideration.

Cited in Wishart v. Gerhart, 105 Mo. App. 112, 78 S. W. 1094; Ohmer v. Boyer, 89 Ala. 273, 7 So. 663,—holding parol evidence inadmissible to vary legal effect of deed, by attacking the consideration, even though nominal; Hannibal & St. J. R. Co. v. Green, 68 Mo. 169, holding a trust deed given for the nominal sum of one dollar good.

Cited in note in 90 A. D. 272, as to proof of nonpayment of nominal consideration expressed in deed.

What constitutes adverse possession.

Cited in Musick v. Barney, 49 Mo. 458, holding the adverse possession must be such that true owner may be presumed to have known of and acquiesced in it; Key v. Jennings, 66 Mo. 356, holding such presumption is raised by a possession so patent and open that if party remained in ignorance of the hostile claim it was his own fault; Turner v. Hall, 60 Mo. 271, holding while actual occupation is not always indispensable its absence should be supplied by some act done which would give notice of an adverse claim; Leeper v. Baker, 68 Mo. 400, holding a fence, building or other improvement is not essential to constitute such possession; Goltermann v. Schiermeyer, 125 Mo. 291, 28 S. W. 616, holding it depends upon the nature and situation of the land and the uses of which it is capable, also upon the nature of the claim under which the right to the possession is asserted; Brown v. Hartford, 173 Mo. 183, 73 S. W. 140, holding the possession must be visible and continuous for the requisite period; Goltermann v. Schiermeyer, 111 Mo. 404, 19 S. W. 484, holding where parties accepted a fence as line between their lands for thirty years and claimed up to fence such facts show an exclusive adverse possession; Worthley v. Burbanks, 146 Ind. 534, 45 N. E. 779, holding possession of land cannot be more than the exercise of exclusive dominion over it; Gildehaus v. Whiting, 39 Kan. 706, 18 Pac. 916, on adverse possession without improvements.

Cited in reference notes in 72 A. D. 142, on open, visible, and notorious occupation in adverse possession; 72 A. D. 142, on necessity of actual occupation,

Digitized by Google

cultivation, or residence in adverse possession; 74 A. D. 189, on acquisition of title by adverse possession; 77 A. D. 592, as to what evidence will support entry on land with color of title; 87 A. D. 558, as to what constitutes adverse possession of land; 85 A. D. 332; 6 A. S. R. 103,—on payment of taxes by claimant of land, as evidence of adverse possession.

Cited in note in 15 L.R.A.(N.S.) 1200, on actual occupancy as essential element in adverse possession.

— As to open or wild lands.

Cited in Gilmore v. Norton, 10 Kan. 491, holding notorious acts of ownership over uninclosed and unimproved land is all that is required; Dice v. Brown, 98 Iowa, 297, 67 N. W. 253, holding continuous occupation of prairie land during the grazing season of each year sufficient; Cook v. Farrah, 105 Mo. 492, 16 S. W. 692, holding the use of a tract of land as pasture and for timber by one residing a mile distant, when tract might be easily enclosed and cultivated is not sufficient, though taxes are paid and temporary buildings erected; Keen v. Schweigler, 70 Mo. App. 409, holding any acts of ownership over marsh lands which clearly and openly indicate a claim to the property are sufficient.

— As question of fact.

Cited in Sell v. McAnaw, 158 Mo. 466, 59 S. W. 1003, holding the question is one of fact to be determined by the jury under proper instructions; Benne v. Miller, 149 Mo. 228, 50 S. W. 824; Illinois Steel Co. v. Bilot, 109 Wis. 418, 83 A. S. R. 905, 85 N. W. 402,—holding the question of adverse possession in every case must be determined by its own circumstances; Johnston v. Albuquerque, 12 N. M. 20, 72 Pac. 9, holding actual possession is a question compounded of law and fact.

Extent of adverse possession.

Cited in McElhinney v. Kraus, 10 Mo. App. 218, holding one in possession under color of title of a part of a tract and claiming the whole, is considered in possession of the whole.

Distinguished in St. Louis v. Gorman, 29 Mo. 593, 77 A. D. 586, holding the adverse possession of one who enters without right and retains possession wrongfully does not extend beyond the limits of actual occupancy.

69 AM. DEC. 467, STATE v. SLOSS, 25 MO. 291.

Separation of legislative, judicial and executive power.

Cited in Smith v. Myers, 109 Ind. 1, 58 A. R. 375, 9 N. E. 692, holding the legislature itself cannot invest the judicial department with jurisdiction over the legislative or executive departments; Parker v. State, 135 Ind. 534, 23 L.R.A. 859, 35 N. E. 179, holding it not in the power of one department of the government to perform any of the functions belonging to another.

Exclusiveness of executive power over pardons.

Cited in State v. Todd, 26 Mo. 175, holding the pardoning power belongs exclusively to the executive department; United States ex rel. Seiple v. Byers, 127 Fed. 993, holding commutation laws a trespass upon the judicial power of the government; Singleton v. State, 38 Fla. 297, 56 A. S. R. 177, 34 L.R.A. 251, 21 So. 21, holding the power to remit fines, grant pardons, etc., being conferred by the constitution upon a pardoning board, cannot be exercised by the legislature; State v. Grant, 79 Mo. 113, 49 A. R. 218, holding the legislature cannot restore the competency of a witness without trenching on the pardoning power

Digitized by Google

which is vested in the executive department; Butler v. State, 97 Ind. 373, holding the power to grant reprieves being conferred upon the governor the courts cannot exercise that power.

Cited in reference notes in 47 A. S. R. 915, on pardoning power; 56 A. S. R. 183, as to who may exercise pardoning power.

Cited in notes in 34 L.R.A. 251, on legislative power to grant pardon or amnesty after conviction; 34 L.R.A. 252, on legislative power to grant pardon or amnesty before conviction.

69 AM. DEC. 469, STATE v. APPLING, 25 MO. 315.

Common law crimes and misdemeanors.

Cited in State v. Boll, 59 Mo. 321, holding as to public nuisances not covered by statute, the common law remains in force; State v. Turner, 21 Mo. App. 324, holding an indictment for obstructing the highway good at the common law though there were no statutes on the subject.

— Public obscenity and profanity.

Cited in Goree v. State, 71 Ala. 7, holding public profane swearing indictable at the common law; State v. Rose, 32 Mo. 560, holding whatever outrages decency and is injurious to public morals is a misdemeanor at common law, and punishable as such.

Cited in note in 22 L.R.A. 353, on indictability at common law of blasphemy and profanity.

69 AM. DEC. 471, VAUGHN v. TRACY, 25 MO. 318.

Effect of notice of unrecorded deed.

Cited in Gross v. Watts, 206 Mo. 373, 121 A. S. R. 662, 104 S. W. 30, holding actual and full notice by purchasers of another's claim countervails the effect of the registry; Hickman v. Green, 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 455 (dissenting opinion), on notice of unrecorded deed.

Possession as notice of ownership.

Cited in Drey v. Doyle, 99 Mo. 459, 12 S. W. 287, holding knowledge of possession is not actual notice of the renewal of a lease under the statute; Shumate v. Reavis, 49 Mo. 333, holding possession, though not actual notice, is evidence of such notice to be submitted to the jury; Freeman v. Moffitt, 119 Mo. 280, 25 S. W. 87, holding open possession for eleven months sufficient notice to put party upon inquiry; Masterson v. West End Narrow-Gauge R. Co. 5 Mo. App. 64, holding some evidence must exist tending to show purchaser had knowledge of the possession to authorize inference of actual notice; Hughes v. Israel, 73 Mo. 538, on possession as notice to one holding by administrator's deed.

Cited in reference notes in 73 A. D. 549, on possession as notice of occupant's title; 74 A. D. 178, on possession as notice; 77 A. D. 459, on possession of land as constructive notice of title; 89 A. D. 171, on possession as notice of unrecorded instrument; 19 A. S. R. 243, on possession of tenant as notice of landlord's rights.

Cited in notes in 104 A. S. R. 339, on essentials of possession of real property as notice; 13 L.R.A.(N.S.) 100, on possession of land by tenant as notice of landlord's title or interest.

Facts challenging inquiry as notice.

Cited in Maupin v. Emmons, 47 Mo. 304, holding knowledge of facts that

Digitized by Google

would put a man of ordinary circumspection on his inquiry, should go to the jury as evidence of such notice; Brinkman v. Jones, 44 Wis. 498, holding one chargeable with actual notice who purchases with knowledge of facts that would lead to actual notice if prosecuted with ordinary diligence.

69 AM. DEC. 475, GARRETT v. ST. LOUIS, 25 MO. 505.

Nature of local assessments.

Cited in Winona & St. P. R. Co. v. Watertown, 1 S. D. 46, 44 N. W. 1072, holding special assessments are made under the taxing power and not under right of eminent domain; Kansas City Grading Co. v. Holden, 32 Mo. App. 490 (dissenting opinion), on the principle governing local assessments.

Cited in note in 35 L.R.A. 35, on distinction in meaning between the phrases "local assessment" and "taxation."

Disaffirmed in Chicago v. Larned, 34 Ill. 203, holding a special assessment is not a tax but an exercise of the power of eminent domain.

Disapproved in Macon v. Patty, 57 Miss. 378, 34 A. R. 451, holding such assessment a burden exacted in behalf of the public for public use.

Validity of local assessments.

Cited in State ex rel. Farron v. St. Louis, 62 Mo. 244; Herman Constr. Co. v. Wabash R. Co. 206 Mo. 172, 121 A. S. R. 649, 12 L.R.A.(N.S.) 112, 104 S. W. 67, 12 A. & E. Ann. Cas. 630; State v. St. Louis, 62 Mo. 244,— holding assessments for local benefits a valid exercise of the taxing power; St. Louis v. Speck, 67 Mo. 403; Emery v. San Francisco Gas Co. 28 Cal. 345, holding such assessments a legitimate mode of taxation; St. Louis v. Richeson, 76 Mo. 470, holding the assessment of benefits against owner of property not taken but especially benefited by the improvements is a legitimate exercise of the taxing power; Thomas v. Hooker-Colville Steam Pump Co. 22 Mo. App. 8, holding local assessments special taxes and their assessment an exercise of the taxing power; Halpin v. Campbell, 71 Mo. 493; Irvin v. Mobile, 57 Ala. 6,—sustaining a graduated frontage tax levied upon lands touched by streets opened; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683; St. Joseph v. Farrell, 106 Mo. 437, 17 S. W. 497; Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014; Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303,—holding special assessments for local improvements are sustainable under the taxing power; Springfield v. Baker, 56 Mo. App. 637; Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955,—holding special assessments for local improvements are referable to the taxing power; Uhrig v. St. Louis, 44 Mo. 458, holding special tax assessments are not repugnant to the provisions of the constitution; Hammett v. Philadelphia, 65 Pa. 146, 26 Phila. Leg. Int. 188, holding that local assessment cannot be imposed when improvement is to be for general public.

Cited in reference note in 72 A. D. 281, on validity of acts authorizing assessments for local improvements according to benefits to be derived.

Cited in notes in 55 A. D. 287, on power of assessment for local improvement as exercise of taxing power; 8 A. S. R. 509, on what impositions may be sustained as exercise of taxing power.

— Applicability of constitutional provisions relating to general taxes.

Cited in Morrison v. Morey, 146 Mo. 543, 48 S. W. 629; Jones v. Holzapfel, 11 Okla. 405, 68 Pac. 511; Seanor v. Whatcom County, 13 Wash. 48, 42 Pac. 552; St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713,—holding the constitutional requirements in regard to taxation are wholly inapplicable to mere local assess-

Digitized by Google

ments; King v. Portland, 2 Or. 146, holding local assessments are not necessarily apportioned by reference to the value of the property; Egyptian Levee Co. v. Cummins, 27 Mo. 495, 72 A. R. 276; Farrar v. St. Louis, 80 Mo. 379; Creamer v. Allen, 3 Mo. App. 545; Birmingham v. Klein, 89 Ala. 461, 8 L.R.A. 369, 7 So. 386,—holding such assessment is not a tax within the constitution which requires an assessment in exact proportion to the value of the property levied on; Rolph v. Fargo, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242, holding the constitutional requirement that property be taxed according to its true value in money embraces only general taxation; Corrigan v. Kansas City, 211 Mo. 608, 111 S. W. 115 (dissenting opinion), on necessity of uniformity in special assessments.

Cited in reference note in 72 A. D. 281, on applicability of constitutional provision requiring taxation to be proportioned to value to local assessments.

Basis of apportionment of local assessments.

Cited in State ex rel. Abbott v. Dodge County, 8 Neb. 124, holding assessments for local improvements under the constitution can only be made in proportion to the benefits received; Daily v. Swope, 47 Miss. 367, holding it is competent to apportion the assessments according to the benefits received; Lee v. Tebo & N. R. Co. 53 Mo. 178, holding commissioners should be restricted to such benefits or increase in value, as results to the land not taken, in which other lands in the neighborhood do not participate.

Cited in reference notes in 73 A. D. 522, on assessments for local improvements according to benefits; 78 A. D. 370, on estimating cost of grading street by frontage.

Disapproved in Warren v. Henly, 31 Iowa, 31, sustaining such assessment on the ground that it secures a fair and just distribution of the burden so as to be within the rule requiring uniformity.

Local assessments for part of cost.

Cited in Perry v. Davis, 18 Okla. 427, 90 Pac. 865; Heman v. Allen, 156 Mo. 534, 57 S. W. 559,—holding the whole or any part of such improvements may be assessed against the adjoining property.

Power of legislature as to local assessments.

Cited in Newby v. Platte County, 25 Mo. 258, holding the legislature competent to require the adjacent land owner to contribute toward the cost of ground for a road or street in proportion to the benefits; St. Joseph v. Anthony, 30 Mo. 537, holding the legislature may authorize a municipality to apportion and charge cost of macadamizing streets on the adjoining lots in proportion to frontage.

Power of courts to review.

Cited in Kansas City Grading Co. v. Holden, 107 Mo. 305, 17 S. W. 798, holding so long as common council in making improvements keeps within its powers the courts cannot question its judgment or discretion; St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910, holding one is entitled to notice of the assessment and where such notice is prescribed by statute it must be so given or assessment is void.

69 AM. DEC. 483, DRAPER v. BRYSON, 26 MO. 108.

Recording act as affecting purchaser at sheriff's sale.

Cited in Maupin v. Emmons, 47 Mo. 304, holding the recording act operates in favor of bona fide purchasers at sheriff's as well as private sales; Vance v. Corrigan, 78 Mo. 94; Fox v. Hall. 74 Mo. 315, 41 A. R. 316,—holding a grantee in a sheriff's deed a purchaser within the recording act.

Digitized by Google

Cited in reference notes in 73 A. D. 549, on purchaser at sheriff's sale as purchaser within meaning of recording acts; 86 A. D. 669, on effect of unrecorded deed upon purchasers at sheriff's sale; 51 A. S. R. 36, on effect of prior unrecorded deed on title of purchaser at execution sale.

Cited in note in 16 L.R.A. 671, on priority of right of purchaser at sale under judgment over prior unrecorded conveyance.

Validity of unrecorded deed against purchasers with notice.

Cited in reference note in 83 A. D. 435, on sufficiency of unrecorded instrument between parties and purchasers with notice.

Cited in note in 21 L.R.A. 35, on protection of bona fide purchaser at execution sale against unrecorded deeds of which he had notice.

Priority of liens.

Cited in Jordan v. Pence, 123 Mo. App. 321, 100 S. W. 529, holding as between a mortgagee interpleading and an attaching creditor the mortgagee will prevail if the mortgage is prior in date.

69 AM. DEC. 484, FUHR v. DEAN, 26 MO. 116.

Title necessary to support action of trespass.

Cited in Barbarick v. Anderson, 45 Mo. App. 270, holding possession is sufficient to maintain an action of trespass.

Cited in reference note in 87 A. D. 562, on possession necessary to maintain trespass.

Cited in note in 85 A. D. 323, on remedy for injuries to real estate held adversely to plaintiff.

Title as defense in trespass.

Cited in Cox v. Barker, 81 Mo. App. 181 (transferred to supreme court 71 Mo. App. 568; remanded 150 Mo. 424, 51 S. W. 1051), holding defendant in trespass may dispute plaintiff's possessory right by showing title in himself.

Cited in reference note in 72 A. D. 123, on burden of defendant in trespass to show title in himself.

Cited in note in 77 A. D. 552, on right of owner to enter upon his land.

Remedy where dispossessed by one holding title.

Cited in Vinson v. Flynn, 64 Ark. 453, 39 L.R.A. 415, 43 S. W. 146, holding a tenant, ejected by the landlord after expiration of lease, has but the civil remedy of forcible entry and detainer; Scott v. Willis, 122 Ind. 1, 22 N. E. 786, holding injured party must appeal to the statutory action of forcible entry and detainer where one having a right enters forcibly; Sterling v. Warden, 51 N. H. 217, 12 A. R. 80, holding trespass will not lie against a postmaster duly appointed, who enters to take possession of public property unlawfully withheld.

Liability for re-entry.

Cited in Smith v. Reeder, 21 Or. 541, 15 L.R.A. 172, 28 Pac. 890, holding title and lawful right to the possession are a complete justification for the entry by a landlord; Smith v. Detroit Loan & Bldg. Asso. 115 Mich. 340, 69 A. S. R. 575, 39 L.R.A. 410, 73 S. W. 395, holding a landlord, who enters during absence of tenant after notice to quit for nonpayment of rent, is not liable for injuries caused in repelling efforts of tenant to re-enter; Souter v. Codman, 14 R. I. 119, holding the owner of land not liable for assault and battery where same was reasonably necessary in entering to take possession, withheld wrongfully.

Digitized by Google

Cited in reference notes in 51 A. R. 368, on right to use force in expulsion of trespasser; 9 A. S. R. 660, on civil remedy against person forcibly entering with right.

Cited in notes in 69 A. D. 755, on right of landlord to enter and forcibly eject tenant after expiration of his term; 121 A. S. R. 390, on unlawfulness of force in forcible entry and detainer; 11 L.R.A.(N.S.) 468, on landlord's liability for damages for forcibly dispossessing tenant after expiration of term.

Admissibility of custom or usage.

Cited in reference note in 81 A. D. 253, on admissibility of custom or usage of trade.

Rights under a license.

Cited in Desloge v. Pearce, 38 Mo. 588, holding a parol license carries no interest in land; Nelson v. Nelson, 41 Mo. App. 130; Allen v. Mansfield, 82 Mo. 688,—holding a license countermandable and revocable at the will of the owner; Pitzman v. Boyce, 111 Mo. 387, 33 A. S. R. 536, 19 S. W. 1104, holding the use of a sewer placed on land of another is a revocable license notwithstanding expenditures by licensee; Duinneen v. Rich, 22 Wis. 550, holding the right to draw logs across land for a consideration amounts to a mere license revocable at any time by owner of land; Matson v. Calhoun, 44 Mo. 368, holding the mere erection of a fence upon the land of another does not operate to vest title in him; Thomas v. Babb, 45 Mo. 384, holding a licensee not liable to the same measure of damages as one whose possession has been wrongful.

Cited in note in 31 A. S. R. 713, on general character of parol licenses.

Creation of easement by parol.

Cited in reference note in 81 A. D. 373, on creation of easement by parol.

Right to take minerals or trees as interest in land.

Cited in Arnold v. Bennett, 92 Mo. App. 156, holding a license to take minerals from the land passes no estate or interest in minerals in place; Potter v. Everett, 40 Mo. App. 152, holding a bill of sale of growing timber ineffectual to convey any interest in the land.

Revocation of license.

Cited in Tatum v. St. Louis, 125 Mo. 647, 28 S. W. 1002, holding the nonuser of an executory license by a city for forty years, especially where there was no possession taken by licensee, terminated the license.

Revocability of licenses.

Cited in reference notes in 77 A. D. 233, as to when and how far license is revocable; 77 A. D. 376, on revocable nature of licenses; 91 A. D. 207, on circumstances in which licenses are irrevocable; 93 A. D. 739, on revocability of licenses.

Cited in note in 10 A. D. 42, as to when license is not revocable.

Estoppel to revoke executed license.

Cited in House v. Montgomery, 19 Mo. App. 170, holding where licensee expends labor and money by reason of license there is an equitable estoppel; Gibson v. St. Louis Agri. & Mechanical Asso. 33 Mo. App. 165, holding same where one has incurred expense in order to use a license for an indefinite time; Baker v. Chicago, R. I. & P. R. Co. 57 Mo. 265, holding one, who licenses another to enter and make improvements in consideration of the performing of a subsequent condition, cannot oust him by ejectment.

Cited in note in 49 L.R.A. 522, on estoppel of licensor to revoke license to

Digitized by Google

maintain burden on land after licensee has incurred expense in creating the burden.

Distinguished in Mine La Motte Lead & Smelting Co. v. White, 106 Mo. App. 222, 80 S. W. 356, holding a license to enter and cut timber is not irrevocable though the licensee has expended money in the cutting.

Sufficient tender of deed.

Cited in Davis v. Watson, 89 Mo. App. 15, on tender of deed without avering possession of good title.

69 AM. DEC. 489, BOW v. ALLENSTOWN, 34 N. H. 351.

Proof of establishment of municipal corporation by reputation.

Cited in State ex rel. Halfway River School Dist. v. Bradley, 54 Conn. 74, 5 Atl. 861, holding in absence of record evidence of the establishment of a school district, its legal character as such may be proved by reputation.

Recitals in deeds as evidence.

Cited in reference note in 40 A. S. R. 81, on admissibility of recitals in deeds as evidence.

Entry in public book as evidence.

Cited in Pittsfield v. Barnstead, 40 N. H. 477, holding books of town clerk competent evidence that copies of tax records had been duly deposited with him; Wendell v. Abbott, 43 N. H. 68, holding unauthorized record not admissible.

Public documents as evidence.

Cited in reference note in 37 A. S. R. 620, public documents as evidence.

Court's judicial notice of public statutes.

Cited in note in 89 A. D. 665, 666, on court's judicial notice of public statutes of state within which court sits.

Legislative recognition of status or power.

Cited in State ex rel. Crow v. Lincoln Trust Co. 144 Mo. 562, 46 S. W. 593, holding recognition by legislative action of a corporation operates as a waiver by state of any irregularity in its incorporation; State v. Evans, 161 Mo. 95, 84 A. S. R. 669, 61 S. W. 590, holding inasmuch as statutes had recognized policemen as proper persons to make arrests for state crimes, such legislative recognition was tantamount to prior authorization; Dow v. Epping, 48 N. H. 75, holding recognition by town of highway surveyor made it liable to him for work done although his appointment was not in due form.

Legislative recognition of town or public corporation.

Cited in Muse v. Lexington, 110 Tenn. 655, 76 S. W. 481; Koch v. North Ave. R. Co. 75 Md. 222, 15 L.R.A. 377, 23 Atl. 463,—holding defect in charter of town cured by subsequent legislative recognition; Austrian v. Guy, 21 Fed. 500, holding state recognized existence of town by attaching certain territory to it, and providing for adjustment of certain indebtedness; People v. Reclamation Dist. No. 108, 53 Cal. 346, holding existence of a public corporation may be established by implication arising from passage of acts recognizing its existence.

Necessity of express words to create corporation.

Cited in note in 7 E. R. C. 258, on necessity of express words to create corporation.

Digitized by Google

Effect of legislative annexation of other territory to town.

Cited in reference note in 12 A. S. R. 695, on effect of legislative annexation of other territory to town.

Presumption of grant from state by user of franchise.

Cited in Juliaetta v. Smith, 12 Idaho, 288, 85 Pac. 923, holding municipal corporation may exist by prescription; Sherry v. Gilmore, 58 Wis. 324, 17 N. W. 252, holding after a lapse of nearly twenty years every presumption must be in favor of the regularity of proceedings to attach certain territory to a town; Felton v. Newport, 34 C. C. A. 470, 92 Fed. 470, as to whether a lawful organization may not be presumed from proof of user of franchise of an incorporated town for a long period of time; Strosser v. Ft. Wayne, 100 Ind. 443, as to exercise of corporate authority over a territory under color of legal proceedings with knowledge on part of public for twenty years being conclusive evidence of charter; Bradley Fertilizer Co. v. South Pub. Co. 6 Misc. 128, 26 N. Y. Supp. 4; Haynes v. Brown, 36 N. H. 545,—as to acts of user being sufficient to show existence of corporation.

Title by prescription.

Cited in Burnham v. Kempton, 44 N. H. 78, holding twenty years maintenance and use of dam, evidence of grant or right to maintain and use such dam; Stevens v. Nashua, 46 N. H. 192, holding where there is a dedication to public use by the owner of land twenty years use of it as a public highway is conclusive evidence of an acceptance, and where there is no such dedication then such use for that length of time if continuous and adverse, will be conclusive evidence of a right to use such highway, not only as against the landowner but also against the town; Webber v. Chapman, 42 N. H. 326, 80 A. D. 111, holding if a highway be inclosed by an individual and occupied by him adversely and uninterruptedly, and under a claim of right for more than twenty years he will acquire a prescription right to the land.

Cited in reference notes in 80 A. D. 118, on how prescriptive right to land acquired; 100 A. D. 608, on presumption of grant as basis of prescription.

Distinguished in State v. Franklin Falls Co. 49 N. H. 240, 6 A. R. 513, holding no right will be acquired as against state by the obstruction of a public highway, though continued for more than twenty years under a claim of right, if such obstruction in fact originated without right.

69 AM. DEC. 505, DANIELS v. BROWN, 34 N. H. 454.

Relation created by cultivation of land on shares.

Cited in McNearly v. State, 17 Fla. 198, holding it makes landlord and tenant tenants in common of the crop.

Cited in reference notes in 79 A. D. 151, on respective rights of parties in land and crops under contract to work land on shares; 97 A. D. 55, on relation as tenants in common of persons working farm land upon shares; 69 A. S. R. 752, on cotenancy in crops raised by tenant.

Cited in note in 37 A. D. 318, on agreement for cultivation of land on shares as creating cotenancy in crops.

Right of one tenant in common to maintain trespass against cotenant.

Cited in Boynton v. Hodgdon, 59 N. H. 247, holding he cannot do so without eviction and ouster.

Digitized by Google

Cited in reference note in 97 A. D. 55, on conversion between cotenants and remedy therefor.

Right to enter premises to reclaim property.

Cited in reference notes in 72 A. S. R. 850, on tenant's right to remove improvements erected by him; 103 A. S. R. 746, on tenant's right to go on premises after expiration of lease to remove personal property.

—Right of tenant in common.

Cited in Kamerick v. Castleman, 29 Mo. App. 658; Kamerick v. Castleman, 23 Mo. App. 481,—holding he has right to enter premises for gathering and dividing crop, but not to regain possession by force or violence, and where he resorts to force he becomes a trespasser ab initio; Haley v. Colcord, 59 N. H. 7, 47 A. R. 176, as to his right.

Overrrued in Pickering v. Moore, 67 N. H. 533, 68 A. S. R. 695, 31 L.R.A. 698, 32 Atl. 828, holding a tenant in common of goods of the same kind, quality and value so as to be divisible by tale measure or weight, has a right to take his share and his cotenant who prevents him is guilty of conversion.

—Right of administrator.

Cited in Waldo v. Waldo, 52 Mich. 94, 17 N. W. 710; Rough v. Womer, 76 Mich. 375, 43 N. W. 573,—holding that executor has no power, as such, to enter premises of person in peaceable possession of property, even though it belongs to estate, and take it therefrom by force, without process.

Division of common property without cotenant's consent.

Cited in reference note in 9 A. S. R. 79, on right of one tenant in common to make division of common property without consent of other.

Right of cotenant to convey by metes and bounds.

Cited in reference note in 73 A. D. 669, on invalidity of conveyance by metes and bounds of part of common estate by cotenant.

Correction of error without new trial.

Cited in Lisbon v. Lyman, 49 N. H. 553, holding new trial may be granted only of that part of a case, in the former trial of which there was error, or only of so much of the case as it is necessary to try in order to fairly correct the error.

Measure of damages for trespass de bonis asportatis.

Cited in reference note in 93 A. D. 743, on measure of damages for trespass de bonis asportatis.

Estoppel to deny landlord's title.

Cited in reference notes in 75 A. D. 111, as to when tenant can dispute landlord's title; 95 A. D. 139, on tenant's estoppel to deny landlord's title; 33 A. S. R. 190, on right of tenant holding over after expiration of lease to deny landlord's title.

Cited in note in 11 E. R. C. 77, on estoppel of tenant to deny landlord's title.

Forcible ejectment of tenant at expiration of term.

Cited in reference note in 33 A. S. R. 907, on forcible ejectment of tenant by landlord at expiration of term.

Tenant's right to quit notice.

Cited in reference notes in 75 A. D. 111, on right of tenant holding over to notice to quit; 83 A. D. 260, on when tenant is not entitled to notice to quit; 71 A. S. R. 729, on notice to quit to tenant holding over.

Digitized by Google

Right to emblements on death of life tenant.

Cited in reference note in 7 A. S. R. 319, on implements passing to executor on death of life tenant.

69 AM. DEC. 516, STATE v. McDUFFIE, 34 N. H. 523.

Property rights in dogs.

Cited in Harrington v. Miles, 11 Kan. 480, 15 A. R. 355, holding dogs to be subject of larceny; Patton v. State, 93 Ga. 111, 24 L.R.A. 732, 19 S. E. 734, as to status of dog as property; Shaul v. Brown, 28 Iowa, 37, 4 A. R. 151, as to whether dogs are subject of larceny; Mullally v. People, 1 N. Y. Crim. Rep. 351, holding that dog is thing of value and stealing dog constitutes larceny under statute; Hurley v. State, 30 Tex. App. 333, 28 A. S. R. 916, 17 S. W. 455, holding dog within statute for punishment of theft of "domestic animals;" Wilcox v. State, 101 Ga. 563, 39 L.R.A. 709, 28 S. E. 981, holding dog to be within prohibition of cruelty to a "domestic animal;" State v. Harriman, 75 Me. 562, 46 A. R. 423 (dissenting opinion), majority holding dog not within statute making killing or wounding of "domestic animals" indictable; Salley v. Manchester & A. R. Co. 54 S. C. 481, 71 A. S. R. 810, 32 S. E. 526, sustaining right to civil action for negligent killing of dogs; Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219, sustaining action for malicious destruction of dogs; Chapman v. Decrow, 93 Me. 378, 74 A. S. R. 357, 45 Atl. 295, denying right of individual to kill dog as public nuisance where he suffers no special injury and statute authorizes killing thereof by constable under warrant.

Cited in reference notes in 81 A. D. 183, as to when action for injuries to dog lies; 62 A. S. R. 326, on property rights in dogs; 81 A. D. 183; 66 A. S. R. 761,— on property in dogs.

Cited in notes in 72 A. D. 359, on wounding animals as indictable offense; 67 A. S. R. 290–291, on property in dogs and remedies for its enforcement; 67 A. S. R. 291–292, on remedies of owner to protect property right in dogs, and measure of recovery for injury thereto; 67 A. S. R. 297, on larceny of dogs; 40 L.R.A. 504, on property rights in dogs; 40 L.R.A. 507, on actions of trover, replevin, and trespass for dogs; 40 L.R.A. 512–513, on criminal actions for injuries to dogs; 40 L.R.A. 515, on larceny and obtaining dog by false pretenses.

— Right to kill dog omitted from assessment roll or without proper collar.

Cited in Jenkins v. Ballantyne, 8 Utah, 245, 16 L.R.A. 689, 30 Pac. 760, sustaining charter power to regulate and prohibit keeping of dogs, and provisions for registry thereof and authorizing killing where at large without collar bearing registry number; Morey v. Brown, 42 N. H. 373, holding mere initials not within statute providing for killing of dog without collar bearing owner's "name;" Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, holding statute outlawing dogs not on assessment rolls and limiting civil liability for killing dogs to value fixed by owner for assessment, to be within police power.

Indictment for killing dogs.

Cited in State v. Harriman, 75 Me. 562, 46 A. R. 423 (dissenting opinion), as to question whether license and registration need be set out in indictment for killing dog.

Evidence of value of dog.

Cited in reference note in 32 A. S. R. 515, on evidence of value of dog.

Digitized by Google

Malicious mischief under statutory regulations.

Cited in note in 32 A. D. 666, on malicious mischief under statutory regulations.

69 AM. DEC. 520, HUBBARD v. CONCORD, 35 N. H. 52.

Duty and liability of municipality as to keeping streets and sidewalks in safe condition.

Cited in Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576, holding it is its duty to keep them in a reasonably safe condition for travel and this duty extends to the entire width of the streets and sidewalks appropriated to such use and purposes; Hall v. Manchester, 40 N. H. 410, holding city liable for injury caused by defect in sidewalk provided that the defect was one of which the city could have reasonably had knowledge and plaintiff exercised due prudence and care; Palmer v. Portsmouth, 43 N. H. 265, holding town not liable unless under the circumstances of the case it ought to have repaired the defect before the accident happened and had a reasonable opportunity to do so; Howe v. Plainfield, 41 N. H. 135, holding liability of town does not depend upon whether or not its officers or agents had actual notice of the existence of the defect provided it were of such a character and of such continuance at the time of the accident, that the town was reasonably bound to have remedied it; Stanyan v. Peterborough, 69 N. H. 372, 46 Atl. 191, holding statute did not impose liability upon town where immediate cause of injury is such a defect that the town could not have notice of it, or could not have prevented or remedied the defect before the accident; Grimes v. Keene, 52 N. H. 330, holding if defect was caused by act of town it is immaterial whether town had an opportunity to remedy it before accident or not; Lambert v. Pembroke, 66 N. H. 280, 23 Atl. 81, holding town liable to injuries to a traveller resulting from the original defective construction of a sidewalk in a highway, which the town permitted an adjoining owner to build; Curry v. Mannington, 23 W. Va. 14, holding notice of defect either express or implied must be brought home to municipality; Graves v. Shattuck, 35 N. H. 257, 69 A. D. 536; Wheeler v. Westport, 30 Wis. 392; Woodruff v. Stewart, 63 Ala. 206,—on liability of municipal corporations for failure to keep sidewalks in repair; Hearn v. Boston & M. R. Co. 67 N. H. 320, 29 Atl. 970, as to necessity of notice of defect to render town liable.

Cited in reference notes in 72 A. D. 441, on liability of cities and towns for injuries resulting from defective sidewalks, streets, and highways; 74 A. D. 762, on municipal liability for defects in streets; 79 A. D. 379, on liability of cities and towns for injuries by defective sidewalks, streets, and highways; 89 A. D. 421, on city's liability for defective streets and sidewalks; 98 A. D. 587, on defects in streets and highways for which cities and towns are liable; 98 A. D. 587, on duty of cities and towns to keep streets and highways in good repair and safe condition; 4 A. S. R. 111, on municipal liability for defects in streets and sidewalks; 8 A. S. R. 149, on liability of city for injuries from defective sidewalks; 69 A. D. 551, on contributory negligence of traveller as affecting liability of town for defective highway.

Cited in notes in 82 A. D. 473, on liability of municipal corporations for defective highways; 7 A. R. 44, on liability of municipality for injury caused by defective highway; 21 L.R.A. 264, on liability of municipal corporation for ice on streets or sidewalks; 21 L.R.A. 271, on liability of municipal corporation for accumulation of and obstruction by ice on streets or sidewalks; 21 L.R.A.

Digitized by Google

276, on contributory negligence affecting liability of municipal corporation for ice on streets or sidewalks; 7 L.R.A.(N.S.) 934, on municipal liability for injuries from smooth, level ice or snow accumulating from natural causes on sidewalk not otherwise defective.

— Reasonable safety of highway for travel.

Cited in Gosport v. Evans, 112 Ind. 133, 2 A. S. R. 164, 13 N. E. 256; Sale v. Aurora & L. Turnp. Co. 147 Ind. 324, 46 N. E. 669, holding whether a street or turnpike is reasonably safe for travel is a question to be determined by surrounding circumstances; Hardy v. Keene, 52 N. H. 370, on question of town not being liable unless it should have repaired the defect before accident happened or had reasonable opportunity to do so; Van Pelt v. Clarksburg, 42 W. Va. 218, 24 S. E. 878, holding municipality not an insurer and that whether street is reasonably safe is question of fact.

What constitutes negligence on party of municipality.

Cited in Beardsley v. Hartford, 50 Conn. 529, 47 A. R. 677, holding failure of city to erect a barrier in front of an open basement is not of itself negligence and city is not liable to a passerby who falls into same.

Degree of care required by one using highway.

Cited in Clark v. Barrington, 41 N. H. 44, holding a traveler upon a public highway is bound for ordinary care and prudence in providing a suitable horse, carriage and harness, but for nothing more; Phillips v. Ritchie County, 31 W. Va. 477, 7 S. E. 427; Tucker v. Henniker, 41 N. H. 317,—holding traveler is bound to use ordinary care and prudence; Harris v. Clinton Twp. 64 Mich. 447, 8 A. S. R. 842, 31 N. W. 425, holding a person who, in the lawful use of a highway, meets with an obstacle or other cause of insufficiency may yet proceed if it is consistent with reasonable care so to do; Cofran v. Sanbornton, 56 N. H. 12, holding town not liable to one who attempted, knowing of obstruction of snow in highway, to pass over same before town had a reasonable time to remove it; Erslew v. New Orleans & N. E. R. Co. 49 La. Ann. 86, 21 So. 153, as to degree of care required.

Cited in reference notes in 74 A. D. 278, on care required of one using highway to avoid injury by defect therein; 85 A. D. 694, on necessity of party injured by defect in highway proving due care.

Admissibility of evidence of ability of town to keep highway in repair.

Cited in Winship v. Enfield, 42 N. H. 197, on admissibility of such evidence in action for injuries received by reason of defect in highway.

Evidence of similar but unrelated matter.

Cited in Perkins v. Fond du Lac, 34 Wis. 435, holding evidence that other walks were constructed in the same manner incompetent to show that walk in question was safe; Bremner v. Newcastle, 83 Me. 415, 23 A. S. R. 782, 22 Atl. 382, holding evidence that other persons have received injuries not admissible to show way is defective; Branch v. Libbey, 78 Me. 321, 57 A. R. 810, 5 Atl. 71, holding evidence is not admissible to prove that other persons passed safely over alleged defect; Eastman v. Amoskeag Mfg. Co. 44 N. H. 143, 82 A. D. 201, holding in action for flooding land of plaintiff by reason of defendant's dam, evidence of the effect on stream of another dam thirty miles below, not admissible.

Doubted in Darling v. Westmoreland, 52 N. H. 401, 13 A. R. 55, holding

Digitized by Google

on question whether pile of lumber was likely to frighten horses, evidence was admissible to show that horses passing it were or were not frightened by it.

Competency of evidence of similar occurrences.

Cited in Cleveland, C. C. & I. R. Co. v. Wynant, 114 Ind. 525, 5 A. S. R. 644, 17 N. E. 118, holding evidence of similar occurrences not admissible to raise presumption that accident in question happened.

Cited in reference notes in 89 A. D. 421, on admissibility of evidence of previous similar accident at same place and for like cause in personal injury action; 5 A. S. R. 117, on evidence of similar accidents from same defect in highway.

When evidence of usage admissible.

Cited in Kendall v. Morse, 43 N. H. 553, holding where question is whether goods deposited by sheriff were deposited in a suitable place, proof that certain insurance companies were accustomed to treat as extra hazardous buildings like that in which the goods were placed, is not admissible; Hayes v. Waldron, 44 N. H. 580, 84 A. D. 105, holding in determining reasonableness of use of stream to carry off manufacturer's waste evidence of usage in deposit of similar waste is not admissible; Saucier v. New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545, holding evidence that a machine by which plaintiff was injured lacked a safety device attached to similar machines upon which he was previously employed in another establishment, is inadmissible to show negligence on part of the master in the absence of proof that such devise was in common and ordinary use; Timm v. Bear, 29 Wis. 254, holding in action by mill owner to recover damages by reason of defendant having erected a new dam to supply his own mill, evidence of the custom of upper mill owners on other streams to shut their gates and hold the water when their mills are not at work, inadmissible.

Admissibility of similar acts of negligence.

Cited in Wentworth v. Smith, 44 N. H. 419, 82 A. D. 228, holding in action against postmaster for negligence for loss of letter evidence of specific acts of negligence in relation to other letters, not admissible.

What constitutes an obstruction to highway.

Cited in Biermann v. St. Louis, 120 Mo. 457, 25 S. W. 369; Johnson v. Haverhill, 35 N. H. 74; Chamberlain v. Enfield, 43 N. H. 356,—holding it a question of fact for jury; Ray v. Manchester, 46 N. H. 59, 88 A. D. 192, holding neither rightful use by individuals of a highway, which is itself in reasonably safe condition, nor their misconduct upon it though such misconduct may amount to a public nuisance will of itself constitute an "obstruction" under the statute; Davis v. Manchester, 62 N. H. 422, holding nothing is an obstruction, defect, insufficiency, or want of repair, within meaning of statute which the town is not bound to remove or remedy and for the existence of which it is not liable to indictment and fine.

Cited in notes in 7 A. R. 208, on snow and ice as defects in street and sidewalk; 21 L.R.A. 277, on question for jury as to liability of municipal corporation for ice on streets or sidewalks.

69 AM. DEC. 536, GRAVES v. SHATTUCK, 35 N. H. 257.

Nuisance on highway as jury question.

Cited in State v. Smith, 54 Vt. 403, holding it is question for jury whether obstacle in highway is an obstruction; Hall v. Brown, 58 N. H. 93, holding

Digitized by Google

extent and character of obstruction was question of fact; Chamberlain v. Enfield, 43 N. H. 356; Winship v. Enfield, 42 N. H. 197,—holding it is for jury to determine whether materials placed within limits of highway, by any person, are, under the circumstances, to be regarded as obstructions or incumbrances in such highway; Nutter v. Pearl, 71 N. H. 247, 51 Atl. 897, holding whether a stepping-stone within the limits of a highway constitutes such a nuisance as to render its owner liable in damages to person injured by collision therewith, is question of fact.

Cited in reference note in 78 A. D. 689, on what is a nuisance as question for jury.

Cited in note in 14 L.R.A. 559, on determination of nuisance on highway.

Obstruction to highway constituting nuisance.

Cited in Costello v. State, 108 Ala. 45, 35 L.R.A. 303, 18 So. 820, holding permanent obstruction to public highway such as erection of a fruit stand on the sidewalk of a city, is of itself a nuisance, as a matter of law, irrespective of any actual inconvenience to the public; State v. Kean, 69 N. H. 122, 48 L.R.A. 102, 45 Atl. 256, holding any structure, except a sign or awning put up in conformity with the police regulations of the town, which extends over any part of a public highway is under statute to be deemed a nuisance, whether public travel is or is not thereby obstructed.

Cited in reference notes in 72 A. D. 599, as to what obstructions use by public of street is subject; 74 A. D. 228, on what obstructions in highways and streets constitute nuisance; 88 A. D. 193, as to what obstruction in highway constitutes nuisance.

— Temporary obstructions.

Cited in Harold v. Jones, 86 Ala. 274, 3 L.R.A. 406, 5 So. 438, holding where stream is declared a highway by statute for purpose of floating logs, etc., an action does not lie against one constructing a boom for this purpose if he did not continue boom for unreasonable time and used due care and diligence; Mankato v. Willard, 13 Minn. 13, Gil. 1, 97 A. D. 208, as to right of public to temporarily obstruct street.

Cited in note in 1 A. S. R. 840, on justification on ground of necessity of temporary obstruction and partial occupation of streets.

— Moving of house along street.

Cited in Northwestern Teleph. Exch. Co. v. Anderson, 12 N. D. 585, 102 A. S. R. 580, 65 L.R.A. 771, 98 N. W. 706; Williams v. Citizens' R. Co. 130 Ind. 71, 30 A. S. R. 201, 15 L.R.A. 64, 29 N. E. 408, holding moving of house along a public street is an extraordinary use of street which may be controlled or denied and owner of such house cannot insist upon moving it if such moving will result in the destruction of property of others; Indiana R. Co. v. Calvert, 168 Ind. 321, 10 L.R.A.(N.S.) 780, 80 N. E. 961, 11 A. & E. Ann. Cas. 635, holding moving a house along streets of a city is not necessarily a nuisance where done under municipal authority, with proper dispatch, and where private rights are not unreasonably invaded; Hinman v. Clarke, 121 App. Div. 105, 105 N. Y. Supp. 725 (affirming 51 Misc. 252, 100 N. Y. S. 1068), holding in absence of restrictive legislation by ordinance or otherwise, there is a common law right to use a city street for purpose of moving buildings; Cairncross v. Pewankee, 78 Wis. 66, 10 L.R.A. 473, 47 N. W. 95, as to steam boat on wheels being an obstruction to street; Gustafson v. Hamm, 56 Minn. 334, 22 L.R.A.

Digitized by Google

565, 57 N. W. 1054 (dissenting opinion); Morrison v. Howe, 120 Mass. 565,—as to right to move house through street.

Cited in note in 14 L.R.A.(N.S.) 448, on right to interfere with wires of public-service corporation in moving house along street.

When highway is reasonably safe for travel.

Cited in Sale v. Aurora & L. Turnp. Co. 147 Ind. 324, 46 N. E. 669, holding it is to be determined by surrounding circumstances; Wheeler v. Westport, 30 Wis. 392, as to safety and repair of highway.

Reasonable use of highway.

Citel in Varney v. Manchester, 58 N. H. 430, 42 A. R. 592, holding the question whether stopping in a highway for a certain time is a reasonable use is question for the jury; Haley v. Colcord, 59 N. H. 7, 47 A. R. 176, as to what constitutes reasonable use of highway.

Right of way, what included.

Cited in Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 13 L.R.A. 826, 21 Atl. 1090, as to it being a right of using land or water as a way, reasonably and with due care.

What are nuisances.

Cited in Ladd v. Granite State Brick Co. 68 N. H. 185, 37 Atl. 1041, holding whether a lawful business properly conducted constitutes an actionable nuisance when injurious to another, depends upon its reasonableness under all circumstances.

Right to abate nuisance.

Cited in Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53, holding where a party can maintain an action for a nuisance he may enter and abate it, though at the time it caused but nominal damage.

Cited in reference notes in 12 A. S. R. 804, on right to abate nuisance; 45 A. S. R. 911, on abatement of nuisances.

Cited in notes in 26 A. D. 443; 124 A. S. R. 606, 607,—on right of private person to abate nuisance without suit.

Municipal power over nuisances.

Cited in notes in 39 L.R.A. 651, on municipal power over nuisances affecting highways and waters; 39 L.R.A. 659, on municipal power over nuisances consisting of obstructions of and encroachments on street.

Compensation for property destroyed in abating nuisance.

Cited in note in 19 L.R.A. 196, on right to compensation for property destroyed in abating nuisance in highway.

Rights as to shade trees along streets.

Cited in Frostburg v. Wineland, 98 Md. 239, 103 A. S. R. 399, 64 L.R.A. 627, 56 Atl. 811, 1 A. & E. Ann. Cas. 783, holding shade trees growing in a city street are not a nuisance per se; Bigelow v. Whitcomb, 72 N. H. 473, 65 L.R.A. 676, 57 Atl. 680, holding trees standing within limits of an ancient public highway upon land not required for the accomodation of actual travel are the property of the adjacent owner; Tate v. Greensboro, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767, as to rights of owner of land in regard to shade trees abutting street; Phifer v. Cox, 21 Ohio St. 248, 8 A. R. 58, holding growing hedge standing within the bounds of highway but leaving ample room for public travel, which was not incommoded or annoyed not such a nuisance as would justify any person in abating it.

Digitized by Google

Cited in reference notes in 20 A. S. R. 538, on rights of abutting owners to trees, herbage, etc., growing in highway; 29 A. S. R. 904, on rights in trees on highways.

Cited in notes in 101 A. S. R. 113, on abutting owner's right to shrubs and trees in highway; 15 L.R.A. 553, on ownership and control of trees in highway.

Paths as proper in highways.

Cited in Kelley v. Kennard, 60 N. H. 1, as to public convenience requiring paths in highways.

Rights in defense of property.

Cited in Aldrich v. Wright, 53 N. H. 398, 16 A. R. 339, holding statute prohibiting destruction of certain fur-bearing animals during certain seasons is not applicable to cases in which such destruction is in exercise of constitutional right of protecting property.

69 AM. DEC. 546, NORRIS v. LITCHFIELD, 35 N. H. 271.

Duty toward trespassers or wrongdoer.

Cited in Pewonka v. Stewart, 13 N. D. 117, 99 N. W. 1080, holding one negligently obstructing a highway is liable to person injured though the latter may be a trespasser; Lovett v. Salem & S. D. R. Co. 91 Mass. 557, holding boy ten years old who was injured by being ejected from a train while it was moving at a high rate of speed, could recover although he was a trespasser upon the train; Mark v. Hudson River Bridge Co. 56 How. Pr. 108, on liability of defendant for the reckless and needless acts of its servants in removal of property of plaintiff which was upon or against defendant's property.

Cited in reference notes in 87 A. D. 652, on owner's liability for negligence causing injury to trespasser; 98 A. D. 322, on liability for injury to trespasser.

Negligent injury to person violating law.

Cited in Newcomb v. Boston Protective Department, 146 Mass. 596, 4 A. S. R. 354, 16 N. E. 555, holding that fact that a person, while violating city ordinance, is injured through another's negligence, will not defeat his right to recover, unless his unlawful act was a contributing cause of the injury; Lammert v. Chicago & A. R. Co. 9 Ill. App. 388, holding breach of duty to the state on part of plaintiff will not absolve the defendant from the consequences of its acts, unless that breach of duty necessarily contributed to the result in which case the doctrine of comparative negligence will apply; Sewell v. Webster, 59 N. H. 586; Baldwin v. Barney, 12 R. I. 392, 34 A. R. 670; Sutton v. Wauwatosa, 29 Wis. 21, 9 A. R. 534; Platz v. Cohoes, 89 N. Y. 219, 42 A. R. 286,—holding where street is defective, it is not defense to an action for injuries sustained by reason thereof that plaintiff was traveling on Sunday in violation of the statute; Corey v. Bath, 35 N. H. 530, as to violation of law by traveling on Sunday being no defense to action for injuries caused by defective highway; State v. Boston & M. R. Co. 58 N. H. 408, holding evidence that defendant's train was running at a greater speed than allowed by law admissible on question of defendant's liability; Roe v. Crimmins, 10 Misc. 711, 31 N. Y. Supp. 807 (dissenting opinion), as to effect of violation of law by person negligently injured upon his right to recover.

Cited in notes in 36 A. S. R. 818, on right of one violating law to recover for negligent injury; 30 A. R. 418, on action for damages for injury sustained on Sunday; 2 L.R.A. 522, on plaintiff's violation of Sunday law as defense to action for injuries received on that day.

Digitized by Google

—Traveling on wrong side or portion of roadway.

Cited in Brember v. Jones, 67 N. H. 374, 26 L.R.A. 408, 30 Atl. 411, holding to recover damages for a collision upon the highway, the defendant's carriage being upon the wrong side of the road, the plaintiff must show that the collision could not have been avoided by exercise of ordinary care on his part.

Proximate cause where accident intervenes.

Cited in Houfe v. Fulton, 29 Wis. 296, 9 A. R. 568, holding where, besides a defect in the highway, there is another proximate cause contributing to produce the injury, which cause is not attributable to plaintiff's negligence nor that of any third person, the town is still liable if the damage would not have been sustained but for the defect in the way; Sturgis v. Kountz, 165 Pa. 358, 27 L.R.A. 390, 30 Atl. 976, 36 W. N. C. 78, 25 Pittsb. L. J. N. S. 442, holding where horse on ferry boat is frightened by a whistle and plunges against a defective rail and is lost, the defective rail is the independent intermediate cause, without which, notwithstanding the primary cause the injury would not have been inflicted; Moulton v. Sanford, 51 Me. 127 (dissenting opinion), as to accidental event occurring without the intervention of either party not being sufficient to relieve defendant of negligence; Bresnehan v. Gove, 71 N. H. 236, 51 Atl. 916, as to whether defendant's illegal speed was proximate cause of accident.

Cited in reference note in 72 A. D. 251, on recovery where party's own negligence does not directly contribute to injury.

Cited in note in 18 L.R.A.(N.S.) 1138, on what injuries may be deemed to be proximately caused by absence of guard rail in highway.

Contributory negligence as a defense.

Cited in Isabell v. New York & N. H. R. Co. 27 Conn. 393, 71 A. D. 78; Union P. R. Co. v. Eddy, 2 Kan. App. 291, 42 Pac. 413; St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia, 55 Ark. 163, 18 S. W. 43,—holding negligent act or omission of plaintiff must have been proximate cause and not a remote cause or mere condition; Brown v. Boston & M. R. Co. 73 N. H. 508, 64 Atl. 194; Kenyon v. New York C. & H. R. R. Co. 5 Hun, 479; Bouwmeester v. Grand Rapids & I. R. Co. 63 Mich. 557, 30 N. W. 337,—holding it cannot be relied on as a defense where action of defendant is wanton, wilful, or reckless; Chicago City R. Co. v. Canevin, 72 Ill. App. 81, holding there can be no recovery for injuries caused by negligence of a defendant, if plaintiff's own negligence contributed in any degree to the injury; Redford v. Spokane Street R. Co. 15 Wash. 419, 46 Pac. 650; State v. Manchester & L. R. Co. 52 N. H. 528,—holding although plaintiff was negligent, recovery can be had if it appears that the negligence of the defendant was the more proximate cause of the injury; New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112, 12 A. R. 356, holding railway company not liable for injuries caused by negligence of its servants to a stranger while engaged in voluntary service of uncoupling its cars, if by his negligence he contributed to the injury; Hall v. Manchester, 40 N. H. 410; Noyes v. Boscawen, 64 N. H. 361, 10 A. S. R. 410, 10 Atl. 690; Hearn v. Boston & M. R. Co. 67 N. H. 320, 29 Atl. 970; Nashua Iron & Steel Co. v. Worcester & N. R. Co. 62 N. H. 159,—as to necessity of exercise of ordinary care on part of person injured.

Cited in reference note in 72 A. D. 720, on right of recovery where both parties are mutually at fault in negligence.

—Failure to avoid perceived danger.

Cited in Omaha Horse R. Co. v. Doolittle, 7 Neb. 481, holding in case of mutual

Digitized by Google

negligence the plaintiff is entitled to recover, unless he might, by the exercise of ordinary care, have avoided the consequences of defendant's negligence; O'Brien v. McGlinchy, 68 Me. 552, holding where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury if, notwithstanding his negligence, the injury could be avoided by use of ordinary care at the time by the defendant.

— Venturing ahead on dangerous streets.

Cited in Riest v. Goshen, 42 Ind. 339, holding in action against city for injuries caused by defective bridge if plaintiff knew of the condition of the bridge when he drove upon it he could not recover.

Negligence as question of fact.

Cited in Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 A. S. R. 354, 16 N. E. 555, holding what is a contributing cause to an accident is usually a question for the jury, to be determined by the facts in the particular case; Daniels v. Lebanon, 58 N. H. 284; Haskell v. New Gloucester, 70 Me. 305,—holding what constitutes ordinary care is for the jury to determine under all the circumstances of the case.

Cited in reference notes in 78 A. D. 186; 80 A. D. 53,—on whether negligence question of law or fact; 90 A. D. 54, on negligence as mixed question of law and fact.

— Safety of street for travel.

Cited in Koontz v. District of Columbia, 24 App. D. C. 59, holding it is question of fact for jury; O'Neil v. East Windsor, 63 Conn. 150, 27 Atl. 237, holding the questions of the duty of a town to keep its highways in repair and of a traveler to use reasonable care are questions of law, but the question in any particular case whether the duty has been performed is wholly one of fact.

Definition of negligence.

Cited in reference notes in 74 A. D. 469; 80 A. D. 588,—on definition of "negligence."

Duty of town or city respecting highways.

Cited in Chapman v. Cook, 10 R. I. 304, 14 A. R. 686, as to duty of towns to keep highways in repair; Winship v. Enfield, 42 N. H. 197, holding in absence of contributory negligence, town is liable for injury caused by defect in highway.

Cited in reference notes in 79 A. D. 379, on liability of cities and towns for injuries by defective sidewalks, streets, and highways; 88 A. D. 644, on liability for injuries received from defects in highway; 98 A. D. 587, on duty of cities and towns to keep streets and highways in good repair and safe condition.

Liability for injury resulting from want of barrier or guard on street or bridge.

Cited in Baltimore & O. R. Co. v. Boteler, 38 Md. 568; South Omaha v. Cunningham, 31 Neb. 316, 47 N. W. 930,—holding if person make an excavation so near the line of a public street that one lawfully passing along said street may accidentally fall into it, it is the duty of the person making such excavation to erect barriers, and if he fails to do so, he is liable to one falling into such excavation; Hyatt v. Rondout, 44 Barb. 385, holding duty of municipality to keep highway or bridge in repair extends not merely to the floor of the bridge or road bed of highway, but to proper guards on their sides or borders when necessary for safety of public; Woodman v. Nottingham, 49 N. H. 387, 6 A. R. 526,

Digitized by Google

holding the want of a sufficient railing upon the sides of a bridge or public highway when necessary for the security of the traveler, constitutes a legal defect for which town in case of accident is liable; Maxim v. Champion, 50 Hun, 88, 4 N. Y. Supp. 515, as to whether failure by town to erect barriers on retaining wall of an embankment crossing a creek in a ravine, constituted negligence.

Degree of care required of traveller on highway.

Cited in Clark v. Barrington, 41 N. H. 44, holding he is bound for ordinary care and prudence in providing a suitable horse, carriage and harness, but for nothing more; Tucker v. Henniker, 41 N. H. 317, holding traveler is bound to exercise only ordinary care and diligence in providing himself with a suitable horse, carriage and harness, and if a defect in either contribute to an accident upon a dangerous highway, he is not thereby precluded from recovering if the defect were unknown to him and he were in no fault for not knowing it.

Law of the road.

Cited in Graves v. Shattuck, 35 N. H. 257, 69 A. D. 536, holding it does not apply to buildings that are being moved through a public highway.

Liability of principal for wrongful or negligent acts of agent.

Cited in Brown v. Hannibal & St. J. R. Co. 66 Mo. 588, holding him liable when agent acts within course of his employment.

Burden of proof of negligence.

Cited in Lisbon v. Lyman, 49 N. H. 553, as to its being on plaintiff.

— Of proving that injury was due solely to fault of defendant.

Cited in Harriman v. Moore, 74 N. H. 277, 67 Atl. 225, holding it unnecessary if plaintiff's own conduct in no way contributed to injury.

Degree of care toward animals on highway.

Cited in Clark v. Boston & M. R. Co. 64 N. H. 323, 10 Atl. 676, as to degree of care required toward animals on highway.

69 AM. DEC. 551, LADD v. WIGGIN, 35 N. H. 421.

Conclusiveness of return of levy.

Cited in reference notes in 77 A. D. 460, on right to contradict return of levy of execution on real property; 29 A. S. R. 165, on conclusiveness of return to execution, 10 A. S. R. 280, on sufficiency of officer's return of sale to pass debtor's title to purchaser.

Discharge of mortgage.

Cited in Bunker v. Barton, 79 Me. 62, 1 A. S. R. 282, 8 Atl. 253; Buchanan v. Balkum, 60 N. H. 406,—holding mortgage can only be discharged by payment of debt which it secures; Wiley v. Boyd, 38 Ala. 625, holding payment of debt is extinguishment of mortgage; Enright v. Amsden, 70 Vt. 183, 40 Atl. 37, holding purchase of equity of redemption does not discharge mortgage lien; Avery v. Hackley, 20 Wall. 407, 22 L. ed. 385, holding a valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him with a view of giving him a preference in violation of the Bankrupt Act.

Cited in reference notes in 82 A. D. 58, on discharge or release of mortgage; 63 A. S. R. 467, on satisfaction or discharge of mortgage; 1 A. S. R. 288, on mortgage dischargeable only by payment or release.

Digitized by Google

Merger of securities.

Cited in Corwin v. Collett, 16 Ohio St. 289, holding where a mortgagor, holding the equity of redemption in trust wrongfully conveys the mortgaged premises to the mortgagee, with notice of the trust giving him new security for the debt and the cestui que trust sets the conveyance aside, the mortgage does not merge in the conveyance, but stands for the security of the mortgagee.

Cited in reference notes in 75 A. D. 250, on extinguishment of inferior securities by securities of higher nature; 85 A. D. 538, on when merger occurs by mortgagee acquiring equity of redemption.

Effect of taking subsequent security.

Cited in Hammond v. Barker, 61 N. H. 53, holding security for debt not extinguished by taking of subsequent security of equal degree.

Written obligation as payment of pre-existing debt.

Cited in Jones v. Rider, 60 N. H. 452; Moore v. Fitz, 59 N. H. 572,—holding it is not payment unless specially agreed to be received as such.

Effect of avoidance of contract upon previously existing rights of parties.

Cited in McClaskey v. O'Brien, 16 W. Va. 791; Leach v. Tilton, 40 N. H. 473,—holding it restores each party to his previous existing rights.

— Effect of recovery by assignee in bankruptcy against satisfied creditor.

Cited in Towle v. Lane, 61 N. H. 586, holding the recovery of judgment fully satisfied by execution extinguishes the payment of the debt and reinstates the obligation.

Enforcement of mortgage after abortive discharge.

Cited in Salvage v. Haydock, 68 N. H. 484, 44 Atl. 696, as to its being upheld when justice requires it.

Fraudulent conveyances.

Cited in Coolidge v. Melvin, 42 N. H. 510, holding all conveyances with a secret trust reserved to vendor, are fraudulent and void as to creditors; Ashuelot Sav. Bank v. Frost, 19 Fed. 237, holding conveyance in lien of attachment not in fraud of creditors; Locke v. New England Brick Co. 73 N. H. 492, 63 Atl. 178, holding mortgage of personal property is invalid as to subsequent attaching creditors when there is an understanding that until default the mortgagor shall retain possession and use or dispose of the property for his own benefit; Stratton v. Putney, 63 N. H. 577, 4 Atl. 876, holding conveyance, absolute on its face with a secret agreement that it shall be reconveyed upon the payment of a certain sum by grantor to the grantee, is void as to creditors of grantor, although no fraud was actually intended by the parties; Thompson v. Esty, 69 N. H. 55, 45 Atl. 566, holding under statute an assignee in insolvency cannot avoid a sale by the debtor made in good faith and for a sufficient consideration, on the ground that it was fraudulent as to creditors because possession of property was retained by vendor.

Cited in reference notes in 72 A. D. 384, on when voluntary conveyances are fraudulent as to subsequent creditors; 73 A. D. 179, as to when voluntary conveyances are good as against subsequent creditors; 73 A. D. 574, as to when conveyances are fraudulent as against subsequent creditors; 75 A. D. 236, on effect of grantee's participation in conveyance for purpose of hindering, delaying or defrauding creditors.

Cited in note in 31 L.R.A. 634, on reservation of benefits to grantor as indicating creditor's participation in debtor's fraudulent intent.

Digitized by Google

Limited in Fuller v. Griffith, 91 Iowa, 632, 60 N. W. 247, holding absolute conveyance intended as security is badge of fraud as to creditors but the transaction is not ipso facto void as to them.

Who may sue or defend on account of usury.

Cited in Pritchett v. Mitchell, 17 Kan. 355, 22 A. R. 287; Beach v. Guaranty Sav. Asso. 44 Or. 530, 76 Pac. 16, 1 A. & E. Ann. Cas. 416; Lee v. Feamster, 21 W. Va. 108, 45 A. R. 549; Gathercole v. Young, 61 N. H. 121,—holding defense of usury is personal; Pearson v. Gooch, 69 N. H. 571, 45 Atl. 406, as to the right to sue on account of usury being personal in its nature.

Cited in reference note in 87 A. D. 599, as to when usury may be set up in action on usurious mortgage.

Cited in note in 81 A. D. 358, on defense of usury being personal.

Title of administrator or executor to assets of deceased.

Cited in Pittsfield v. Exeter, 69 N. H. 336, 41 Atl. 82, holding he has legal title; Kent v. Exeter, 68 N. H. 469, 44 Atl. 607, holding title vests in administrator as trustee for the heirs and creditors.

Cited in reference notes in 88 A. D. 308, on title of executor or administrator to deceased's assets; 88 A. D. 308, on administrator's right to assign choses in action; 72 A. S. R. 439, on executor's right to corporation stock.

Cited in notes in 78 A. S. R. 178, on general power of executors over real property; 78 A. S. R. 179, on general powers of executors over personal estate.

Nature of mortgage.

Cited in Divoll v. Atwood, 41 N. H. 446, holding under statute mortgage and debt are on same footing and vulnerable to defense of usury; Trustees of Donations v. Streeter, 64 N. H. 196, 5 Atl. 845, as to mortgagor being absolute owner as against everyone except mortgagee.

Cited in reference note in 78 A. D. 718, on mortgage as chose in action and mere incident of debt.

Rights of mortgagor in possession.

Cited in note in 7 L.R.A. 631, on rights of mortgagor in possession.

Action on note executed to administrator.

Cited in reference note in 77 A. D. 550, as to who may sue on note executed to one as administrator.

69 AM. DEC. 560, JOHNSON v. ATLANTIC & ST. L. R. CO. 35 N. H. 569.

Measure of damages for injuries due to construction of railroad.

Cited in Cleveland, C. C. & St. L. R. Co. v. Huddleston, 21 Ind. App. 621, 69 A. S. R. 385, 52 N. E. 1008, holding law presumes that landowners have received full compensation for all damages resulting from construction and operation of railroad.

Cited in reference notes in 73 A. D. 329, on measure of damages to landowner for injuries to land by construction of railroad over it; 94 A. D. 106, on measure of damages of landowner for injuries to land by construction of railroad thereon.

Liability of railroad company for damages from construction of road.

Cited in reference notes in 80 A. D. 794, on liability of railroad for damages for taking property for its road; 94 A. D. 106, on right of action of landowner against railroad company for injury from building road in a suitable manner;

Digitized by Google

94 A. D. 106, on privileges and rights of railroad company in constructing its road.

—From improper construction.

Cited in Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 36 A. S. R. 359, 32 N. E. 529, holding them liable; Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 A. R. 147, as to question of necessary care in construction of road being material and for the jury.

Cited in reference notes in 94 A. D. 106, on liability of railroad company for improper construction of road; 37 A. S. R. 562, on liability of railroad company for negligence in construction of road; 45 A. S. R. 910, on liability for injuries received during construction of railroad.

Liability for obstructing water courses.

Cited in Chicago, R. I. & P. R. Co. v. Andreesen, 62 Neb. 456, 87 N. W. 167, holding railroad company in building its road has no right to obstruct natural water courses and must construct a culvert or drain with a proper grade to carry off water; Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 A. D. 179, holding if owners of a dam on a water course, by means of their dam obstruct the natural drainage from the land of another, to his actual injury, they are liable therefor, although his land is not situated upon the watercourse unless such obstruction was caused by them in the reasonable use of their own land or privilege; Gordon v. International Paper Co. 72 N. H. 346, 56 Atl. 757, as to common law liability of railroad company for flooding lands; Gilbert v. Savannah, G. & N. A. R. Co. 69 Ga. 396, holding suitable culverts for natural waterflow must ordinarily be made.

Cited in reference notes in 73 A. D. 329, on railroad company's right to overflow land in construction of its road; 73 A. D. 331, on railroad company's liability for so constructing road across stream as to overflow lands above; 94 A. D. 107, on duty of railroad company to construct drains or culverts; 11 A. S. R. 736, on railroad's liability to landowner for overflow of water caused by roadbed.

Cited in notes in 4 A. S. R. 403, on damage from overflowing land, diverting stream, etc.; 5 A. S. R. 538, on liability of railroad for obstructing flow of water; 21 L.R.A. 604, on effect of civil law on correlative rights to obstruct natural flow of surface water in improving property; 59 L.R.A. 867, on liability for injury by damming back water of stream by railroad bridge.

Distinguished in O'Connor v. Fond du Lac, A. & P. R. Co. 52 Wis. 526, 38 A. R. 753, 9 N. W. 287, holding that fact that a railway company, in constructing its roadbed, had filled up an artificial ditch on the land by which surface water was conducted from plaintiff's premises to river and had thus turned back the water upon said premises, was no ground of action.

Rights of public in way by eminent domain.

Cited in Bigelow v. Whitcomb, 72 N. H. 473, 65 L.R.A. 676, 57 Atl. 680, holding it has no right to appropriate trees standing within limits of highway but upon land not required for accommodation of actual travel.

Damages in eminent domain.

Cited in reference notes in 74 A. D. 249, on measure of damages in eminent domain; 75 A. D. 616, on mode of ascertaining compensation to owner of land taken for public use.

Cited in note in 88 A. D. 116, on damages in eminent domain cases.

Digitized by Google

Right of municipality to license or maintain nuisance.

Cited in note in 16 E. R. C. 581, on right of municipal corporation to license or maintain nuisance.

69 AM. DEC. 565, TINSMAN v. BELVIDERE DELAWARE R. CO. 26 N. J. L. 148.

Liability for acts done under franchise or in public service.

Cited in McAndrews v. Collerd, 42 N. J. L. 189, 36 A. R. 508; Rudder v. Koopman, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601,—holding the legislative protection to a private corporation does not extend to damages arising from a legalized nuisance; Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 A. R. 147, holding the charter should not be construed as evincing a legislative intent to authorize injury to private property, or relieve from liability in a common law action; Quinn v. Paterson, 27 N. J. L. 35, holding acts done in the execution of a public trust and for public benefit, within limits of street, does not render party liable to one fronting on street; Alexander v. Milwaukee, 16 Wis. 248; Trenton Water Power Co. v. Raff, 36 N. J. L. 335,—holding where work done is for the benefit of a party with private capital, the liability attaches though the public be benefited.

Cited in reference notes in 72 A. D. 295, on liability of corporations in tort; 31 A. S. R. 850, on liability of corporations for ultra vires acts.

Cited in notes in 89 A. D. 501, on corporation's liability to make compensation for injuries to private individuals in exercising right of eminent domain; 4 A. S. R. 405, on what constitutes damage for public use for which compensation must be made; 1 L.R.A.(N.S.) 51, on effect of legislative authority on liability for private nuisance; 1 L.R.A.(N.S.) 66, on railroad charter as conferring no immunity from liability for injuries from location and construction of road; 1 E. R. C. 667, on right of action for damage necessarily resulting from exercise of statutory powers.

Liability of corporation for acts of servants.

Cited in reference notes in 87 A. D. 400, on liability of corporations for wrongful acts of servants; 90 A. D. 664, on liability of corporation for acts of its agents or servants.

Construction of statutes.

Cited in reference notes in 95 A. D. 152, on construction of statutes; 97 A. D. 428, on construction of statutes in derogation of common law; 73 A. D. 176, as to when rights and liabilities at common law are not affected by statutory enactments; 72 A. S. R. 552, on abrogation of common law by enactment of statute.

Private status of corporation exercising public functions.

Cited in New York C. & H. R. R. Co. v. Metropolitan Gaslight Co. 63 N. Y. 326 (affirming 5 Hun, 201), holding the fact that a gas company furnishes gas to light the public streets does not make it public; State ex rel. Mickey v. Reneau, 75 Neb. 1, 106 N. W. 451, holding fact that condemnation proceedings were instituted by corporation for a public purpose does not affect state's lien on the land for taxes.

Cited in reference notes in 37 A. D. 238; 81 A. D. 552,—as to what is public corporation.

What are municipal corporations.

Cited in reference note in 40 A. S. R. 126, on what are municipal corporations.

Digitized by Google

Power of legislature over municipal corporations.

Cited in Williamson v. New Jersey, 130 U. S. 189, 32 L. ed. 915, 9 Sup. Ct. Rep. 453 (affirming 44 N. J. L. 165), holding the power of a legislature over a corporation created for the purpose of self government is supreme.

Cited in reference notes in 74 A. D. 595, on legislative control over municipal charters, rights, and privileges; 84 A. D. 141, on legislative power over corporate charters; 86 A. D. 193, as to when provisions in corporate charters are contracts which cannot be impaired; 96 A. D. 596, on power of legislature to control municipal corporations; 6 A. S. R. 319, on legislature's right to exercise sovereign control over municipal corporations; 40 A. S. R. 127, on whether municipal corporation franchises are vested rights.

What is admitted by demurrer.

Cited in reference notes in 62 A. S. R. 316, on what admitted by demurrer; 97 A. D. 236, on what facts admitted by demurrer; 3 A. S. R. 594, on demurrer as admitting all well pleaded facts.

Liability for deflection of water in construction of public works.

Cited in Costigan v. Pennsylvania R. Co. 54 N. J. L. 233, 23 Atl. 810, holding a corporation liable in damages for increasing pressure on complainant's land though the construction of embankment was a lawful act; Pickens v. Coal River Boom & Timber Co. 51 W. Va. 445, 90 A. S. R. 819, 41 S. E. 400, holding one erecting a boom in such close proximity to a mill as to injure water power, liable to the mill owner for the damages resulting.

Cited in notes in 4 A. S. R. 403, on damage from overflowing land, diverting stream, etc; 40 L.R.A. 601, on right of owner of upland to access to navigable water.

Liability of public officers for their acts.

Cited in reference notes in 90 A. D. 729, as to liability of public officers, other than judicial, for their acts in absence of malice; 49 A. S. R. 348, on private actions for breach of public duty.

69 AM. DEC. 580, INSLEE v. FLAGG, 26 N. J. L. 368.

Necessity of swearing arbitrators before award.

Cited in Hepburn v. Jones, 4 Colo. 98, holding a valid award cannot be made if arbitrators or any one of them fail to take the oath prescribed.

Distinguished in Day v. Hammond, 57 N. Y. 479, 15 A. R. 522, holding failure to take oath an irregularity that may be waived.

Disapproved in Kankakee & S. W. R. Co. v. Alfred, 3 Ill. App. 511, holding parties may waive the statutory requirement that arbitrators be sworn; Pardridge v. Ryan, 134 Ill. 247, 25 N. E. 627, holding the appearance of parties before auditor and examination of witnesses without objection that auditor has not been sworn as required by statute, constitutes a waiver; Glass-Pendery Consol. Min. Co. v. Meyer Min. Co. 7 Colo. 51, 1 Pac. 443, holding an objection made after an award that one of the arbitrators was absent comes too late where party knew of the absence and made no objection to proceeding without him.

69 AM. DEC. 584, CARRON v. MARTIN, 26 N. J. L. 594.

Power over streets.

Cited in State, Terhune, Prosecutor, v. Passaic, 41 N. J. L. 90, holding power

Digitized by Google

of city council in matters of street improvements legal only when in strict conformity to authority given; State, Breninger, Prosecutor, v. Belvidere, 44 N. J. L. 350, holding such power must emanate from the creating body.

Showing of jurisdiction in record of special tribunals.

Cited in Nixon v. Ruple, 30 N. J. L. 58, holding special tribunals should show all jurisdictional facts upon the face of their record.

Cited in reference note in 92 A. D. 374, on whether presumptions prevail in favor of jurisdiction of inferior and limited courts.

Procedure and record necessary to validity of local assessments and sale thereunder.

Cited in State, Fleischauer, Prosecutor, v. West Hoboken, 40 N. J. L. 109, setting aside sale of land for taxes by a city where all the legal conditions precedent do not appear as having been performed; State v. Trenton, 36 N. J. L. 499; Paret v. Bayonne, 39 N. J. L. 559; State, Baxton, Prosecutor, v. Jersey City, 36 N. J. L. 188,—holding the requirement of the statute prescribing the procedure to enforce sale of land for taxes or assessments must be strictly complied with; State, Pope, Prosecutor, v. Union, 32 N. J. L. 343, holding where there was no application for the contemplated improvement as the law required, the ordinance should be set aside where proceeded against directly; State, Woodruff, Prosecutor, v. Orange, 32 N. J. L. 49, holding an assessment bad where it does not appear upon the face of the proceedings that notice was given of meeting of commissioners to hear parties affected; Phillips v. Hudson, 31 N. J. L. 143, holding the neglect to give notice required in sale of land for street improvements renders the purchaser's title invalid; State, Brinley, Prosecutor, v. Perth Amboy, 29 N. J. L. 259, holding that an ordinance for building a sewer without the notice to interested parties required by charter is void and no assessments can be made under it; Dinsmore v. Westcott, 25 N. J. Eq. 470, holding there is no title conveyed where warrant is issued to and deed made by a person not authorized to so act; Mulligan v. Smith, 59 Cal. 206, sustaining the right to resist payment of tax levied for opening an avenue without a petition from a majority of owners of frontage as required by statute.

— Review of proceedings.

Cited in State, Evans, Prosecutor, v. Jersey City, 35 N. J. L. 381, holding defective proceedings upon which sales of land for assessments were made can not be questioned collaterally but must be reviewed directly by certiorari: State, Gregory, Prosecutor, v. Jersey City, 34 N. J. L. 390, sustaining jurisdiction of court to review proceedings of municipal corporations where judicial or quasi judicial in their nature.

Review of void municipal proceedings.

Cited in Morris Canal & Bkg. Co. v. Jersey City, 12 N. J. L. 252, holding there are exceptions to the general rule that a court of equity is not the proper tribunal to correct errors of inferior tribunals.

Scope and office of certiorari.

Cited in Re Wilson, 32 Minn. 145, 19 N. W. 723, holding a purely legislative act, as such, cannot be reviewed on certiorari; State, Winsor, Prosecutor, v. Brown, 31 N. J. L. 355, holding a certiorari cannot be used to bring certificate of incorporation of school district before court to determine legal existence of such corporation; State, Cavanagh, Prosecutor, v. Bayonne, 63 N. J. L. 176,

Digitized by Google

43 Atl. 442, holding ordinarily court will extend the aid of prerogative writ of certiorari in order to remove the cloud of void municipal action prejudicial to a prosecutor.

Powers of municipal corporation.

Cited in Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650, holding neither the municipal corporation nor its officers can do any act or incur any liability not authorized by the charter; Marshall & B. Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815 (dissenting opinion), on the liability of a city where acting outside charter.

Cited in reference notes in 72 A. D. 97, on limited powers of municipal corporation; 80 A. D. 730, on powers of municipal corporation.

Cited in notes in 34 A. D. 628, on general limitations on power of municipality to pass ordinances; 81 A. D. 107, on municipality's powers; 2 A. S. R. 93, on powers of municipal corporations regarding appropriation of public funds; 1 L.R.A. 169, on power and authority of municipal corporations; 36 L.R.A. 600, on extent of municipal power to prevent or abate nuisances.

Effect of want of jurisdiction.

Cited in reference notes in 97 A. D. 381, on validity of act of judicial nature when attempted by court without jurisdiction; 36 A. S. R. 754, on effect of want of jurisdiction; 39 A. S. R. 331, on effect of proceedings without jurisdiction.

69 AM. DEC. 591, ROBINSON v. DAVIS, 11 N. J. EQ. 302.

Judgment as evidence of debt.

Cited in Moore & H. Hardware Co. v. Curry, 106 Ala. 284, 18 So. 46, holding a judgment conclusive evidence of the debt as to other creditors of the judgment creditor, in the absence of fraud.

Cited in reference note in 72 A. D. 641, on use of decree to defraud creditors not parties to suit.

Cited in note in 23 A. S. R. 118, on collateral attacks upon judgments.

Proper parties defendant in suit to set aside fraudulent transaction.

Cited in Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392, holding in a suit to clear title from a fraudulent conveyance, the parties executing the conveyance are necessary parties; Miller v. Jamison, 24 N. J. Eq. 41, holding parties participating in fraudulent conveyances are proper parties defendant; Importers' & T. Nat. Bank v. Littell, 41 N. J. Eq. 29, 2 Atl. 785, holding a complainant in a creditor's bill may make everyone participating in a fraud a party for the purpose of discovery; Johnston v. Little, 141 Ala. 382, 37 So. 592, holding a person to a fraudulent transaction may be made a defendant, in equity, though he had no interest in the suit.

69 AM. DEC. 595, IZARD v. BODINE, 11 N. J. EQ. 403.

Liability of cotenants to account.

Cited in Bird v. Bird, 15 Fla. 424, 21 A. R. 296, holding mere occupancy by one tenant in common involves no liability to account to another tenant in common; Kean v. Connelly, 25 Minn. 222, 33 A. R. 458; Israel v. Israel, 30 Md. 120, 96 A. D. 571,—holding one cannot be held liable for use and occupancy unless there has been an actual ouster; Sailer v. Sailer, 41 N. J. Eq. 398, 5 Atl. 319, holding there must be something more than mere occupancy on the

Digitized by Google

one hand and forbearance on the other to render cotenant liable; Almy v. Daniels, 15 R. I. 312, 4 Atl. 753, holding where a tenant in common excludes his cotenant from all use and benefit of one half the common property and erects a permanent building thereon he may be made to account; Hammond v. Cronkright, 47 N. J. Eq. 447, 20 Atl. 847, holding a mother and infant children having exclusively occupied and enjoyed farm for five years after death of testator must account to a daughter for profits on her part for that time.

Cited in reference notes in 73 A. D. 79, on liability of cotenants to account; 69 A. S. R. 559, on accounting by cotenant.

Cited in notes in 52 A. S. R. 926, on cotenant's duty to account for use or occupancy, no rents being received; 52 A. S. R. 929, on cotenant's liability to others during exclusive or adverse holding; 28 L.R.A. 829–831, on liability of cotenants to account for use and occupation and rents and profits; 28 L.R.A. 833, on liability of cotenants to account for use and occupation and rents and profits in case of ouster; 28 L.R.A. 840, 841, on statutory action of account against cotenant for use and occupation and rents and profits; 28 L.R.A. 854, as to when cotenant is liable for rental value of premises; 1 E. R. C. 455–457, on accounts between tenants in common.

Distinguished in Tyler v. Cartwright, 40 Mo. App. 378, holding a cotenant bound to account where he holds a position of trust toward one of the cotenants.

—As to profits realized.

Cited in Coleman's Appeal, 62 Pa, 252, holding as to fructus industriales a tenant in common who has sole enjoyment and makes a profit from the whole receives nothing more than he may justly claim; Edsall v. Merrill, 37 N. J. Eq. 114, holding a cotenant who takes possession of the whole premises and uses them as his own thereby making a profit is bound to account to his cotenants; Le Barren v. Babcock, 46 Hun, 598, holding this does not include the value of the use or product devoted to his own use.

Cited in reference notes in 73 A. D. 555, as to when tenant in common is liable to account in equity for rents and profits; 80 A. D. 534, on liability of tenant in common to cotenant for share of profits; 4 A. S. R. 733, on liability of cotenant in possession for rents and profits.

Cited in notes in 14 A. D. 587, on action by one cotenant against another for rents and profits; 29 A. D. 485, on trespass by one cotenant against another for mesne profits; 78 A. D. 666, on liability of cotenants to account for rents and profits and for use and occupation of common property; 52 A. S. R. 925, on one cotenant's duty to account to other cotenant for rents received; 28 L.R.A. 848, on liability of cotenants to account for rents received; 28 L.R.A. 858, on liability of cotenant to account for mesne profits.

Distinguished in McCord v. Oakland Quicksilver Min. Co. 64 Cal. 134, 49 A. R. 686, 27 Pac. 863, holding waste not proper action for accounting.

What constitutes ouster of cotenant.

Cited in reference notes in 74 A. D. 61; 77 A. D. 623; 79 A. D. 656,—on what constitutes ouster of cotenant; 90 A. D. 454, as to what constitutes adverse possession and ouster of tenant in common by cotenant; 2 A. S. R. 284, on ouster and adverse possession between cotenants.

69 AM. DEC. 598, CAMPBELL v. GARDNER, 11 N. J. EQ. 423.

Power of equity to set aside judicial sale.

Cited in National Bank v. Sprague, 21 N. J. Eq. 458, holding equity acts

Digitized by Google

upon proper application to set aside sales made by their officers, as where there is an unlawful combination to suppress competition; Hayes v. Stiger, 29 N. J. Eq. 196, holding the power of court to set aside sale for mistake, not result of purchaser's own negligence, is unquestionable; International Wood Co. v. National Assur. Co. 99 Me. 415, 105 A. S. R. 288, 59 Atl. 544, 2 A. & E. Ann. Cas. 356, holding a court of equity has power to set aside sale and restrain officers from delivering deed to purchaser.

— Ground for setting aside and resale.

Cited in Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; Cline v. Prall, 27 N. J. Eq. 415,—holding offers to pay more than property brought at sale are no ground for setting aside sale in themselves; Woodward v. Bullock, 27 N. J. Eq. 507, holding surprise or misapprehension, created by the conduct of the purchaser or officers conducting sale, ground for setting aside sale; Marlatt v. Warwick, 18 N. J. Eq. 108, holding equity will set aside a sale by sheriff where property sold for an inadequate price and where mortgagor acted under the belief that property was being bought in for himself; Aldrich v. Wilcox, 10 R. I. 405, setting aside sale by reason of inadequate consideration where fraud was practiced; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686, holding sale will not be set aside for inadequacy of price unless so great as to shock the conscience, or where additional circumstances appear as against it; Mound City Mut. L. Ins. Co. v. Hamilton, 3 Tenn. Ch. 228, holding the most rigid rules in regard to rights of purchasers are made to yield to the application of infants to whom no negligence can be imputed; The Sparkle, 7 Ben. 528, Fed. Cas. No. 13,207, holding an admiralty court will set aside sale where fraud or misconduct appears in any person connected with the sale; Stuart v. Gay, 127 U. S. 518, 32 L. ed. 191, 8 Sup. Ct. Rep. 1279, holding court may order a resale of mortgaged property upon a rule to purchaser to show cause, he having defaulted; Mutual L. Ins. Co. v. Goddard, 33 N. J. Eq. 482, holding sale may be vacated to let in a defense.

Cited in reference notes in 83 A. D. 112, on circumstances under which chancery will set aside execution sales; 84 A. D. 385, on when judicial sale will be set aside; 5 A. S. R. 22, on grounds for setting aside judicial sale; 20 A. S. R. 507, on setting aside judicial sale and ordering resale.

Cited in note in 40 L. ed. U. S. 721, on setting aside judicial sale for fraud, irregularity, accident, mistake, or inadequacy of price.

Setting aside sale on petition.

Cited in Meyer v. Bishop, 27 N. J. Eq. 141, holding sale may be set aside on petition where complainant under foreclosure proceedings is the purchaser; Cawley v. Leonard, 28 N. J. Eq. 467, holding where no new rights have intervened order opening a decree may be made on petition; Mutual L. Ins. Co. v. Sturges, 33 N. J. Eq. 328, holding fact that the sheriff's sale had been perfected by delivery of deed is not an insuperable bar to the vacation of the proceedings on petition; Sayre v. Elyton Land Co. 73 Ala. 85, holding proceedings may be by petition unless the peculiar circumstances render it necessary proceedings and issues be put in more formal and permanent shape.

Grounds for opening decree or order.

Cited in Mutual L. Ins. Co. v. Sturges, 32 N. J. Eq. 678, holding court will open a decree, regularly obtained by default, even after enrollment where mistake, accident or surprise is the defense.

Digitized by Google

Right of judicial purchaser to merchantable title.

Cited in Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456, holding court will deal with purchaser upon equitable principles though he must be content with such title as the proceedings give him.

Reimbursement of purchaser on annulling judicial sale.

Cited in note in 69 L.R.A. 41, on reimbursement of purchaser on annulling judicial or execution sale.

69 AM. DEC. 606, FAIRCHILD v. OGDENSBURGH, C. & R. R. CO. 15 N. Y. 337.

Promissory notes in form of order.

Cited in Almy v. Winslow, 126 Mass. 342, holding instrument in following form "on demand with interest please pay J. S. or order fifty-five dollars" a promissory note.

— Instrument in form of order on drawer.

Cited in Com. v. Butterick, 100 Mass. 12, holding an order for payment of money drawn by a person on himself payable to his own order and by himself accepted and indorsed, may be properly described in an indictment as a bill of exchange.

— Municipal and corporation warrants on treasurer.

Cited in Clark v. Des Moines, 19 Iowa, 199, 87 A. D. 423, holding warrants drawn by proper officers of a municipal corporation on the treasurer thereof are not bills of exchange, but are, in legal effect, promissory notes of the corporation; Read v. Buffalo, 67 Barb. 526, holding instrument signed by mayor and clerk, and countersigned by comptroller, addressed to treasurer directing payment out of certain fund when collected is a non-negotiable promissory note; Spooner v. Rowland, 4 Allen, 485, holding an order upon secretary of an insurance company, payable at sight, drawn by its duly authorized agent, and given and received in full satisfaction for loss under a policy had effect of promissory note of company and operated as payment of loss; Clark v. Lake Ave. Permanent Sav. & Loan Asso. 48 N. Y. S. R. 189, 20 N. Y. Supp. 363, holding instrument directing treasurer of corporation to pay to order of F. $1,651.50 "for S. loan" signed by president and secretary and countersigned "Correct F." is an accepted draft, transferable by indorsement and delivery; National F. Ins. Co. v. Eastern Bldg. & L. Asso. 65 Neb. 483, 91 N. W. 482; Fink v. Canyon R. Co. 5 Or. 301,—holding orders by corporation on itself to pay amounts indicated to bearer, promissory notes; Bull v. Sims, 23 N. Y. 570, holding statement in written warrant of a municipal corporation for payment of a certain sum that same is payable "out of any funds not specially appropriated" and "chargeable to general city fund" does not deprive instrument of the character of a negotiable promissory note.

Cited in reference note in 83 A. D. 306, on nature of order drawn by president on treasurer of corporation and necessity for proof of demand.

Requisites of promissory note.

Cited in Wright v. Irwin, 33 Mich. 32, holding statement in note as to how party who was to receive the money was to employ it did not change character of note; Oatman v. Taylor, 29 N. Y. 649, on the nature of obligation reciting what the money was for and referring to other papers in that respect.

Cited in reference notes in 71 A. D. 699, on essential qualities of bills or

Digitized by Google

notes and test of negotiability; 76 A. D. 745, on necessity that promissory note be for specific sum.

What are bills of exchange.

Cited in reference note in 16 A. S. R. 721, on what are not bills of exchange.

Necessity of presentment of draft or non-negotiable note.

Cited in Smith v. Unangst, 20 Misc. 564, 46 N. Y. Supp. 340, holding it necessary and that there was evidence of presentment in the case to take it to the jury; Mobley v. Clark, 28 Barb. 390, holding draft drawn by agent of a corporation upon the corporation in favor of plaintiff for the amount of a protested draft previously drawn by such agent in plaintiff's favor and then held by him, need not be presented for payment.

Cited in reference note in 73 A. D. 203, as to whether demand is necessary on non-negotiable note.

Cited in note in 8 A. D. 404, on necessity of averring and proving demand in action on bill payable in particular place.

— Of order by one corporate officer on another.

Cited in Indiana & I. C. R. Co. v. Davis, 20 Ind. 6, 83 A. D. 303, holding it unnecessary.

Place of demand.

Cited in Commercial Nat. Bank v. Chicago, M. & St. P. R. Co. 45 Wis. 172, holding in an action upon a demand payable at a particular place and not elsewhere it is not necessary for the plaintiff to show a demand at the place named.

Frivolous pleading.

Cited in Goldstein v. Krause, 2 Idaho, 294, 13 Pac. 232, holding an answer taking issue only on an immaterial issue of the complaint is frivolous.

Negotiability of note payable in specific articles.

Cited in reference note in 71 A. D. 731, on non-negotiability of note payable in specific articles.

69 AM. DEC. 609, CHENEY v. ARNOLD, 15 N. Y. 345.

Common law marriage.

Cited in Applegate v. Applegate, 45 N. J. Eq. 116, 17 Atl. 293; Van Tuyl v. Van Tuyl, 8 Abb. Pr. N. S. 5, 57 Barb. 235; Vincent v. Vincent, 16 Daly, 534, 17 N. Y. Supp. 497; Bissell v. Bissell, 7 Abb. Pr. N. S. 16, 55 Barb. 325; People ex rel. Public Charities & C. Comrs. v. Bartholf, 24 Hun, 274; Lorimer v. Lorimer, 124 Mich. 631, 83 N. W. 609; Hutchins v. Kimmell, 31 Mich. 126, 18 A. R. 164,— holding where parties agree presently to take each other for husband and wife, whatever the form of ceremony, or if all ceremony be dispensed with, and from that time live professedly in that relation, it is a valid marriage.

Cited in reference notes in 91 A. D. 203, on contracts of marriage per verba de præsenti and per verba de futuro; 17 A. S. R. 798, on what constitutes marriage.

Cited in notes in 11 L.R.A. 587, on form necessary to validity of contract of marriage; 17 E. R. C. 175, on validity of common-law marriage.

— Future promises to marry.

Cited in Duncan v. Duncan, 10 Ohio St. 181; Peck v. Peck, 12 R. I. 485, 34 A. R. 702; Arnold v. Chesebrough, 7 C. C. A. 508, 20 U. S. App. 87, 58 Fed. 833,— holding promises to marry in future, although followed by cohabitation, do not constitute a marriage so as to render issue legitimate; Re Maher, 204 Ill. 25, 68

Digitized by Google

N. E. 159; Stoltz v. Doering, 112 Ill. 234,—holding in order to render a marriage per verba futuro cum copula valid the copula must be in fulfillment of the agreement to marry or in consummation of such a contract; Holmes v. Holmes, 1 Abb. (U. S.) 525, Fed. Cas. No. 6,638, as to whether in absence of statute declaring mode of contracting a marriage, a contract to marry in future, followed by copulation, amount to marriage in fact.

Cited in reference notes in 2 A. S. R. 118, on effect of promise to marry in future followed by cohabitation to constitute valid marriage; 33 A. S. R. 144, on validity of marriage per verba de futuro followed by cohabitation.

Cited in note in 124 A. S. R. 109, on contract of marriage by agreement to marry in future.

Cohabitation meretricious in its beginning.

Cited in Ahlberg v. Ahlberg, 24 N. Y. Supp. 919, holding marriage will not be presumed from the mere fact that the parties live together where their relations were meretricious in their inception; Caujolle v. Ferrie, 23 N. Y. 90, holding presumption that an intercourse, illicit in its origin, continued to be of that character, may be repelled by contrary presumption in favor of marriage.

Effect of marriage of parents on antenuptial issue.

Cited in note in 13 L.R.A. 277, on effect of subsequent marriage of parents on antenuptial issue.

Effect of a directory statute regulating marriage.

Cited in Carmichael v. State, 12 Ohio St. 553; Mathewson v. Phœnix Iron Foundry, 20 Fed. 281,—holding where statute regulating marriage is directory merely, and does not forbid other marriage contracts, a marriage valid at common law is good in that state.

Nature of marriage contract as distinguished from promise to marry.

Cited in Wade v. Kalbfleisch, 58 N. Y. 282, 16 Abb. Pr. N. S. 104, 17 A. R. 250, as to nature of promise to marry and noncontractual nature of action for breach of same; Marks v. Marks, 108 Ill. App. 371; Cartwright v. McGown, 121 Ill. 388, 2 A. S. R. 105, 12 N. E. 737,—on valid common law marriage distinguished from cases of seduction or sexual intercourse followed by a promise of marriage, or cases where the intercourse is illicit in its inception and known to be such.

Presumption as to law of another state.

Cited in Paine v. Noelke, 54 How. Pr. 333; Henry v. Root, 33 N. Y. 526; McCulloch v. Norwood, 4 Jones & S. 180; Spencer v. Busch, 50 Misc. 284, 98 N. Y. Supp. 690,—holding it will be presumed to be the same as the common law of the state in which the action is pending.

Cited in note in 21 L.R.A. 469, on presumption as to statutes of other states.

69 AM. DEC. 619, THOMAS v. HUBBELL, 15 N. Y. 405, Later appeal in 35 N. Y. 120.

Conclusiveness of judgment against principal upon sureties on bond.

Cited in Stephens v. Shafer, 48 Wis. 54, 33 A. R. 793, 3 N. W. 835; Beauchaine v. McKinnon, 55 Minn. 318, 43 A. S. R. 506, 56 N. W. 1065,—holding judgment on official bond is prima facie evidence against sureties; Thayer v. Clark, 4 Abb. App. Dec. 391, holding in absence of fraud or collusion between administrator and creditor, a surrogate's decree directing the administrator to pay a debt, is conclusive on sureties in administration bond; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859, holding judgment against contractor not conclusive

Digitized by Google

upon sureties on bond who were not parties to the action; Coe v. Patterson, 122 App. Div. 76, 106 N. Y. Supp. 659, holding judgment against receiver in his official capacity not conclusive upon his sureties unless there has been an accounting of the trust fund and the remedies against the receiver have been exhausted; Douglass v. Ferris, 63 Hun, 413, 18 N. Y. Supp. 685, holding judgment against guardian prima facie evidence against sureties; Thomson v. MacGregor, 81 N. Y. 592, on conclusiveness of judgment against principal upon surety who was not party thereto but who expressly covenants to be bound; Skrainka v. Rohan, 18 Mo. App. 340, holding that surety can recover contribution from co-sureties only when compelled to pay debt to common principal.

Cited in reference notes in 40 A. D. 271, on conclusiveness of judgment against one covenanting for result of suit between others; 85 A. D. 131, on binding effect of judgment against principal on sureties where they are not parties.

Disapproved in Shepard v. Pebbles, 38 Wis. 373, holding sureties on guardian's bond for sale of real estate are concluded by the order of the county court on guardian's accounting on amount due from him to ward where guardian was duly cited, whether they appeared at the hearing or not.

— As dependent on notice to defend.

Cited in Cory v. Somerset County, 47 N. J. L. 131, holding ordinary judgments against principal not binding on surety who was not notified; Cornell v. Travelers' Ins. Co. 175 N. Y. 239, 67 N. E. 578 (dissenting opinion); Barton v. Scramling, 31 Hun, 467 (dissenting opinion),—as to judgment against principal being evidence against surety when latter was notified to defend.

Cited in note in 22 A. S. R. 207, on effect of judgment on indemnitor when notice of suit not given.

Distinguished in Conner v. Reeves, 35 Hun, 507, holding that as sureties had entered into an absolute agreement to protect the sheriff against any judgment that might be recovered against him they were concluded by the judgment recovered although they had no notice of the action.

— Sureties on bond for indemnity.

Cited in Bridgeport F. & M. Ins. Co. v. Wilson, 7 Bosw. 427, holding in bond for indemnity for actual damage only judgment against principal not evidence against indemnitors; Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275, holding judgment against principal on indemnity bond only prima facie evidence against surety.

Distinguished in Fay v. Ames, 44 Barb. 327, holding where parties join in bond of indemnity as principal and sureties a judgment against one is a judgment against all.

— Sureties on sheriffs' or constables' bonds.

Cited in Berry v. Schaad, 50 App. Div. 132, 63 N. Y. Supp. 349, holding judgment against constable not evidence against his sureties; New York v. Ryan, 9 Daly, 316, holding under statute judgment against constable established his liability in action against surety on bond; People ex rel. Tuthill v. Russell, 25 Hun, 524, holding judgment against sheriff on his official bond is not admissible as evidence in an action against sureties.

Cited in notes in 45 L.R.A. 184, on effect against surety on official bond of judgment against deputy officer; 52 L.R.A. 167, as to when judgment recovered in action against officer is not evidence against surety on official bond.

Distinguished in Crawford v. Turk, 24 Gratt, 176, holding under conditions

Digitized by Google

of bond judgment against sheriff for failure of deputy conclusive evidence against surety.

Judgment against superior as conclusive against deputy's sureties.

Cited in notes in 83 A. D. 387, on conclusiveness of judgment against officer for misconduct of deputy on sureties of deputy; 52 L.R.A. 185–186, as to when judgment against officer is prima facie evidence in action on bond of deputy officer.

Estoppel of sureties by privity to principal.

Cited in Ohning v. Evansville, 66 Ind. 59, holding sureties are not estopped by entries made by principal; Cooke v. Odd Fellows' Fraternal Union, 49 Hun, 23, 1 N. Y. Supp. 498, holding surety upon contractor's bond not bound by award of arbitrators determining damages for delay it not being stipulated in building contract that such damages should be submitted to arbitration.

Right of person not party to action to impeach judgment contravening his rights.

Cited in Sidensparker v. Sidensparker, 52 Me. 481, 83 A. D. 527, holding he may do so whenever it has been obtained by fraud or collusion, or when the court rendering it had no jurisdiction, or when unlawfully entered upon; Wilson v. Davol, 5 Bosw. 619; National F. Ins. Co. v. McKay, 5 Abb. Pr. N. S. 445, 1 Sheldon, 138,—holding judgment is not conclusive as res adjudicata upon one who is neither a party nor privy; Miller v. White, 50 N. Y. 137, holding judgment against corporations not binding on trustees; Tyng v. Clarke, 9 Hun, 269 (dissenting opinion), as to conclusiveness of judgment in favor or against a corporation upon trustees.

69 AM. DEC. 623, NOLTON v. WESTERN R. CORP. 15 N. Y. 444.

Who are passengers.

Cited in Buffett v. Troy & B. R. Co. 40 N. Y. 168, holding one taking his seat in railroad car for transportation becomes a passenger although he has bought no ticket.

Cited in note in 2 L.R.A. 166, as to who are passengers.

— Mail clerks and express messengers.

Cited in Chesapeake & O. R. Co. v. Patton, 23 App. D. C. 113, holding railway mail clerk is a passenger for hire; Pennsylvania R. Co. v. Price, 96 Pa. 256, 38 Phila. Leg. Int. 23, 11 Pittsb. L. J. N. S. 197; Yarrington v. Delaware & H. Co. 143 Fed. 565,—holding under statute of Pennsylvania railway mail clerk is not a passenger; Brewer v. New York, N. H. & H. R. Co. 124 N. Y. 59, 21 A. S. R. 647, 11 L.R.A. 483, 26 N. E. 324; Voight v. Baltimore & O. S. W. R. Co. 79 Fed. 561,—holding express messenger carried under contract with express company passenger for hire.

Cited in note in 61 A. S. R. 99, on mail agents or postal clerks as passengers.

— Ticket as evidence of contract.

Cited in Ripley v. New Jersey R. & Transp. Co. 31 N. J. L. 388, as to ticket being evidence of contract.

Cited in reference notes in 81 A. D. 338; 90 A. D. 680; 82 A. D. 290,—on payment of fare as affecting liability of carrier of passengers.

Foundation of duty of carrier.

Cited in Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 A. R. 221; Whitehouse v. Grand Trunk R. Co. 2 Haskell, 189, Fed. Cas. No. 17,565,—holding

Digitized by Google

it rests upon obligation of law and not upon contract; Sanford v. American Dist. Teleg. Co. 13 Misc. 88, 34 N. Y. Supp. 144; Boniface v. Relyea, 5 Abb. Pr. N. S. 259, 6 Robt. 397, 36 How. Pr. 457; Wells v. New York C. R. Co. 24 N. Y. 181 (dissenting opinion),—on same point.

Liability of carriers for injuries.

Cited in reference notes in 75 A. D. 106, on liability of passenger carriers for negligence; 75 A. D. 310, on extent of railroad company's duty to prevent accidents.

Cited in note in 5 L.R.A.(N.S.) 722, on degree of care owed to passenger in absence of stipulation upon the subject.

— To passengers carried free.

Cited in Siegrist v. Arnot, 10 Mo. App. 197, holding it is bound to exert the measure of care and skill appropriate to the employment; Higley v. Gilmer, 3 Mont. 90, 35 A. R. 450, holding ordinary care only is required toward "dead heads" and trespassers; Flint & P. M. R. Co. v. Weir, 32 Mich. 111, 26 A. R. 499, as to degree of care required of carriers in transporting free passengers; Perkins v. New York C. R. Co. 24 N. Y. 196, 82 A. D. 281; Bissell v. Michigan S. & N. I. R. Co. 22 N. Y. 258,—as to liability of carrier to persons riding free; Littlejohn v. Fitchburg R. Co. 148 Mass. 478, 2 L.R.A. 502, 20 N. E. 103, as to liability of carrier to child riding free.

Cited in reference notes in 75 A. D. 789, on liability of carrier for injury to person carried gratuitously; 80 A. D. 52, on carrier's liability for negligent injury to free passenger.

Cited in note in 2 L.R.A. 522, on liability of carrier where service is gratuitous.

— To one neither passenger nor employee.

Cited in reference notes in 85 A. D. 412, on liability of railroad to one neither passenger nor employee for injury; 87 A. D. 607, on liability of passenger carrier for injury to trespasser or one not employee or servant; 90 A. D. 55, on liability of railroad for injury to one neither passenger nor employee.

— Care due towards mail clerks and express messengers on train.

Cited in Houston & T. C. R. Co. v. Hampton, 64 Tex. 427; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 A. R. 75,—holding railroad owes same degree of care to mail agents riding in postal cars in charge of mails as it does to passengers; Blair v. Erie R. Co. 66 N. Y. 313, 23 A. R. 55, holding same rule applies to express messengers; Carpenter v. Boston & A. R. Co. 97 N. Y. 494, 49 A. R. 540, as to liability of carrier for injury to mail clerk.

Cited in reference note in 47 A. R. 84, on carrier's duty to railway mail agent.

Cited in note in 19 L.R.A. 340, on liability of railroad company for injury received by postal clerk on train.

Contract to carry mails as inuring to mail clerk.

Cited in Seybolt v. New York, L. E. & W. R. Co. 31 Hun. 100 (dissenting opinion), as to right of mail clerk or representatives to avail himself of contract between government and carrier in action against carrier for injuries or death.

Limitation of carrier's liability.

Cited in notes in 82 A. D. 292, on exemption of passenger carrier from liability by contract; 5 A. S. R. 728, on notices restricting liability of carriers of passengers for tort or negligence.

Digitized by Google

To free passengers.

Cited in Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 A. R. 360, 31 Phila. Leg. Int. 277, holding carrier liable to one riding on free pass with conditions on the back thereof exempting it from liability, for injuries received through its gross negligence; Kinney v. Central R. Co. 34 N. J. L. 513, 3 A. R. 265, holding contract that in consideration of free passage a passenger will assume the risk of injuries to his person from the negligence of the servants of the railroad company, is valid; Smith v. New York C. R. Co. 29 Barb. 132, holding stipulation on back of drover's pass providing that persons riding free to take charge of stock do so at their own risk or personal injury from whatever cause did not exempt carrier from liability for gross negligence or for want of ordinary care; Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 A. R. 362; Pennsylvania R. Co. v. Henderson, 51 Pa. 315, 23 Phila. Leg. Int. 284,—holding stipulation on back of drover's pass exempting carrier from liability for injury to person or property did not exempt carrier from liability for injury to person caused by its negligence; Ashmore v. Pennsylvania Steam Towing & Transp. Co. 28 N. J. L. 180, on the disability of a carrier to contract against his own negligence.

Liability of carrier transporting baggage free.

Cited in Flint & P. M. R. Co. v. Weir, 37 Mich. 111, 26 A. R. 499, holding it held to no greater diligence than any other gratuitous bailee.

Distinguished in Burkett v. New York C. & H. R. R. Co. 24 Misc. 76, 53 N. Y. Supp. 394, holding carrier not liable for theft of trunk whose carriage was procured by fraud.

Rights at railroad grade crossings.

Cited in reference note in 90 A. D. 60, on relative rights of railroad company and travelers at grade crossings.

Necessity of pleading degrees of negligence.

Cited in Rockford, R. I. & St. L. R. Co. v. Phillips, 66 Ill. 548; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 A. R. 719; Louisville & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. 706,—holding them a matter of proof and not of averment.

Cited in note in 69 L. R. A. 610–611, on recovery of allegation of ordinary negligence on proof of wilful or gross negligence.

Pleading conclusions.

Cited in Lyons v. New York C. & H. R. R. Co. 39 Hun, 385, holding that engineer of train was intoxicated may be shown under allegation that he was incompetent; Hanselman v. Carstens, 60 Mich. 187, 37 N. W. 18; Grinde v. Milwaukee & St. P. R. Co. 42 Iowa, 376,—holding while mere abstract conclusions of law cannot be pleaded, yet allegations which combine the elements of such conclusions and also of fact may.

Standard of care required of licensor or gratuitous bailee.

Cited in West v. Poor, 196 Mass. 183, 124 A. S. R. 541, 11 L.R.A.(N.S.) 936, 81 N. E. 960, holding them only liable for culpable negligence; Edwards v. New York & H. R. Co. 98 N. Y. 245, 50 A. R. 659 (dissenting opinion), on duty owing by proprietors of places to which general public is invited.

Correlation of care to danger.

Cited in Sawyer v. Hannibal & St. J. R. Co. 37 Mo. 240, 90 A. D. 382, as to degree of care required being in proportion to nature, difficulty and peril of the business.

Digitized by Google

Negligence in failing to exercise care.

Cited in New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, as to its being actionable.

Gross negligence.

Cited in McGrath v. Hudson River R. Co. 19 How. Pr. 211, 32 Barb. 144; Phillips v. Rensselaer & S. R. Co. 57 Barb. 644,—holding what is gross negligence depends upon the particular circumstances of each case.

69 AM. DEC. 629, STOREY v. BRENNAN, 15 N. Y. 524.

Recovery of money lost at gaming.

Cited in Hendrickson v. Beers, 6 Bosw. 639, holding one who loses money at play may assign his claim against the winner of the money and action will lie against the latter at suit of such assignee.

Cited in reference note in 78 A. D. 548, on validity of note for money won at gaming.

Recovery of money from stakeholder.

Cited in Mahony v. O'Callaghan, 6 Jones & S. 461, holding under statute if money has been paid over by stakeholder with authority and consent of depositor it may be recovered in action by latter against stakeholder; Lewy v. Crawford, 5 Tex. Civ. App. 293, 23 S. W. 1041, holding where parties have placed wager on election in hands of stakeholder either party has the right to recover the money from stakeholder before election, or when notice has been given the stakeholder of the disaffirmance before he pays the money to the winner; Hensler v. Jennings, 62 N. J. L. 209, 41 Atl. 918, as to whether payment to winner with unconditional consent of loser will relieve stakeholder.

Cited in reference note in 89 A. D. 603, as to whether money may be recovered back from stakeholder's hands.

Construction of statute permitting recovery of money lost at gaming.

Cited in Luetchford v. Lord, 132 N. Y. 465, 30 N. E. 859 (reversing 57 Hun, 572, 11 N. Y. Supp. 597), holding that it is to be construed so as to accomplish as far as possible, the suppression of gambling; Kennealy v. Leary, 67 N. J. L. 435, 51 Atl. 475, as to statute providing for recovery of money lost at gaming being a remedial statute.

Instructions assuming hypothesis at variance with fact.

Cited in Holmes v. Boydston, 1 Neb. 346; MacGowan v. Duff, 14 Daly, 315; Mark v. Hudson River R. Co. 56 How. Pr. 108; Jones v. John Kroder & Henry Reubel Co. 95 App. Div. 140, 18 N. Y. Supp. 870; Brown v. Manhattan R. Co. 105 App. Div. 395, 94 N. Y. Supp. 190; Dean v. Tarrytown, W. P. & M. R. Co. 113 App. Div. 437, 99 N. Y. Supp. 250; Decker v. Sexton, 19 Misc. 59, 43 N. Y. Supp. 167; Spaulding v. Chicago & N. W. R. Co. 33 Wis. 582; Jackson v. Odell, 9 Daly, 371,—holding submission to the jury of a question of fact for a finding if there is no sufficient evidence of such fact, is erroneous; Rouse v. Lewis, 2 Keyes, 352, 4 Abb. App. Dec. 121, holding where there was no evidence to warrant jury finding a waiver of the conditions of an agreement, the court was not bound to instruct them as to the legal effect of such waiver.

Cited in notes in 72 A. D. 541, on giving abstract instructions; 13 L.R.A. 272, on nature and scope of judge's charge.

Direction of verdict.

Cited in reference notes in 90 A. D. 438, on instructing jury to find that a

Digitized by Google

material fact is not proved; 95 A. D. 567, on court's duty to instruct jury that there is no evidence to support issue; 32 A. S. R. 213, as to when verdict may be directed; 72 A. S. R. 676, on direction of verdict.

Cited in note in 4 L.R.A. 777, on practice as to directing verdicts.

Duty of court to order non-suit.

Cited in Liddle v. Hodges, 2 Bosw. 537, holding when the court sees that a verdict against the defendant would be without evidence, it is duty of court to order non-suit.

Errors reviewable on case made.

Cited in Brush v. Kohn, 14 Abb. Pr. 51, holding misdirection by the judge may be so brought up.

69 AM. DEC. 632, PARTRIDGE v. GILBERT, 15 N. Y. 601.

Ownership in party walls and land supporting them.

Cited in National Commercial Bank v. Gray, 71 Hun, 295, 24 N. Y. Supp. 997; Cutting v. Stokes, 72 Hun, 376, 25 N. Y. Supp. 365; Dauenhauer v. Devine, 51 Tex. 480, 32 A. R. 627; Ingals v. Plamondon, 75 Ill. 118,—holding land covered by party wall remains the several property of the owner of each half, but the title of each owner is qualified by the easement to which the other is entitled of supporting his building by means of the half of the wall belonging to his neighbor; Hendricks v. Stark, 37 N. Y. 106, 93 A. D. 549, 4 N. Y. Trans. App. 146, as to central line of party wall being boundary between adjoining premises.

Cited in reference note in 50 A. S. R. 95, on party walls.

Cited in notes in 92 A. D. 290; 89 A. S. R. 928,—on how party wall created.

Right or duty to rebuild party wall.

Cited in Reynolds v. Fargo, 1 Sheldon, 531, holding in absence of any covenant creating the obligation, neither party is bound to rebuild it; Fleming v. Cohen, 186 Mass. 323, 104 A. S. R. 572, 71 N. E. 563, on right of either party to rebuild party wall when necessary.

Cited in reference note in 44 A. S. R. 304, on right to rebuild party walls.

Cited in notes in 92 A. D. 293, on performance of work upon party wall; 89 A. S. R. 933-935, on right of owner of party wall to remove, rebuild, or repair.

Right to take down deficient or unsafe party wall.

Cited in American Tube & Iron Co. v. Maypole, 44 Ill. App. 494, holding when right to take down party wall, because it has become unsafe, exists, the party who takes it down without the consent of the other must exercise reasonable care to do his neighbor no unnecessary harm, and must furnish support in place of wall; Partridge v. Lyon, 67 Hun, 29, 21 N. Y. Supp. 848, holding one owner cannot remove and rebuild wall unless it is unsafe; Schile v. Brokhahus, 80 N. Y. 614; Crawshaw v. Sumner, 56 Mo. 517,—holding when party wall becomes ruinous or dangerous either party may rebuild it; Dowling v. Hennings, 20 Md. 179, 83 A. D. 545, holding that the uninterrupted enjoyment and use of alley and alley walls for the period shown by the evidence raises the presumption of mutual grants for such enjoyment and that one owner of wall had no authority to interfere with alley or walls without consent of the other unless he could do so without injury to possession of the other; Hieatt v.

Digitized by Google

Morris, 10 Ohio St. 523, 78 A. D. 280, as to right of one owner to remove party wall.

Cited in reference note in 78 A. D. 285, on rebuilding dilapidated party wall by one owner.

Cited in note in 89 A. S. R. 937, on destruction of party wall.

Contributory cost and expense of party wall.

Cited in Sanders v. Martin, 2 Lea, 213, 31 A. R. 598, holding one owner who has made additions to wall for his own convenience, is entitled to contributions from co-owner, who afterwards uses the additions, to extent of one-half the value of the additions at time they are thus used; Cole v. Hughes, 54 N. Y. 444, 13 A. R. 611, holding that agreement to compensate cost and expense of party wall does not run with land where no privity of estate exists or is created between parties; Antomarchi v. Russell, 63 Ala. 356, 35 A. R. 40, on contribution between adjacent proprietors.

Cited in notes in 66 L.R.A. 697, on enforcement of obligation to contribute to cost of party walls, by or against grantees or successors in title, based on theory of implied equitable lien or charge; 66 L.R.A. 706, on enforcement by or against grantees or successors in title of noncontractual obligation to contribute to cost of party wall erected against nonbuilder's wish.

Easements appurtenant to party wall.

Cited in Kerwin v. Post, 120 App. Div. 179, 104 N. Y. Supp. 1005, holding that easement of each proprietor in party wall ceases with existence of state of things which created it; Heartt v. Kruger, 121 N. Y. 386, 18 A. S. R. 829, 9 L.R.A. 135, 24 N. E. 841 (affirming 24 Jones & S. 382, 5 N. Y. Supp. 192); Hoffman v. Kuhn, 57 Miss. 746, 34 A. R. 491; Moore v. Shoemaker, 10 App. D. C. 6,—holding right to lateral support exists only so long as the wall continues to be sufficient for the purpose of mutual support and the buildings remain in a condition to require the support.

Cited in note in 19 L.R.A.(N.S.) 885, on effect of destruction of building to terminate adjoining owner's easement of support.

Rights in use of party wall.

Cited in Normile v. Gill, 159 Mass. 427, 38 A. S. R. 441, 34 N. E. 543, holding owner of land in building party wall has no right to leave opening in wall for windows; DeBaun v. Moore, 22 App. Div. 485, 48 N. Y. Supp. 16, holding where two persons severally acquire from common grantor adjoining premises separated by party wall which contains windows overlooking premises of one grantee, the latter, who knew of the existence of the windows at time he took the title cannot compel other grantee to close windows, unless their existence deprives him of beneficial use of wall to which he is entitled; Nash v. Kemp, 12 Hun, 592 (affirming 49 How. Pr. 522), holding one proprietor had no right to erect building so as to cover front of party wall; Moody v. McClelland, 39 Ala. 45, 84 A. D. 770, as to right of part owner to have his house supported by party wall.

Right to raise party wall.

Cited in Everett v. Edwards, 149 Mass. 588, 14 A. S. R. 462, 5 L.R.A. 110, 22 N. E. 52, holding one owner of party wall may build it to a greater height to support an addition to his building doing no injury to his co-owner; Brooks v. Curtis, 50 N. Y. 639, 10 A. R. 545, holding one proprietor has right to increase

Digitized by Google

height of party wall but in making such addition he acts at his peril and if injury results to adjoining proprietor he is liable.

Party wall as easement or incumbrance.

Cited in Schaefer v. Blumenthal, 169 N. Y. 221, 62 N. E. 175; Hendricks v. Stark, 37 N. Y. 106, 93 A. D. 549, 4 N. Y. Trans. App. 146,—holding a party wall cannot be deemed a legal incumbrance upon property; Corn v. Bass, 43 App. Div. 53, 59 N. Y. Supp. 315, holding party wall agreement constitutes an incumbrance when it provides for the repair and rebuilding of the wall at the joint expense of the parties.

Lateral support.

Cited in Briggs v. Klosse, 5 Ind. App. 129, 51 A. S. R. 238, 31 N. E. 208, holding right of lateral support is easement and if one owner interferes with it for purpose of making improvements on his own lot without consent of other owner, so as to injure others building, he is liable.

Cited in notes in 25 A. D. 527, on right of lateral support; 33 A. S. R. 456, on rights of lateral support for buildings acquired by grant.

Mutual easements.

Cited in Dillman v. Hoffman, 38 Wis. 559, holding where easements are mutual neither party can insist upon easement in the estate of the other, and at the same time obstruct easement on his own estate.

— Support of buildings.

Cited in Pierce v. Dyer, 109 Mass. 374, 12 A. R. 716, holding there is no implied obligation between owners of distinct parts of a building, which will enable either to maintain an action against the other for mere refusal and neglect to repair his tenement, whereby plaintiff's part is injured; Jackson v. Bruns, 129 Iowa, 616, 3 L.R.A.(N.S.) 510, 106 N. W. 1, holding owner of second story of building in absence of contract has no equitable right to compel owner of first story to repair his foundation and walls for purpose of furnishing support for second story, where the defective condition was caused by natural deterioration due to elements and not the fault of the owner; Shirley v. Crabb, 138 Ind. 200, 46 A. S. R. 376, 37 N. E. 130, as to whether mutual easements for perpetual support applies to future structures.

Right to use of one's own property.

Cited in notes in 8 L.R.A. 809, on right to use of one's own property; 53 A. D. 369, on injuries to another's property through use of one's own.

69 AM. DEC. 642, PEOPLE v. McCANN, 16 N. Y. 58.

Constitutionality of statutes embracing more than one subject or subjects not expressed in the title.

Cited in Murray v. New York, 11 Jones & S. 164, holding under constitution local statute which embraces more than one subject is void; People ex rel. Schenectady Astronomical Observatory v. Allen, 42 N. Y. 404; People ex rel. Pratt v. Brooklyn, 13 Abb. Pr. N. S. 121,—holding under constitution the subject of a local statute must be expressed in the title; Richards v. Richards, 76 N. Y. 186; Fall Brook Coal Co. v. Lynch, 47 How. Pr. 520,—holding constitutional provision requiring subject matter of act to be expressed in title only applied to local or special acts; Robert v. Kings County, 3 App. Div. 366, 38 N. Y. Supp. 521, holding provision of constitution prohibiting acts embracing more than one subject restricted to legislature and did not apply to resolution of

Digitized by Google

board of supervisors; State v. Young, 47 Ind. 150 (dissenting opinion), as to purpose of section of constitution requiring subject matter of act to be expressed in title.

Cited in reference notes in 71 A. D. 359, on constitutionality of statutes containing provisions not embraced in title; 73 A. D. 217, on necessity that statute relate to but one subject which shall be expressed in its title; 74 A. D. 534, on validity of statutes embracing subjects not expressed in title; 82 A. D. 110, on constitutional provision that act of legislature shall embrace but one subject and that expressed in the title; 90 A. D. 284, on constitutional requirement as to subject and title of statute; 21 A. S. R. 149, on correspondence between title and body of act; 41 A. S. R. 311, on expression of subject of statute in title; 41 A. S. R. 311, on reference to title in construction of statute.

Cited in note in 61 A. D. 343-346, as to when statutes are constitutional or unconstitutional under provision that they shall contain but one subject to be expressed in the title.

—General provisions in local law.

Cited in People ex rel. Akin v. Morgan, 65 Barb. 473, 1 Thomp. & C. 101, holding when a local or private bill contains provisions which apply to whole state, the act is valid although the title does not refer to such provisions; Ferguson v. Ross, 126 N. Y. 459, 27 N. E. 954, holding general provision inserted in an act containing local provisions is valid whether the subject is expressed in the title or not; Williams v. People, 24 N. Y. 405, as to validity of act local in many of its provisions but public in its motives and object.

Distinguished in People ex rel. Lee v. Chautauqua County, 43 N. Y. 10, holding joining of two subjects in a bill, one public or general, and the other private or local, will not save private matter bill from conflicting with clause of constitution which prohibits a private bill from embracing more than one subject.

—Sufficiency of title.

Cited in Barton v. Pittsburg, 4 Brewst. (Pa.) 373, 3 Pittsb. 242, 18 Pittsb. L. J. 44, 2 Legal Gaz. 321; Alexander v. Bennett, 6 Jones & S. 492,—holding it is only necessary that the title express the subject of the act and not its provisions; People ex rel. Crowell v. Lawrence, 41 N. Y. 137, holding bill for changing steam underground to surface railway and for compensation to persons injured was not double in its subject; Ballentyne v. Wickersham, 75 Ala. 533, holding act to establish inferior court of general jurisdiction for Mobile County, and to define jurisdiction of said court, and the criminal jurisdiction of justices of the peace in said county expressed in title and contained in body two distinct and independent subjects and was in violation of constitution; State v. Miller, 45 Mo. 495, holding "an act to prevent issue of false receipts or bills of lading and to punish transfers of property by warehousemen, wharfingers and others" is sufficiently in conformity with constitution; Smith v. New York, 34 How. Pr. 508, holding act providing that mayor etc., of the City of New York shall not be liable upon any contract or expenditures etc., made by any board or officer of the corporation, not expressly authorized by that act void as embracing subject not contained in title of the act; Central Crosstown R. Co. v. Twenty-third Street R. Co. 54 How. Pr. 168, holding statute which embodies various different provisions relating to a common subject and having a natural although not necessary connection therewith and with each other and which by its title so designates the subject of the entire enactment as that neither the legislature or public is likely to be misled is valid; Baldwin v. New York, 2 Keyes, 387,

Digitized by Google

as to degree of particularity with which title of an act must express its subject.

Cited in note in 64 A. S. R. 106, on sufficiency of title of statutes.

Amendment of statute by mere reference to title.

Cited in reference note in 12 A. S. R. 695, on amendment of statute by mere reference to title in amending act.

Public and local or special laws.

Cited in People v. Davis, 61 Barb. 456, holding law which affects public generally and in which they are interested is a public law; People v. O'Brien, 38 N. Y. 193, holding any law limited to any particular locality is local; State ex rel. Berry v. Shields, 4 Mo. App. 259, holding law creating an office and prescribing the duties of the officer whose services are to be rendered in and form a part of the administration of the laws of the state and affect equally all who come within their range, is neither "local" or "special" within meaning of the constitution; People ex rel. Bradley v. Stevens, 51 How. Pr. 103, 2 Abb. Pr. N. S. 348, holding act which transferred from mayor and aldermen of city to members of water board the power to fill vacancies in said board a local law; People ex rel. McConvill v. Hills, 35 N. Y. 449, holding "an act to amend and consolidate the several acts relating to the city of Rochester" is a local act; Fellows v. New York, 8 Hun, 484, holding act fixing salaries of officers in particular county local act; Macomber v. New York, 17 Abb. Pr. 35, as to whether act allowing comptroller of New York City to take measures in name of city to reverse or modify judgments against latter which he has reason to believe were obtained by fraud or collusion, is a local bill within meaning of constitution; Bretz v. New York, 4 Abb. Pr. (N.S.) 258, 35 Pr. 130, 6 Robt. 325, holding act local in its general provisions may contain a section public in its character; Richards v. Richards, 14 Hun, 25, as to placing of a general law in a private bill making the act public.

How character of a statute is to be determined.

Cited in People v. O'Brien, 111 N. Y. 1, 7 A. S. R. 684, 2 L.R.A. 255, 18 N. E. 692; McLain v. New York, 3 Daly, 32; People v. Molyneux, 40 N. Y. 113; Goodrich v. Russell, 42 N. Y. 117; Northern Counties Trust v. Sears, 30 Or. 388, 35 L.R.A. 188, 41 Pac. 931; Berges v. Milwaukee, County, 116 Wis. 191, 93 N. W. 44; Pumpelly v. Owego, 45 How. Pr. 219,—holding character of act is to be determined by its provision and not by its title.

Cited in reference note in 38 A. S. R. 301, on construction of statute.

Validity of act when part of same is unconstitutional.

Cited in Re De Vaucene, 31 How. Pr. 289; Hurlburt v. Banks, 1 Abb. N. C. 157, 52 How. Pr. 196,—holding remainder of act may stand if defective provision is not so identified with the general scheme, that its elimination overthrows the plan.

Cited in reference note in 91 A. D. 269, on rule that act void in part is not necessarily void in toto.

— General law containing void local provisions.

Cited in Lewenthal v. New York, 61 Barb. 511, 5 Lans. 532, holding law may be both general and local and may be void as to local provisions and valid as to general; Alexander v. Bennett, 6 Jones & S. 492, holding general provisions of statute not void because it contained some local provisions the subject of which was not expressed in title of the act; Re New York Elev. R. Co. 7 Hun, 239,

Digitized by Google

as to law being void as regards its local applications and valid as to its general ones.

Review of errors not objected to at trial.

Cited in People v. Driscoll, 107 N. Y. 414, 14 N. E. 305, 8 N. Y. Crim. Rep. 455, holding court is not bound to reverse for such errors, and is only authorized to do so, in its discretion, where it appears affirmatively from the whole case, that injustice has been done to accused in result arrived at by the trial court; Ostrander v. People, 28 Hun, 38, holding upon writ of error to review a trial and conviction had in oyer and terminer the general term can only consider such questions as were raised by exceptions duly taken in the court below.

Cited in note in 99 A. D. 132, on time when objection to instructions should be taken.

Distinguished in Brotherton v. People, 14 Hun, 486, holding that except as provided by statute an exception below is necessary.

Burden of proof in criminal actions.

Cited in Glover v. United States, 77 C. C. A. 450, 147 Fed. 426, 8 A. & E. Ann. Cas. 1187, holding instruction that in respect to alibi burden of proof shifted to defendant, error; People v. Hill, 49 Hun, 432, 3 N. Y. Supp. 564, holding burden of proving that the killing was neither justifiable nor excusable remains with the people throughout the case; Pollard v. State, 53 Miss. 410, 24 A. D. 703, as to shifting of burden of proof in criminal cases.

Insanity as defense to crime.

Cited in notes in 80 A. D. 163; 81 A. D. 383,—on insanity as defense to crime.

Burden of proof in respect to insanity in criminal actions.

Cited in King v. State, 9 Tex. App. 515, holding burden of proving sanity was on state; People v. Garbutt, 17 Mich. 9, 97 A. D. 152, holding prosecution may rest upon presumption that accused was sane until it is overcome by defendant's evidence; People v. Waltz, 50 How. Pr. 204, as to burden of proof of insanity in criminal cases; People v. Dillon, 8 Utah, 92, 30 Pac. 150 (dissenting opinion), as to burden of proof of insanity.

Cited in reference notes in 69 A. D. 650, on burden and sufficiency of proof respecting insanity in criminal cases; 83 A. D. 239, on burden of proof of sanity when insanity is pleaded as defense to crime; 86 A. D. 123, on burden and sufficiency of proof where insanity is set up as defense to crime.

Cited in notes in 36 A. D. 410, on burden of proof where insanity set up as defense; 97 A. D. 178; 76 A. S. R. 96,—on burden of proof as to insanity set up as an excuse for crime.

Disapproved in State v. Felter, 32 Iowa, 49; State v. Klinger, 43 Mo. 127; Boswell v. Com. 20 Gratt. 860; State v. Lewis, 20 Nev. 333, 22 Pac. 241; State v. Strauder, 11 W. Va. 745, 27 A. R. 606; People v. Walter, 1 Idaho, 386,—holding burden of proof to establish insanity is on defendant.

— In civil actions.

Cited in Perkins v. Perkins, 39 N. H. 163, holding in the proof of a will the presumption of sanity is sufficient to support the will till some evidence to the contrary is offered.

Application of reasonable doubt rule to defensive issues.

Cited in People v. Riorden, 117 N. Y. 71, 22 N. E. 455, holding the rule that defendant is entitled to the benefit of a reasonable doubt applies not only to

Digitized by Google

the case made by the prosecution but to any defense interposed; State v. McCluer, 5 Nev. 132, holding accused entitled to benefit of reasonable doubt, however arising; People v. Willett, 36 Hun, 500, 3 N. Y. Crim. Rep. 324, holding a reasonable doubt as to any element of the crime entitles the prisoner to an acquittal.

Cited in note in 39 L.R.A. 743–745, on reasonable doubt of insanity in criminal cases.

Distinguished in Patterson v. People, 46 Barb. 625, holding where killing is proved and there is no doubt as to the identity of the prisoner he must prove his justification beyond a reasonable doubt.

Sufficiency of proof of defense to crime.

Cited in State v. Pierce, 8 Nev. 291; Territory v. Edmonson, 4 Mont. 141, 1 Pac. 738,—holding matters of justification, excuse or mitigation should be proven by a preponderance of testimony.

Cited in reference note in 26 A. S. R. 74, on duty of accused to show insanity beyond a reasonable doubt.

Cited in note in 39 L.R.A. 737, on proof of insanity in criminal cases beyond reasonable doubt.

Doubted in People v. Schryver, 42 N. Y. 1, 1 A. R. 480, 1 Cowen, Crim. Rep. 188; holding justification must be established by prisoner by preponderance of evidence.

Quantum of proof required as to sanity of accused.

Cited in Davis v. United States, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353, holding verdict of guilty cannot properly be returned if jury entertain a reasonable doubt as to sanity of defendant; Hodge v. State, 26 Fla. 11, 7 So. 593, holding instruction that defendant must prove insanity beyond a reasonable doubt, error; State v. Shuff, 9 Idaho, 115, 72 Pac. 664, holding it error to instruct jury that defendant must prove insanity by preponderance of evidence; People v. Coffman, 24 Cal. 230, holding defendant must establish his insanity by such a preponderance of evidence that if the single issue of sanity or insanity of the defendant was submitted to the jury in a civil case, they would find that he was insane; Hopps v. People, 31 Ill. 385, 83 A. D. 231, holding if upon the whole evidence, the jury entertain a reasonable doubt as to sanity of defendant, they must acquit; State v. Bartlett, 43 N. H. 224, 80 A. D. 154; People v. Nino, 149 N. Y. 317, 43 N. E. 853, 12 N. Y. Crim. Rep. 228; People v. Egnor, 175 N. Y. 419, 67 N. E. 906, 17 N. Y. Crim. Rep. 388; Cunningham v. State, 56 Miss. 269, 31 A. R. 360,—holding whenever the question of sanity is put in issue the state must establish the sanity of the prisoner beyond all reasonable doubt arising out of all the evidence in the case; Polk v. State, 19 Ind. 170, 81 A. D. 382; State v. Crawford, 11 Kan. 32,—holding if there be a reasonable doubt as to defendant's sanity he must be acquitted; Walker v. People, 88 N. Y. 81, 1 N. Y. Crim. Rep. 7 (affirming 26 Hun, 67), holding instruction that "to establish a defense of insanity it must be clearly proved" accompanied with an instruction that if the testimony satisfied the jury beyond a reasonable doubt of guilt of prisoner they should convict, not error; Flanagan v. People, 52 N. Y. 467, 11 A. R. 731, 1 Cowen, Crim. Rep. 523, as to necessity of proving defendant's insanity beyond a reasonable doubt.

Disapproved in Kelch v. State, 55 Ohio St. 146, 60 A. S. R. 680, 39 L.R.A. 737, 45 N. E. 6, holding defendant must establish insanity by a preponderance of evidence, but should be held to no higher degree of proof.

Digitized by Google

Meaning of "burden of proof."

Cited in Prince v. St. Louis Cotton Compress Co. 112 Mo. App. 49, 86 S. W. 873, holding it means an obligation imposed on the party who alleges the existence of the fact or thing necessary in prosecution or defense of an action to establish it by proof; Siefke v. Siefke, 3 Misc. 81, 22 N. Y. Supp. 546 (dissenting opinion), as to definition of "burden of proof."

Burden of proof in civil actions.

Cited in Kay v. Metropolitan Street R. Co. 163 N. Y. 447, 57 N. E. 751, holding it is at all times upon the plaintiff.

Harmless error.

Cited in Gardiner v. People, 6 Park. Crim. Rep. 155, holding judgment against a prisoner will not be reversed for a technical error which did not affect the merits of the case to his prejudice; People v. Gonzalez, 35 N. Y. 49, holding where testimony admitted did not or could not affect the result nor work injustice or injury to the person objecting, the court has no authority to reverse the judgment on that ground; People v. Wileman, 44 Hun, 187, holding statute only requires a reversal for prejudicial error.

69 AM. DEC. 651, WILLIAMS v. NEW YORK C. R. CO. 16 N. Y. 97.

Rights of abutters to fee of streets and streams.

Cited in Demopolis v. Webb, 87 Ala. 659, 6 So. 408, holding that title to land dedicated to a public use, remains in the grantor, and may be used by him in any manner not interfering with that public use; People v. Law, 22 How. Pr. 109, 34 Barb. 494, holding that owners of a lot, bounded in general terms by a street, own to the middle of such street; Bowen v. Delaware, L. & W. R. Co. 153 N. Y. 476, 60 A. S. R. 667, 47 N. E. 907, holding that a railroad company acquiring city lots, can not lease the adjoining street for railroad purposes, such being inconsistent with its use as a public street; Buffalo Pipe Line Co. v. New York, L. E. & W. R. Co. 10 Abb. N. C. 107, holding that easement by public in a navigable stream does not include the right to use its bed for laying pipe line which is a trespass against the fee-holder.

Cited in reference notes in 19 A. S. R. 918, on rights acquired by public in highway; 20 A. S. R. 537, on rights of abutting owners to trees, herbage, etc., growing in highway.

Cited in note in 101 A. S. R. 103, on ownership of soil in highway.

Distinguished in White's Bank v. Nichols, 64 N. Y. 65, holding that when the grantor retains the fee in the adjoining street, a part of which is seized and accepted by grantee, the former is entitled only to possession subject to grantee's easement therein; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 A. R. 146, 11 Abb. N. C. 236, holding that although the abutting owner has only an easement in the street, this is appurtenant to the land, and cannot be impaired by erection of elevated railway in cutting off light and air.

Right to compensation for taking fee of street.

Cited in Re Terrace, 39 N. Y. S. R. 270, 15 N. Y. Supp. 775, holding that when a city takes over the fee of the public streets it must pay compensation based on the damage done to the value of the private property.

Right of abutting property owners to compensation for imposition of additional burden on street.

Cited in Prosser v. Wapello County, 18 Iowa, 327, holding that grantee of an

Digitized by Google

easement to public who restrains the fee is entitled to compensation from one who seeks to additionally burden it by operating a ferry at the end of street; Buford v. Smith, 2 Tex. Civ. App. 178, 21 S. W. 168, holding use of a public road by a private ferry is an additional burden requiring compensation; Blashfield v. Empire State Teleph. & Teleg. Co. 18 N. Y. Supp. 250, holding same as to a telephone company; Knox v. New York, 55 Barb. 404, 38 How. Pr. 67, holding same as to a bridge company in using a part of a public street upon which to erect a bridge; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386, holding same as to a gas company in laying pipes beneath the street; Tiffany v. United States Illuminating Co. 67 How. Pr. 73, holding upon grant to an illuminating company to erect poles and wires upon public streets is must pay for the added burden; Eels v. American Teleph. & Teleg. Co. 65 Hun, 516, 20 N. Y. Supp. 600, holding same as to a grant to a telephone company to erect poles and string wires; Calkins v. Bloomfield & R. Natural Gaslight Co. 1 Thomp. & C. 541, holding the use of a highway over which the public has merely an easement, for laying gas pipes, is an additional burden not contemplated by the owner in fee, who is thereby entitled to compensation; McCaffrey v. Smith, 41 Hun, 117, holding that neither the legislature nor town council has the power to permit the public to use a street, in front of a hotel for standing their teams without proprietor's consent; Castle v. Bell Teleph. Co. 49 App. Div. 437, 63 N. Y. Supp. 482, on right of fee-holders to compensation for the use of the streets for burying pipes and conduits containing; Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834, holding that a public street cannot be so appropriated without compensation as to prevent the use of the same by abutting property owner; United States v. Illinois C. R. Co. 2 Biss. 174, Fed. Cas. No. 15,437, holding that property dedicated to a special use can be diverted from that purpose by neither city nor state except under the right of eminent domain; State v. Laverack, 34 N. J. L. 201, holding that land acquired by public for use as a public street can not be subjected to an additional burden of a market place without compensation to those holding fee to streets; Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146, 36 Atl. 1107, holding when land has been dedicated to be used in a certain manner neither the city nor the state can enlarge that use against the donor without compensation.

Cited in notes in 16 A. S. R. 613, on what is a taking of property for public use; 106 A. S. R. 234, on functions and purposes of streets and highways; 17 L.R.A. 474, 476, on what use of street or highway constitutes an additional burden.

Distinguished in Kelsey v. King, 33 How. Pr. 39, 17 N. Y. Trans. App. 133 (affirming 11 Abb. Pr. 180), holding that the use of public streets for laying sewers is not incompatible with the purpose of dedication, and legislature has power to authorize such use, although only nominal damages are awarded; Crooke v. Flatbush Waterworks Co. 27 Hun, 72; Kelsey v. King, 32 Barb. 410, —holding that laying of a public sewer under a public street is not incompatible with its use as such, and may be so appropriated without compensation to abutting owners; Jones v. Keith, 37 Tex. 394, 14 A. R. 382, holding that legislature in authorizing the erection of a toll bridge at the intersection of a road and a stream imposes no new burden on the highway and no compensation can be recovered.

— Railroad in public street.

Cited as a leading case in Kucheman v. Chicago, C. & D. R. Co. 46 Iowa,

Digitized by Google

366, holding that the fee holder in a public street is entitled to compensation for its appropriation for railway purposes.

Cited in Hodges v. Seaboard & R. R. Co. 88 Va. 653, 14 S. E. 380, holding that the location of a railroad track on a public street creates an additional servitude entitling the owner to compensation; Cox v. Louisville, N. A. & C. R. Co. 48 Ind. 178; Chicago, K. & W. R. Co. v. Woodward, 47 Kan. 191, 27 Pac. 836; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 A. R. 306; Schurmeier v. St. Paul & P. R. Co. 10 Minn. 182, 88 A. D. 59, Gil. 59; Hinchman v. Patterson Horse R. Co. 17 N. J. Eq. 75, 86 A. D. 252; Re New York Elev. R. Co. 7 Hun, 239; Syracuse Solar Salt Co. v. Rome, W. & O. R. Co. 67 Hun, 153, 22 N. Y. Supp. 321; Washington Cemetery v. Prospect Park & C. I. R. Co. 68 N. Y. 591, 4 Abb. N. C. 15 (affirming 7 Hun, 655); Spencer v. Point Pleasant & O. River R. Co. 23 W. Va. 406; Ford v. Chicago & N. W. R. Co. 14 Wis. 610, 80 A. D. 791; Bond v. Pennsylvania Co. 171 Ill. 508, 49 N. E. 545,—holding that steam railroads cannot use public streets without either condemning them and compensating the fee holder or securing his consent; Peck v. Schenectady R. Co. 170 N. Y. 298, 63 N. E. 357, holding same as to street railway; Craig v. Rochester & B. R. Co. 39 Barb. 494, holding same as to a horse railroad; Re Gilbert Elev. R. Co. 38 Hun, 438, holding same as to an elevated railway; Petersburg R. Co. v. Burtons, 1 Va. Dec. 397, holding the owner of a lot situated on a public street of a city, entitled to damages for special injury done to property by the use and occupation of such street by a railroad company without his consent; Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co. 20 N. J. Eq. 61; Harrington v. St. Paul & S. C. R. Co. 17 Minn. 215, Gil. 188; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 439, 16 A. R. 624,—holding when the fee in the street belongs to the abutting owner, the city by granting its use to a street railway company, imposes new burdens on it for which company must pay the owner; Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 A. R. 290, 10 N. W. 205, holding same as to a railroad for transferring freight; Hastings & G. I. R. Co. v. Ingalls, 15 Neb. 123, 16 N. W. 762, holding same as to a steam railroad; Mattlage v. New York Elev. R. Co. 14 Misc. 291, 35 N. Y. Supp. 704, holding same as to elevated railway; Wager v. Troy Union R. Co. 25 N. Y. 526, on distinction when the legislature does not require the company to acquire the fee; People v. Kerr, 37 Barb. 357, on legislative power to require the railroad to acquire title to the soil in highway and pay the owner thereof; Pierce v. Drew, 136 Mass. 75, 49 A. R. 7, holding that easement acquired by public in highway does not embrace its use for a steam railway; Wager v. Troy Union R. Co. 25 N. Y. 526, holding that the appropriation by a railway company of city streets constitutes a new burden and entitles the fee holders to compensation; Mahon v. New York C. R. Co. 24 N. Y. 658, holding upon dissolution of a turnpike company, the fee holder of the land is entitled to compensation when it is appropriated by a railroad company; Gray v. First Div. St. Paul & P. R. Co. 13 Minn. 315, Gil. 289, holding that public easement in a street does not include its use for a railroad; Fanning v. D. M. Osborne & Co. 102 N. Y. 441, 7 N. E. 307, on right of owner in fee of street to compensation for its use by a railroad; New York & H. R. Co. v. New York, 1 Hilt. 562, on the imposition of an additional burden by the operation of a railroad upon public streets entitling fee holder to compensation; Edsill v. Howell, 86 Hun, 424, 33 N. Y. Supp. 892, on the right of fee holders of public street to compensation for its appropriation for steam railway purposes;

Digitized by Google

Craig v. Rochester City & B. R. Co. 39 N. Y. 404, 7 N. Y. Trans. App. 194, on distinction between a street railway and a steam road the former of which does not impose additional burden on land; Mason v. Brooklyn C. & N. R. Co. 35 Barb. 373, on distinction between the use of a public street for a steam railroad and city railway; Re New York C. & H. R. R. Co. 15 Hun, 63, on the imposition of a new burden beyond public easement by using public street for a railway entitling owner to compensation; Re New York, L. & W. R. Co. 27 Hun, 151, on right of fee owner to compensation for use of the street, dedicated by him, by a railway company; Sun Printing & Pub. Asso. v. New York, 8 App. Div. 230, 40 N. Y. Supp. 607, on the distinction between the use of land as a public street and its use for the purpose of a railroad; State, Felix, Prosecutor, v. Atlantic City, 34 N. J. L. 99, holding that there may be a concurrent use of a street by public and a railroad by consent of all affected thereby.

Cited in reference notes in 9 A. R. 465, on railway in street as additional burden; 7 A. S. R. 627; 9 A. S. R. 546,—on appropriation of highway for railway purposes as new servitude.

Cited in notes in 28 A. R. 267, on right of owner of fee in street to compensation for laying car tracks thereon; 37 A. R. 224, on compensation to adjoining owners for using highway for railroad; 4 A. S. R. 402, on damages for establishing railroad on highway where fee of street is in abutting landowner; 3 L.R.A. 175, on abutter's right to compensation for use of street for railway.

Distinguished in Brooklyn C. & J. R. Co. v. Brooklyn C. R. Co. 33 Barb. 420, holding that the use of a public street by a horse railway is not an additional burden entitling the fee holder to compensation; People v. Law, 22 How. Pr. 109, 34 Barb. 494, holding that taking a public street for a street railway is for public use; Reichert v. St. Louis & S. F. R. Co. 51 Ark. 491, 5 L.R.A. 183, 11 S. W. 696, holding that a city can grant the use of city streets to a street railway company without becoming liable to the owner in fee; Fobes v. Rome, W. & O. R. Co. 121 N. Y. 505, 8 L.R.A. 453, 24 N. E. 919; Milburn v. Cedar Rapids, 12 Iowa, 246,—holding that abutting property owners not owning the fee to the streets cannot restrain the grant of their use to a street railroad nor demand compensation; Clinton v. Cedar Rapids & M. River R. Co. 24 Iowa, 455, holding that when the city owns the streets, in trust for the public, the legislature may authorize the use by a railroad company without compensation; Taylor v. Metropolitan Elev. R. Co. 18 Jones & S. 311; Kellinger v. Forty-second Street & G. Street Ferry R. Co. 50 N. Y. 206; Carson v. Central R. Co. 35 Cal. 325,—holding that the use of a public street may be granted to a railroad company by legislature without compensating adjoining property owners who do not own fee in street; Abendroth v. Manhattan R. Co. 20 Jones & S. 274, holding same as to use of street by an elevated street railway; Patten v. New York Elev. R. Co. 3 Abb. N. C. 306, holding that abutting property owner who does not own fee in street, cannot claim compensation for injury to a vault beneath such street caused by erection of elevated street railway.

Modified in Reining v. New York, L. & W. R. Co. 128 N. Y. 157, 14 L.R.A. 133, 28 N. E. 640, holding that even though the abutting property owners do not own the fee in the streets the legislature has not power to grant the exclusive use of such street to a railway without compensation to owners for such loss.

Disapproved in Cook v. Burlington, 36 Iowa, 357, holding that the use of a public street by a railroad company is not incompatible with its purpose and a city may make a grant authorizing such use without compensation.

Digitized by Google

Right to compensation for burdens added to land.

Cited in People ex rel. Williams v. Haines, 49 N. Y. 587, holding that the legislature cannot impose a burden on land by authorizing it to be drained without compensating the owners.

Injunction against taking street for railroad without compensation.

Cited in People v. Law, 22 How. Pr. 109, 34 Barb. 494, holding that abutting property owners may enjoin building of railway on public street if compensation is not given; Hodges v. Seaboard & R. R. Co. 88 Va. 653, 14 S. E. 380, holding proper, an injunction against unlawful imposition of railroad on private property; Milhau v. Sharp, 27 N. Y. 611, 84 A. D. 314; Murdock v. Prospect Park & C. I. R. Co. 73 N. Y. 579; Henderson v. New York C. R. Co. 78 N. Y. 423; Uline v. New York C. R. Co. 101 N. Y. 98, 53 A. R. 123, 4 N. E. 536; Coatsworth v. Lehigh Valley R. Co. 156 N. Y. 451, 51 N. E. 301; Garvey v. Long Island R. Co. 159 N. Y. 323, 70 A. S. R. 550, 54 N. E. 57; Shepard v. Manhattan R. Co. 117 N. Y. 442, 23 N. E. 30; Syracuse Solar Salt Co. v. Rome, W. & O. R. Co. 11 App. Div. 557, 42 N. Y. Supp. 590; Lynch v. Metropolitan Elev. R. Co. 129 N. Y. 274, 26 A. S. R. 523, 15 L.R.A. 287, 29 N. E. 315, 28 Abb. N. C. 1, 21 N. Y. Civ. Proc. Rep. 420; Coastworth v. Lehigh Valley R. Co. 24 App. Div. 273, 48 N. Y. Supp. 511; Colstrum v. Minneapolis & St. L. R. Co. 33 Minn. 516, 24 N. W. 255,—holding that a person whose property is injured by the wrongful building of a railroad may both recover direct damages and also an injunction to abate its further continuance as a nuisance; Galway v. Metropolitan Elev. R. Co. 128 N. Y. 132, 13 L.R.A. 788, 28 N. E. 479; Glover v. Manhattan R. Co. 66 How. Pr. 77,—holding same as to wrongful building of an elevated railway; Woodworth v. Brooklyn Elev. R. Co. 29 App. Div. 1, 51 N. Y. Supp. 323, holding same as to a nuisance by an elevated railway caused by appropriation of complainant's easement to light and air without compensation; Craig v. Rochester City & B. R. Co. 39 N. Y. 404, 7 N. Y. Trans. App. 194, holding that the owner in fee of land, dedicated as a public highway may enjoin a street railroad company from building tracks thereon and operating cars over it; Glover v. Manhattan R. Co. 19 Jones & S. 1, holding that the erection of an elevated street railway is an enlargement of the public use of such a street, and may be enjoined if compensation be refused the abutting owner.

Cited in note in 20 L.R.A. 752, on damages in lieu of injunction.

Distinguished in Troy & B. R. Co. v. Boston, H. T. & W. R. Co. 86 N. Y. 107, denying an injunction where the facts present no equitable jurisdiction; People v. Kerr, 27 N. Y. 188, 20 How. Pr. 130, holding that a grant to a city railway by the municipality is an appropriation of the streets for a public use and cannot be restrained by those holding the fee in the streets subject to public use; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 A. R. 146, 11 Abb. N. C. 236, holding enjoinable, the erection of elevated railway so as to impair abutting owners' mere easement to light and air.

— Against taking of land for turnpike.

Cited in Sidener v. Norristown, H. & St. L. Turnp. Co. 23 Ind. 623, holding injunction, proper remedy to prevent turnpike company from taking land without compensation.

— Against misuse of dedicated places.

Cited in Sanborn v. Van Duyne, 90 Minn. 215, 96 N. W. 41, holding that the owner of land, dedicated to a public use, may enjoin it's use for private purposes under lease from city; Scranton v. Griffin, 5 Luzerne Leg. Reg. 26, upholding

Digitized by Google

injunction restraining owner of land dedicated to public street from encroaching thereon by changing line of fence.

Injunction against nuisance or trespass.

Cited in McKeon v. See, 51 N. Y. 300, 10 A. R. 659, holding injunction lies to abate nuisance caused by factory in jarring and injuring complainant's dwelling; Davis v. Niagara Falls Tower Co. 25 App. Div. 321, 49 N. Y. Supp. 554, holding same as to the continued nuisance of a tower caused by the precipitation of ice and snow from it; Inderlied v. Whaley, 85 Hun, 63, 32 N. Y. Supp. 640, holding same as to a nuisance by a saw-mill in polluting the waters of a stream; Davis v. Lamberton, 56 Barb. 480, holding same as to a nuisance created by a cheese factory in polluting the water of a stream; Hutchins v. Smith, 63 Barb. 251, holding same as a nuisance created by erection of a lime-kiln; Dewitt v. Van Schoyk, 35 Hun, 103, holding same as to right of landowner against one who closed up a public road and established another over complainant's land; Johnson v. Rochester, 13 Hun, 285, holding same as to a nuisance in the nature of a continued trespass in wrongfully using complainant's land as a passage-way; Richards v. Dower, 64 Cal. 62, 28 Pac. 113, holding that the building of a tunnel through a person's property is an encroachment upon his rights therein and will be enjoined; Hersee v. Buffalo, Sheldon, 445, holding that equity will, at instance of aggrieved party, restrain unauthorized grading and paving of street; Lincoln v. Blanchard, 17 Utah, 464, on the right of landowner to restrain by injunction the digging of a tunnel through the same; Cooley v. Cummings, 16 N. Y. S. R. 947, 1 N. Y. Supp. 631, holding that the continuous interference of landlord with his tenant's rights is enjoinable.

Cited in reference notes in 96 A. D. 597, as to when injunction will be issued to prevent trespass; 96 A. D. 597, on right to injunction to prevent multiplicity of suits; 26 A. S. R. 533, on equitable jurisdiction for trespass.

Ejectment by abutter for appropriation of fee of street or public place.

Cited in Perrin v. New York C. R. Co. 36 N. Y. 120, on the right of fee holder to maintain an action for disseisin against railway company for appropriating the public street; Gaslight Co. v. Rome, W. & O. R. Co. 11 N. Y. Civ. Proc. Rep. 239, holding owner of land adjacent to a public street in which public has but a mere easement, can recover to the center of the street from a railroad company which has intruded on street; Perrin v. New York C. R. Co. 1 N. Y. Trans. App. 253, holding the entire and exclusive appropriation of premises laid down on a map and denominated "Park" a sufficient disseisin.

Power of state or municipality to authorize use of public street.

Cited in United States v. Bambridge, 3 Hughes, 593, Fed. Cas. No. 14,496, holding that the legislature has power to authorize a town to lease out to private person a portion of a public street upon which to erect a dock, use of which cannot be restrained.

Cited in reference notes in 98 A. D. 247; 29 A. S. R. 690,—on municipal power to authorize use of streets for railway purposes; 5 A. S. R. 353, on power of state or municipality to authorize use of street by railroad; 7 A. S. R. 627, on power of state or of municipality as its agent to authorize railroad to use street.

Nature and extent of interest, under franchise, of corporation in public street.

Cited in North Beach & M. R. Co's. Appeal, 32 Cal. 499; People ex rel.

Digitized by Google

Dunkirk & F. R. Co. v. Cassity, 46 N. Y. 46,—holding that a railway company's easement in the streets is an "interest in land" subject to taxation; People v. Cassity, 2 Lans. 294, holding assessable as real estate, the tangible property of a street railway together with it's charter and easement in the streets; Atlantic & P. R. Co. v. Lesueur, 2 Ariz. 428, 1 L.R.A. 244, 2 Inters. Com. Rep. 89, 19 Pac. 157, holding that an easement over land as distinguished from a license is an "interest in land;" Northern P. R. Co. v. Carland, 5 Mont. 146, 3 Pac. 134, holding that a right of way granted by the United States to a railroad is an easement which includes all the property thereon for the purposes of exemption from taxation; Concord v. Concord Horse R. Co. 65 N. H. 30, 18 Atl. 87, holding that a street railway company in appropriating the public streets are limited to extent and manner by the charter granting it the use of such streets.

Fee holder's right of reversion on discontinuance of public easement.

Cited in Van Amringe v. Barnett, 8 Bosw. 357, holding when the use of land taken for a public highway, is discontinued for that purpose the abutting owner holding under one in whom title was vested may enter and occupy it as his own; Mangam v. Sing, 11 App. Div. 203, 42 N. Y. Supp. 950, holding that upon abandonment by highway abutting owner becomes entitled to recover premises lying between his lands and center of highway.

Distinguished in Heath v. Barman, 49 Barb. 496, holding that land used for public way under a plank road company upon dissolution of such company may be taken up by a town and used for public street without compensating the owner; State v. Maine, 27 Conn. 641, 71 A. D. 89, holding that the use by a turnpike company of land is a public one and upon revocation of its charter the state may revest it in the public as a highway without compensation to owners in fee.

Dedication for highway.

Cited in reference notes in 60 A. S. R. 676, on dedication for highway; 79 A. D. 295, on dedication of land for highway as passing easement.

Cited in notes in 57 A. S. R. 750, on highways by dedication; 1 L.R.A. 493, on dedication of land to street purposes.

Reversion of title.

Cited in Edison Electric Light Co. v. New Haven Electric Co. 21 Abb. N. C. 119, on property of a dissolved corporation.

Street railroad as nuisance per se.

Cited in note in 5 L.R.A. 371, on whether railroad on city street is nuisance per se.

Liability of railroad for direct damages to private property.

Cited in Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 A. R. 147, holding that even though a railroad has properly acquired an easement over one's land, it is still liable for so constructing the road as to release a natural barrier and flood his land; Robinson v. New York & E. R. Co. 27 Barb. 512, holding that the legislature by authorizing the construction of a railroad does not thereby exempt it from liability for wrongs done to property of individual; Drady v. Des Moines & Ft. D. R. Co. 57 Iowa, 393, 10 N. W. 754, holding damages sustained to property by building a railroad along an adjoining street, are recoverable in an action for trespass.

Digitized by Google

Recovery for prospective damages.

Cited in note in 53 A. R. 129, on recovery for prospective damages.

69 AM. DEC. 665, AUSTIN v. SEARING, 16 N. Y. 112.

By-laws of an organization as contracts.

Cited in Hogan v. Pacific Endowment League, 99 Cal. 248, 33 Pac. 924, holding that unincorporated societies are the creatures of a contract for whose breach claimants may resort to law; Burt v. Oneida Community, 41 N. Y. S. R. 48, 16 N. Y. Supp. 289, holding that the regulations of a certain unincorporated community were contract which cut off recovery by an expelled member for services rendered in return for benefits received; Purdy v. Banker's Life Asso. 101 Mo. App. 91, 74 S. W. 486, holding that a by-law of a corporation though not enforceable as such, may sometimes be binding as a contract.

Cited in reference notes in 91 A. D. 146, on binding effect of constitution and by-laws of charitable associations upon members; 24 A. S. R. 188, on enforcement of articles and by-laws of mutual benefit societies; 53 A. S. R. 319, on force of constitutions and by-laws of voluntary associations; 64 A. S. R. 600, on by-laws of mutual benefit associations; 70 A. S. R. 120, on constitution and by-laws of benevolent society; 71 A. D. 627, on constitution, by-laws, and proceedings of voluntary charitable associations.

Cited in note in 5 L.R.A.(N.S.) 891, on obligation of members of labor union as to political matters.

Effect of by-laws denying judicial remedy to members of society.

Cited in Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 91 A. S. R. 620, 49 Atl. 387, holding the by-laws of an association which attempt to deprive a person of his remedy at law are invalid; Rudolph v. Southern Beneficial League, 23 Abb. N. C. 199, 7 N. Y. Supp. 135, holding that where property rights and pecuniary interests are concerned the jurisdiction of the court cannot be ousted by the rules of an association; Poultney v. Bachman, 10 Abb. N. C. 252, 62 How. Pr. 466, holding that by-laws of a beneficient association cannot deprive the courts of jurisdiction to try claims against it; Reno Lodge No. 99, I. O. O. F. v. Grand Lodge, I. O. O. F. 54 Kan. 73, 26 L.R.A. 98, 37 Pac. 1003, holding unincorporated societies cannot, through the decision of their judicial officers interfere with property rights nor cut off jurisdiction of the courts; Bauer v. Samson Lodge, K. of P. 102 Ind. 262, 1 N. E. 571, holding that an insurance organization cannot constitute a judicial tribunal within itself whose decisions will deprive it's members of recourse to courts; Supreme Lodge, O. S. F. v. Raymond, 57 Kan. 647, 49 L.R.A. 373, 47 Pac. 533, holding that the by-laws of an insurance company cannot abridge the right of claimants to resort to the courts on a claim disallowed by its arbitrators; Sanford v. Commercial Traveler's Mut. Acci. Asso. 86 Hun, 380, 33 N. Y. Supp. 512, holding that a provision, in a certificate of membership of an insurance company, that claims against the company, shall be tried by a referee, is unconstitutional as depriving the claimant of trial by jury; Supreme Council, O. C. F. v. Forsinger, 125 Ind. 52, 21 A. S. R. 196, 9 L.R.A. 501, 25 N. E. 129, holding the regulations of an insurance company providing for the method of presentation and mode of procedure in the matter of claims is valid unless it divests property rights; Davis v. Mayo, 82 Va. 97, to point that voluntary associations cannot through decision of their judicial officers interfere with property rights.

Cited in notes in 59 A. S. R. 206, on effect as res judicata of decisions within

Digitized by Google

fraternal and other associations; 59 A. S. R. 198; 68 A. S. R. 856,—on validity of constitution, by-laws, and proceedings of voluntary charitable associations; 2 L.R.A. 841, on property rights of fraternal and benevolent societies.

Distinguished in Spink v. Co-operative F. Ins. Co. 25 App. Div. 484, 49 N. Y. Supp. 730, holding that the by-laws of a co-operative insurance company, incorporated under the statute, made a part of the policy providing for adjustment of losses, by a committee, whose decision is final, are valid; Eighmy v. Brotherhood of Railway Trainmen, 113 Iowa, 681, 83 N. W. 1051, holding that before a claimant under benefit certificate can recover at law, he must first obtain the decision of the proper officer as to the extent of his disability; Lewis v. Wilson, 50 Hun, 166, 2 N. Y. Supp. 806, holding that a member of a stock exchange company cannot restrain, by law, his expulsion, under its rules, without first availing himself of his right to a hearing before the proper committee.

Forfeitures under rules of society.

Cited in Wicks v. Monihan, 130 N. Y. 232, 14 L.R.A. 243, 29 N. E. 139, (affirming 54 Hun, 614, 8 N. Y. Supp. 121), holding that the property of an association or corporation cannot be divested by any ruling of a judicial body therein, unless by due process of law; State Council J. O. U. A. M. v. Emery, 219 Pa. 461, 15 L.R.A.(N.S.) 336, 68 Atl. 1023, 12 A. & E. Ann. Cas. 870, holding that a local lodge of a beneficient organization, cannot be compelled, under the rules thereof, to account for funds, raised by and for its own members, already distributed.

Cited in notes in 14 L.R.A. 243, on power of general assembly of unincorporated organization to dissolve local assembly and vest its property in itself; 15 L.R.A.(N.S.) 336, on right, upon dissolution of benefit association or local branch thereof, to funds voluntarily accumulated by the branch to be expended solely for its members.

Contracts forfeiting right without judicial hearing.

Cited in De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co. 16 Daly, 529, 14 N. Y. Supp. 277, holding provision in a contract of alliance between competing companies authorizing its members to declare a forfeiture against those violating it, void as conferring judicial powers; Eaton & H. R. Co. v. Hunt, 20 Ind. 457, holding that the jurisdiction of the courts cannot be ousted by contract purporting to cut off the right to foreclose a mortgage.

Cited in note in 2 L.R.A. 181, on judgment on arbitration award.

Rights of unincorporated organizations to sue and to be sued.

Cited in Waller v. Thomas, 42 How. Pr. 337, sustaining liability of a voluntary unincorporated association under the statute on a claim for rent; Bridenbecker v. Hoard, 32 How. Pr. 289, holding that under proper construction of statute, an association may sue in the name of its treasurer, to recover penalties against a member; De Witt v. Chandler, 11 Abb. Pr. 459, holding same as to right to sue to recover a legacy.

Powers of corporations and unincorporated societies.

Cited in reference notes in 91 A. D. 145, on expulsion of members by incorporated or unincorporated societies; 95 A. D. 414, on power of corporations and unincorporated accociations to expel members; 99 A. D. 205, on power of voluntary association to bind members by contract; 20 A. S. R. 885, on powers of corporations and unincorporated societies as to disfranchising and expelling members.

Digitized by Google

Cited in note in 43 A. S. R. 152, on limitations on power of private corporations to enact by-laws.

Jurisdiction of courts over associations.

Cited in reference notes in 18 A. S. R. 301, on redress at law against proceedings in lodges, churches, and other voluntary associations; 48 A. S. R. 316, on jurisdiction of court to protect property rights of members of unincorporated associations; 71 A. S. R. 417–418, on jurisdiction of courts over associations.

Cited in notes in 7 A. S. R. 163–165, on jurisdiction of courts over voluntary associations; 7 A. S. R. 166, on jurisdiction of courts to interfere concerning expulsion of members of voluntary association.

Power of court to interfere with rules of membership organization.

Cited in Watkins v. Wilcox, 4 Hun, 220, 6 Thomp. & C. 539, holding that all members of a religious corporation have a right to vote, in governing the actions of the body, without any ecclesiastical restrictions.

Distinguished in St. James Church v. Huntington, 82 Hun, 125, 31 N. Y. Supp. 91, holding that one who voluntarily enters into service of a church, becomes subject to all its rules and canons, and cannot seek a remedy in court for his dissatisfaction in the manner of its administration; Connitt v. Reformed Protestant Dutch Church, 54 N. Y. 551; Connitt v. Reformed Protestant Dutch Church, 4 Lans. 339,—holding that the judicial act of a church tribunal dissolving the relation of the pastor with his church and terminating his contract is binding and will not be interfered with by the court.

Effect of forfeiture of charter of unincorporated society.

Cited in Wells v. Monihan, 129 N. Y. 161, 29 N. E. 232, holding that the revocation of a charter of an unincorporated society does not divest its members of property, nor right to sue upon a note.

Right to enjoin an unincorporated body.

Cited in Rorke v. Russell, 2 Lans. 244, holding that under statute an unincorporated association cannot be enjoined, through its president, from suspending a member; Heath v. New York Gold Exch. 38 How. Pr. 168, 7 Abb. Pr. N. S. 251, holding that the arbitration board of an unincorporated association, whose power may be revoked by the claimants, has no way of enforcing its decision and no injunction will lie.

Nature of voluntary association.

Cited in reference note in 95 A. D. 111, on nature of voluntary associations.

69 AM. DEC. 678, FARMERS' & M. BANK v. BUTCHERS' & D. BANK, 16 N. Y. 125, Concurring opinions in 14 N. Y. 623, 28 N. Y. 425.

Certification of check.

Cited in Nolan v. Bank of New York Nat. Bkg. Asso. 67 Barb. 24, holding certified check not dishonored by delay of three years in presenting it to bank for payment; Lynch v. First Nat. Bank, 107 N. Y. 179, 1 A. S. R. 803, 13 N. E. 775, holding bank not liable to third person as holder on unindorsed certified check payable to maker or order.

Cited in note in 41 L. ed. U. S. 859, on certification of check.

— What constitutes.

Distinguished in Bowen v. Needles Nat. Bank, 87 Fed. 430, holding promise of bank to pay checks drawn upon it by specified person not a certification of such checks.

Digitized by Google

— Certified check as payment.

Cited in White v. Eiseman, 28 Abb. N. C. 363, 31 N. E. 276, holding delivery of a certified check to payee, equivalent to payment in cash; French v. Irwin, 4 Baxt. 401, 27 A. R. 769; First Nat. Bank v. Leach, 52 N. Y. 350, 11 A. R. 708,—holding certification of check procured by holder, payment as between him and drawer; White v. Eiseman, 134 N. Y. 101, 31 N. E. 276, holding payment by certified check substantial compliance with statute relating to cash contributions by special partners.

Cited in reference note in 31 A. S. R. 411, on payment by certified checks.

— Effect of certification generally.

Cited in Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 A. S. R. 370, 99 N. W. 399, 4 A. & E. Ann. Cas. 347, holding absence of funds in a bank, no defence to action on a certified check by a bona fide holder; Strauss v. American Exch. Nat. Bank, 72 Ill. App. 314, holding that bank, paying without notice, certified check out of funds of insolvent drawer, will be protected in accounting with assignee.

Cited in reference note in 80 A. D. 513, on what obligation certified check imposes.

— As warranty of genuineness.

Cited in Marine Nat. Bank v. National City Bank 59 N. Y. 67, 17 A. R. 305 (reversing 4 Jones & S. 470), holding that bank, by certifying check, does not warrant genuineness of body thereof; Hagen v. Bowery Nat. Bank, 6 Lans. 490, holding bank liable to bona fide holder on forged check certified by it as good; Louisiana Nat. Bank v. Citizens' Bank, 28 La. Ann. 189, 26 A. R. 92, denying right of drawee bank to recover amount paid to bona fide holder on raised check, certified after alteration.

Cited in note in 14 A. R. 238, on effect of raising check before certification.

— Effect of subsequently raising check.

Cited in National Bank v. National Mechanics' Bank, 3 Jones & S. 282, 46 How. Pr. 374, holding only effect of certification of check of $56.75, afterwards raised to $15,006, to be that check was good for amount certified; Clews v. Bank of New York Nat. Bkg. Asso. 89 N. Y. 418, 42 A. R. 303 (dissenting opinion), majority holding bank not liable for full amount of check raised after certification, although raised check was shown teller who pronounced certification good.

— Forgery of.

Cited in Continental Nat. Bank v. National Bank, 50 N. Y. 575, holding bank bound on forged certification of check taken in reliance of teller's statement that it was genuine; Salt Springs Bank v. Syracuse Sav. Inst. 62 Barb. 101, denying right of recovery by drawee bank paying forged check of stranger which contained forged certification of drawee's teller.

— Right to rescind, and effect of rescission.

Cited in Riverside Bank v. First Nat. Bank, 20 C. C. A. 181, 38 U. S. 674, 74 Fed. 276, denying right of bank to rescind certification of note on discovering that maker had insufficient deposit to meet it.

Distinguished in Second Nat. Bank v. Western Nat. Bank, 51 Md. 128, 34 A. R. 300; Irving Bank v. Wetherald, 36 N. Y. 335, 2 N. Y. Trans. App. 120,—holding bank not liable to holder of note, notified in time to prevent loss, that it was certified by mistake; Stevens v. Corn Exch. Bank, 5 Thomp. & C. 283, 48

Digitized by Google

How. Pr. 351, 3 Hun, 147, holding that payee, consenting to withdrawal of maker's deposit in bank after certification of check, cannot recover thereon.

— Liability of bank on generally.

Cited in Louisiana Ice Co. v. State Nat. Bank, McGloin, La. 181; State v. Miller, 47 Or. 562, 6 L.R.A.(N.S.) 365, 85 Pac. 81,—holding certification of check equivalent to acceptance of a draft rendering the bank primarily liable to bona fide holder; Meade v. Merchants' Bank, 25 N. Y. 143, 82 A. D. 331, holding certification of check by bank as good equivalent to acceptance of negotiable bill of exchange.

Cited in notes in 89 A. D. 442, on bank's liability on certified checks; 42 A. R. 311, on liability of certified check which is altered.

— Liability on unauthorized certification.

Cited in Meads v. Merchants' Bank 25 N. Y. 143, 82 A. D. 331, upholding right of bona fide holder to recover on note falsely certified by bank teller as good, on maturity; Cooke v. State Nat. Bank, 52 N. Y. 96, 11 A. R. 667, holding bank liable to bona fide holder on check certified without funds by cashier; Merchants' Bank v. State Bank, 77 U. S. 604, 19 L. ed. 1008, reversing 3 Cliff 205, Fed. Cas. No. 9,449, holding bank permitting cashier to certify checks, liable on check given by him in payment for gold and certified as "good;" Pope v. Bank of Albion, 57 N. Y. 126, denying right of bona fide holder to recover on check certified as good by assistant bank cashier, without authority.

Cited in note in 82 A. D. 336, on certification of checks and effect of false certification by proper officer.

Distinguished in Claflin v. Farmers' & C. Bank, 25 N. Y. 293, 24 How. Pr. 11 (reversing 36 Barb. 540), holding bank not liable on certification of checks by its president where lack of authority appeared on face of instruments; Clarke Nat. Bank v. Bank of Albion, 52 Barb. 592, holding bank not liable on certification of past dated check by cashier.

Scope of authority of agent.

Cited in Felley v. Gilman, 2 Jones & S. 339, holding power to indorse and sell draft not authorized by written authority to receive moneys, property, or effects; Greenwood v. Spring, 54 Barb. 374, holding that power of agent to lease, mortgage, sell and convey did not include power to mortgage for security of antecedent indebtedness of principal.

Cited in note in 2 L.R.A. 808, on authority of agent.

— Of officer of corporation.

Cited in Marine Bank v. Clements, 3 Bosw. 600, holding that the president of an insurance company with neither actual nor apparent authority to endorse notes, can convey no title thereby; Wilson v. Metropolitan Elev. R. Co. 14 Daly, 171, holding that a bona fide holder of notes executed by president to himself in name of corporation, in excess of authority for services not yet performed, may recover on them; Martin v. Niagara Falls Paper Mfg. Co. 122 N. Y. 165, 25 N. E. 303, holding bank justified in assuming that president of corporation had authority to give notes in name of company; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88, holding authority to indorse implied where treasurer and secretary of corporation is accustomed to indorse commercial paper.

Cited in note in 12 A. R. 75, on authority of bank officers.

— Of cashier.

Cited in Van Buren County Sav. Bank v. Sterling Woolen Mills Co. 125 Iowa,

Digitized by Google

645, 101 N. W. 477, holding that cashier of a bank has no authority to accept worthless checks on another bank; Sturdevant Bros. v. Farmers & M. Bank, 69 Neb. 220, 95 N. W. 819, holding that powers of a corporation are limited by charter and cashier can not obligate it by an act so foreign to its object as to constitute notice of "ultra vires."

Cited in notes in 77 A. D. 761, on power of bank cashier to certify checks; 89 A. D. 444, as to who may certify check.

— Of attorney.

Cited in Filley v. Gilman, 2 Jones & S. 339, holding that an attorney acting under special power conveys no title by endorsements of draft in excess of that power.

— Of partner.

Cited in Follmer v. Frommel, 63 Hun, 370, 18 N. Y. Supp. 318, holding partner without authority to make firm note for individual indebtedness.

Distinguished in Lyon v. Fitch, 29 Jones & S. 74, 18 N. Y. Supp. 867, holding that an individual note given by a partner, but endorsed in firm name without authority to a creditor who knew it was for individual debt, is void against firm.

Liability for acts of agent or officer — Of agent.

Cited in Cazeaux v. Mali, 25 Barb. 578 (dissenting opinion), as to liability of agent for his own acts.

— Of principal generally.

Cited in Westfield Bank v. Cornen, 37 N. Y. 320, 93 A. D. 573, 4 N. Y. Trans. App. 442, holding principal liable to bona fide holder for value on accommodation note made by agent exceeding authority; Weeks v. Fox, 3 Thomp. & C. 354, holding principal liable to bona fide holder on accommodation acceptance by agent, having power to accept bills; Marsh v. Gilbert, 4 Thomp. & C. 259, 2 Hun, 58, holding principal liable for lumber bought by former agent, where seller was not notified of termination of authority; Cruzan v. Smith, 41 Ind. 286, holding principal liable for purchase of wheat on credit by general agent, instructed to buy for cash only; Dows v. Perrin, 16 N. Y. 325, holding forwarders not bound by bill of lading executed and transferred to bona fide holder, without authority by their clerk; Chetwood v. Berrian, 39 N. J. Eq. 203, holding assignment of principal's mortgage by agent to secure individual debt, under general power to assign mortgages, good as to bona fide assignee; Law v. Stokes, 32 N. J. L. 249, 90 A. D. 655, holding principal not bound by payment by vendee to agent for sale only.

Distinguished in Smith v. South Royalton Bank, 32 Vt. 341, 76 A. D. 179, holding mortgagor not bound by fraudulent delivery to bona fide holder of bond and mortgage deposited in escrow.

— Of corporation generally.

Cited in McCord v. Western U. Teleg. Co. 39 Minn. 181, 12 A. S. R. 636, 1 L.R.A. 143, 39 N. W. 315, holding telegraph company liable for loss caused by fraudulent message sent by its agent; Lee v. Pittsburgh, Coal & Min. Co. 56 How. Pr. 373, holding corporation bound by contract of its president and manager with agent, to sell coal; Madison & I. R. Co. v. Norwich Sav. Soc. 24 Ind. 457, holding corporation liable to bona fide holder on accommodation guaranty of bonds, within apparent scope of charter powers; New York & N. H. R. Co. v.

Digitized by Google

Schuyler, 34 N. Y. 30 (same case in lower courts 8 Abb. Pr. 239, 17 How. Pr. 464, 38 Barb. 534), holding corporation liable to bona fide holders on spurious stock issued by authorized transfer agent; Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 838, holding corporation liable for torts of its officers against another corporation of which they were directors.

Cited in reference note in 89 A. D. 69, on binding force on corporation of its president's unauthorized contract.

Cited in notes in 1 L.R.A. 607, on corporation's liability for its agents' acts; 12 L.R.A. 715, on liability of corporation for acts and contracts of its officers and agents.

Distinguished in Eaton v. Delaware, L. & W. R. Co. 57 N. Y. 382, 15 A. R. 513, holding railroad corporation not liable for negligent injury to one invited on caboose of freight train by conductor promising to get him employment.

— Of corporation on notes generally.

Cited in Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 A. S. R. 625, 24 N. E. 384, affirming 6 N. Y. S. R. 234, holding corporation liable to one cashing its note given by president for unearned salary; Wile & B. Co. v. Rochester & K. F. Land Co. 4 Misc. 570, 25 N. Y. Supp. 794, holding that bona fide holder may recover on corporation note issued on apparent authority of board of directors; New York Iron Mine v. First Nat. Bank, 39 Mich. 644, holding corporation not liable on notes made without authority by general agent; Marine Bank v. Clements, 31 N. Y. 33, holding bank entitled to recover on note payable to insurance company, indorsed by its president without authority and discounted in good faith.

— Of corporation on accommodation paper.

Cited in Bank of Auburn v. Putnam, 1 Abb. App. Dec. 80, 1 N. Y. Trans. App. 322; Mechanics' Bkg. Asso. v. New York & Saugerties White Lead Co. 23 How. 74 (same case 20 How. Pr. 509); Mechanics' Bkg. Asso. v. New York & S. White Lead Co. 35 N. Y. 505; Second Nat. Bank v. Pottier & S. Mfg. Co. 24 Jones & S. 216; Farmers' Nat. Bank v. Sutton Mfg. Co. 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191; Dexter Sav. Bank v. Friend, 90 Fed. 703; Bridgeport City Bank v. Empire Stone Dressing Co. 19 How. Pr. 51, 30 Barb. 421,—holding corporation liable to bona fide holder for value without notice, on accommodation indorsement of commercial paper; Fox v. Rural Home Co. 90 Hun, 365, 35 N. Y. Supp. 896, holding that corporation cannot make accommodation indorsement without consideration; Mather v. Union Loan & T. Co. 26 N. Y. S. R. 58, 7 N. Y. Supp. 213, holding defense of corporation that draft in hands of bona fide holder was accepted by officer, without authority, for accommodation, not frivolous; Credit Co. v. Howe Mach. Co. 54 Conn. 357, 1 A. S. R. 123, 8 Atl. 472, holding corporation liable to bona fide holder on unauthorized accommodation acceptances by its treasurer.

— Of banks generally.

Cited in Arnold v. National Bank, 126 Wis. 362, 3 L.R.A.(N.S.) 580, 105 N. W. 828, holding a bank liable for services of real estate agents under contract with its cashier to sell land not belonging to it; Reynolds v. Kenyon, 43 Barb. 585, upholding recovery against bank of amount wrongfully charged by cashier to customer's deposit, for purchase of draft; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 A. R. 181, holding national bank not liable for loss by theft of securities of customer deposited, under agreement with cashier, for safe keeping; Booth v. Farmers' & M. Nat. Bank, 50 N. Y. 396, reversing 4 Lans.

Digitized by Google

301, holding prima facie liability of bank for money had and received established by satisfaction of judgment by its president after bank had assigned all interest therein.

Cited in reference note in 73 A. D. 402, on liability of banks for acts of teller.

Distinguished in Farmers' & M. Nat. Bank v. Smith, 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129, holding bank not liable on unauthorized guaranty by cashier, to one knowing bank to be acting as mere broker in the transaction; Bowen v. Needles Nat. Bank, 87 Fed. 430, holding national bank not liable on promise to pay checks drawn upon it by specified person.

— Of banks on negotiable paper generally.

Cited in Bank of State v. Farmers' Branch Bank, 36 Barb. 332, holding bank not liable on indorsement of bill by cashier authorized to indorse for collection only; Bank of State v. Muskingum Branch Bank, 29 N. Y. 619, holding bank liable to bona fide holder on note fraudulently put in circulation by its agent for collection.

— Of bank on accommodation indorsements.

Cited in Bank of Genesee v. Patchin Bank, 19 N. Y. 312, holding bank liable to bona fide holder on accommodation indorsement of bill of exchange by its cashier; Houghton v. First Nat. Bank. 26 Wis. 663, 7 A. R. 107, holding bank liable to bona fide holder on accommodation indorsement of note by cashier.

— Of municipal corporations.

Cited in Duryea v. New York, 26 Hun, 120, holding city not bound by conveyance of land under water without the restrictions imposed by law; Gifford v. White Plains, 25 Hun, 606, holding town liable to bona fide holder on certificate of indebtedness issued by supervisor within apparent scope of authority; Clark v. Des Moines, 19 Iowa, 199, 87 A. D. 423, holding city not liable on warrants issued without authority by its officers the extent of whose authority ascertainable from public records.

— Of firm generally for acts of partner.

Cited in Griswold v. Haven, 25 N. Y. 595, 82 A. D. 380, holding partnership liable for money advanced in good faith on false storehouse receipt given by partner.

— On commercial paper executed by one partner.

Cited in First Nat. Bank v. Morgan, 73 N. Y. 593 (affirming 6 Hun, 346); Johnson v. Lee, 30 N. Y. S. R. 392, 10 N. Y. Supp. 9,—holding partnership liable to bona fide holder on note wrongfully indorsed in firm name by partner; Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946, holding partnership liable on accommodation paper wrongfully drawn by partner and discounted in good faith; Exchange Bank v. Monteath, 26 N. Y. 505, holding partnership liable to bona fide holder on accommodation drafts and acceptances by authorized agents; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293, denying right of bank with notice to recover on partnership note given by partner without authority for individual debt; Tucker v. Iba, 54 App. Div. 566, 66 N. Y. Supp. 1019, holding partnership not liable to payee with notice on partnership note drawn by partner for individual benefit.

Distinguished in Lyon v. Fitch, 46 N. Y. S. R. 541, 18 N. Y. Supp. 867, holding partnership not liable to one not a bona fide holder on note wrongfully indorsed in firm name by partner.

Liability for representations made by agent or officer.

Cited in De Voss v. Richmond, 18 Gratt. 338, 98 A. D. 646, as to whether

Digitized by Google

principal is bound by representations of agent as to authority to do particular act within apparent scope of authority.

— Of corporation generally.

Cited in Edwards v. Thomas, 66 Mo. 468, upholding right of bona fide purchaser of negotiable paper indorsed by financial agent of corporation to rely on agent's statement that money was needed for corporation.

— Of bank.

Cited in Taylor v. Commercial Bank, 68 App. Div. 458, 73 N. Y. Supp. 924, holding bank liable for damages resulting from false representation by its cashier of customer's financial responsibility; City Nat. Bank v. Thomas, 46 Neb. 861, 65 N. W. 895, holding bank bound by representation of president to purchaser of negotiable notes that they belonged to the bank.

— Of public officer.

Cited in State v. Haskell, 20 Iowa, 281, holding state not liable to one injured by false representations of school fund commissioner as to value of mortgaged lands.

Binding effect of agent's admissions.

Distinguished in Rothschild v. Schuberth, 8 Bosw. 289, as to whether admission of general agent, after maturity of note as to its indorsement by him, competent against principal.

Nature of certificate of deposit.

Cited in People ex rel. Belden v. Contracting Board, 27 N. Y. 378, holding proposals for contract requiring deposit of $4,000 in cash satisfied by certificate of deposit for that amount; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910, holding certificate of deposit in ordinary form to be equivalent to demand promissory note.

Liability of bank on certificate of deposit.

Cited in Citizens' Sav. Bank v. Blakesley, 42 Ohio St. 645, holding bank liable to bona fide holder on certificate of deposit fraudulently issued by cashier; Barnes v. Ontario Bank, 19 N. Y. 152, holding bank liable on certificates of deposit issued by cashier for purpose of raising money; Modern Woodmen v. Union Nat. Bank, 47 C. C. A. 667, 108 Fed. 753 (dissenting opinion), majority holding action not maintainable against bank on false non negotiable certificate of deposit, containing no promise to pay.

Liability on bonds.

Distinguished in People v. Bostwick, 43 Barb. 1, holding bond delivered without signatures of all obligors agreed upon, not enforcible.

— Municipal bonds.

Cited in Hoag v. Greenwich, 39 N. Y. S. R. 969, 15 N. Y. Supp. 743, holding bonds in hands of bona fide purchaser, not rendered invalid by issuance of an amount in excess of statutory limit; Gould v. Venice, 29 Barb. 442, holding town liable to bona fide holders on bonds appearing on their face to have been issued by statutory authority; Smith v. Clark County, 54 Mo. 58, on availability to town in action on bonds by bona fide holders without notice, of defense that vote had not been taken as required by statute; Alvord v. Syracuse Sav. Bank 98 N. Y. 599, denying right of taxpayer to have municipal bonds in hands of bona fide holders canceled for lack of consents, where records indicate that requisite consents were filed; Marshall County v. Schenck, 72 U. S. 772, 18 L. ed. 556, holding county bonds valid in hands of bona fide holder, although order for elec-

Digitized by Google

tion on question of issuing same, was made by court instead of supervisors; D'Esterre v. Brooklyn, 90 Fed. 586, holding bonds issued in conformity to statute with exception of leaving name of payee blank, not subject to prior equities in hands of bona fide purchaser.

Estoppel in pais generally.

Cited in Board of Education v. First Nat. Bank, 70 Hun, 520, 24 N. Y. Supp. 392, holding owner not estopped from denying accuracy of architect's estimate of value of work on uncompleted building, as to bank advancing money on strength thereof; The Ottumwa Belle, 78 Fed. 643, holding claimant against vessel after sale thereof, estopped from demanding greater amount than stated to prospective purchaser to have been due.

Cited in note in 1 L.R.A. 522, on equitable estoppel.

Estoppel to deny authority of agent.

Cited in Bank of Auburn v. Putnam, 3 Keyes, 343, holding principal precluded from denying that note indorsed by agent for discount was business paper, where sanctioning previous indorsements of similar notes; Dowden v. Cryder, 55 N. J. L. 329, 26 Atl. 941, holding principal not estopped from denying agent's authority because latter's representations were believed and acted on; Bank of Batavia v. New York, L. E. & W. R. Co. 33 Hun, 589, holding carrier equitably estopped from denying receipt of goods described in bill of lading isused by authorized agent; Bank of Auburn v. Putnam, 1 Abb. App. Dec. 80, holding corporation liable on accommodation paper indorsed by agent where corporation had frequently previously recognized the validity of such transactions.

Cited in reference note in 36 A. S. R. 186, on estoppel by unauthorized acts of corporate agent.

— Estoppel of bank.

Cited in United States Nat. Bank v. First Nat. Bank, 24 C. C. A. 597, 49 U. S. App. 67, 79 Fed. 296, holding bank estopped to deny authority of president and cashier to rediscount bills receivable by long acquiesence in such practice; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 7 Legal Gaz. 134, to point that corporation may be estopped by acts of its officers.

— Estoppel of town.

Distinguished in Gould v. Sterling, 23 N. Y. 439, holding town not estopped from denying validity of bonds issued by agents, where facts upon which validity depends ascertainable by holders.

Who are bona fide holders.

Cited in Webster v. Howe Mach. Co. 54 Conn. 394, 8 Atl. 482, holding one merely indorsing, selling, and placing proceeds of draft to credit of drawer, not bona fide holder.

Liability on treasury notes fraudulently put in circulation.

Cited in Cooke v. United States, 12 Blatchf. 43, Fed. Cas. No. 3,178, as to whether government would be liable on treasury notes fraudulently abstracted from possession of secretary of treasury and put in circulation.

Rights of bona fide holders of negotiable securities.

Cited in note in 11 L.R.A. 847, on rights of bona fide holders of negotiable securities issued by corporations.

Liability for fraud.

Cited in Cross v. Sackett, 2 Bosw. 617, holding persons intending to deceive the public liable to one indirectly induced by their false representations to buy

Digitized by Google

worthless stock; Seizer v. Mali, 32 Barb. 76, 11 Abb. Pr. 129, holding action for price paid for spurious stock maintainable only against one directly transferring it.

Defenses available against bona fide holders generally.

Cited in Bernstein v. Crow, 22 Misc. 99, 48 N. Y. Supp. 531, holding defense that draft was for accommodation of payee not available to drawer and acceptor against bona fide holder for value before maturity.

Judicial notice of historical facts.

Cited in Swinnerton v. Columbian Ins. Co. 37 N. Y. 174, 93 A. D. 560, 4 N. Y. Trans. App. 159, holding that judicial notice will be taken of particular acts creating civil war.

Validity of banking customs.

Cited in note in 50 A. D. 97, on banking customs and their validity.

Right to recover money paid on forged check.

Cited in note in 26 A. R. 97, on bank's right to recover back money paid on forged check.

69 AM. DEC. 694, DAVIS v. GORTON, 16 N. Y. 255.

Statutes of limitations as to claims under contract of indefinite duration.

Cited in Re Sprague, 8 N. Y. S. R. 902; Reid v. Farrar, 6 N. Y. S. R. 199; Carney v. Wadhams, 9 N. Y. Civ. Proc. Rep. 204,—holding where services are rendered through a series of years without any express agreement as to time of payment the presumption is that wages become due yearly; Re Stewart, 21 Misc. 412, 47 N. Y. Supp. 1149, holding that for the purpose of the statute a general employment of no definite duration is presumed as one from year to year and wages are due yearly; Nicholl v. Larkin, 2 Redf. 236; Burnett v. Noble, 5 Redf. 69,—holding that an implied contract for services of no definite duration is presumed to be one from year to year, and the statute bars recovery for so much as was performed prior to the period of limitation; Re Teyon, 2 Redf. 306, holding same as to recovery by a guardian for furnishing his ward with board under contract, with testator, of no definite duration; Turner v. Martin, 4 Robt. 661, holding that a delivery of stone under an implied contract to pay its reasonable value creates a liability at once from which time the statute runs; Jagau v. Goetz, 11 Misc. 380, 32 N. Y. Supp. 144, on the presumption of contract for services by the month in absence of evidence of specific duration; Re Gardner, 103 N. Y. 533, 57 A. R. 768, 9 N. E. 306, holding that an action, for services performed, under a general hiring of no definite duration, but not done within the statutory limitation before action is brought, is barred; Rider v. Union India Rubber Co. 28 N. Y. 379 (affirming 5 Bosw. 85), holding that when the use of chattels has been given for no definite time, nor compensation, a recovery may be had for only so much as has been within the last six years previous to action; Price v. Price, 34 Iowa, 404, on the barring, by the statute, of a claim for personal services accrued at a time beyond the statutory limitation.

Cited in note in 2 L.R.A. 831, as to when statute of limitations begins to run.

Distinguished in Carroll v. McCoy, 40 Iowa, 38, holding that a cause of action on an implied contract to receive and support an infant does not arise until such service is ended, before which time the statute does not run; Bartel v.

Digitized by Google

Mathias, 19 Or. 482, 24 Pac. 918, holding that when a single agreement contains several distinct subjects each to be performed and paid for individually, the statute begins to run against each upon its performance; Shafer v. Pratt, 79 App. Div. 447, 80 N. Y. Supp. 109, holding that contract of employment not stating the rate nor time of payment, nor duration of service for receiving, weighing and inspecting wood pulp, is an entirety and statute begins to run at end of service.

Disapproved in Hay v. Peterson, 6 Wyo. 419, 34 L.R.A. 581, 45 Pac. 1073, holding that service for indefinite period and compensation is a continuing contract and statute of limitations does not begin until service is ended.

— Where payments on contract are made at definite periods.

Cited in Cotton v. Rand, 93 Tex. 7, 51 S. W. 838, holding that the statute commenced to run on a contract for services by the year, at the end of each year for services rendered during that time; Butler v. Kirby, 53 Wis. 188, 10 N. W. 373, holding that compensation for services performed by the month is due each month and the statute begins to run on the amount due at that time.

69 AM. DEC. 696, McKYRING v. BULL, 16 N. Y. 297.

What must be specifically pleaded in an answer.

Referred to as leading case in Marie v. Garrison, 13 Abb. N. C. 389 note, holding illegality must be pleaded to a contract.

Cited in Hall v. United States Reflector Co. 30 Hun, 375, holding that evidence of defense not specially pleaded is inadmissible; Taylor v. Richards, 9 Bosw. 679, holding matter in avoidance must be specially set up by answer; Schreyer v. New York, 7 Jones & S. 1, holding illegality of a contract is an affirmative defense which must be specially pleaded; O'Toole v. Garvin, 1 Hun, 92, 3 Thomp. & C. 118, holding that defense of illegality is confession and avoidance, and must be specially pleaded; Scott v. Johnson, 5 Bosw. 213, holding same as to proof of usury as a defense to a contract when it is not alleged in answer; Mittler v. Herter, 39 Misc. 843, 81 N. Y. Supp. 494, holding that proof of discharge in bankruptcy is confession and avoidance and must be so pleaded; Fischer v. Metropolitan L. Ins. Co. 37 App. Div. 575, 56 N. Y. Supp. 260, holding that in an action on an insurance policy proof of statutory notice upon which to base a forfeiture for nonpayment is inadmissible when such notice is not specially pleaded; Gillson v. Price, 18 Nev. 109, 1 Pac. 459, holding that if defendent wishes to rely on matters not set up in complaint he must allege them as defence in his answer; Atchison & N. R. Co. v. Washburn, 5 Neb. 117; Jones v. Seward County, 10 Neb. 154, 4 N. W. 946,—holding same as to evidence to show an assessment of others' property, in an action to recover taxes; Prall v. Peters, 32 Neb. 832, 49 N. W. 767, holding same as to evidence of misrepresentation in contract for sale; Bishop v. Stevens, 31 Neb. 786, 48 N. W. 827, holding same as to a defense to a contract for services of real estate agent; Linton v. Unexcelled Fireworks Co. 124 N. Y. 533, 27 N. E. 406, holding that in an action for breach of contract of employment, proof of acts warranting dismissal, not alleged in answer, is inadmissible; Wehle v. Butler, 12 Abb. Pr. N. S. 139, 43 How. Pr. 5, 3 Jones & S. 1, holding in an action of conversion that the defense of a subsequent valid sale on execution in favor of defendants must be pleaded; Pier v. Finch, 29 Barb. 170, holding that in an action against a conductor for assault, proof of conformity with the regulations of company is inadmissible as a defense unless pleaded in answer; Baldwin v. United States Teleg. Co. 1 Lans. 125,

Digitized by Google

holding that in an action for failure to deliver a telegraph message evidence of claimant's negligence is inadmissible as a defense when not set up in answer; Babb v. Mackey, 10 Wis. 319, holding that under statute each party must apprise the other of the precise ground on which he stands.

Distinguished in Harter v. Crill, 33 Barb. 283, holding that in an action for criminal conversation matters in mitigation which are not properly "new matters" are admissible without being pleaded.

— Partial defenses.

Cited in Somerville v. Stewart, 48 N. J. L. 116, 3 Atl. 77; Cumings v. Morris, 3 Bosw. 560; United States v. Ordway, 30 Fed. 30; Loosey v. Orser, 4 Bosw. 391,— holding that under statute partial defenses must be pleaded the same as full defenses; Maretzek v. Cauldwell, 2 Robt. 715, 19 Abb. Pr. 535, holding pleading of partial defenses to an action on a contract is essential; Foland v. Johnson, 16 Abb. Pr. 235, holding that in an action for assault and battery facts constituting a partial defense must be pleaded; Bennett v. Matthews, 64 Barb. 410, holding that in an action for libel matters in mitigation may be shown as a partial defense when set up in answer; Clough v. Murray, 19 Abb. Pr. 97, holding failure of consideration whether entire or partial must be set forth accordingly.

— Necessity of plea in mitigation.

Cited in Reed v. Union Cent. L. Ins. Co. 21 Utah, 295, 61 Pac. 21, holding that in an action on a contract insolvency can not be shown in mitigation of damages under simple denial; Wehle v. Haviland, 42 How. Pr. 399, holding that in an action for wrongful attachment, subsequent valid levy in favor of a third person can not be shown in mitigation of damages under general denial; Gabay v. Doane, 77 App. Div. 413, 79 N. Y. Supp. 312, holding that under statute partial defenses may be pleaded to diminish claimant's recovery; Beckett v. Lawrence, 7 Abb. Pr. N. S. 403, holding that in an action for malicious wrong facts in mitigation may be pleaded in defense; Kniffen v. McConnell, 30 N. Y. 285, holding that in an action for seduction proof of uncharitable conduct by complainant is admissible, though not pleaded, in mitigation of damages; Button v. McCauley, 5 Abb. Pr. N. S. 29, 1 Abb. App. Dec. 282, 38 Barb. 413, holding that in an action for breach of promise proof of matters not alleged as a defense in answer can not be shown except in mitigation of damages.

Necessity of specially pleading payment or discharge.

Cited in Esbensen v. Hover, 3 Colo. App. 467, 33 Pac. 1008, holding where facts constituting cause of action are set forth, that defense of payment must be specifically pleaded; Wall v. Bulger, 46 Hun, 346, holding in an action to recover a legacy payment into court is an affirmative defense to be specially pleaded; Smith v. Anderson, 57 Hun, 72, 10 N. Y. Supp. 278, holding that in an action against a bank for moneys deposited payment is an affirmative defense to be specially pleaded; Glickman v. Loew, 20 Misc. 401, 45 N. Y. Supp. 1040, holding that in an action on a building contract part payment can not be shown when no plea of payment is made; Re Neil, 35 Misc. 254, 71 N. Y. Supp. 840, holding that in an action for rent, payment is an affirmative defense and must be specially pleaded; Morrell v. Irving F. Ins. Co. 33 N. Y. 429, 88 A. D. 396, holding that in action on fire insurance policy, evidence of judgment against another company on same loss is inadmissible without being pleaded; Williams v. Birch, 6 Bosw. 299, holding evidence of a valid award of arbitrators inadmissible as a defense unless set up in answer.

Digitized by Google

Cited in reference note in 82 A. S. R. 758, on necessity of specially pleading payment.

Distinguished in Cochran v. Reich, 91 Hun, 440, 36 N. Y. Supp. 233, 25 N. Y. Civ. Proc. Rep. 147, holding that in an action for rent under a lease where nonpayment must be alleged and proven to establish a cause of action, payment is not an affirmative defense to be specially pleaded.

—Evidence admissible under general denial.

Cited in Bank of Cooperstown v. Corlies, 1 Abb. Pr. N. S. 412, holding that under statute denials of material allegations are a substitute for general issue at common law; Schaus v. Manhattan Gaslight Co. 45 How. Pr. 481, 14 Abb. Pr. N. S. 371, holding that under general denial any evidence which tends to controvert the material allegations in complaint is admissible; McKay v. Draper, 27 N. Y. 256, on same point; Hopkins v. Ensign, 11 N. Y. S. R. 85, holding that new matter constituting a defense must be pleaded; Wells v. Applegate, 12 Or. 208, 6 Pac. 770, holding failure of consideration can not be set up under general denial; Stoddard v. Treadwell, 26 Cal. 294; Krom v. Levy, 1 Hun, 171, 3 Thomp. & C. 704, 47 How. Pr. 97,—holding evidence of counterclaim inadmissible under general denial; Roe v. Angevine, 7 Hun, 679, holding same as to evidence in confession and avoidance; Manning v. Winter, 7 Hun, 482, on same point; St. John v. Skinner, 44 How. Pr. 198, holding inadmissible under general denial evidence of avoidance of contract for loan; Fox v. Turner, 17 N. Y. S. R. 666, 2 N. Y. Supp. 164, holding that under an answer consisting of a general denial and also counterclaim which does not state the nature of the claim and is therefor unavailing, no proof of affirmative defense is admissible; Hoffheimer v. Stiefel, 17 Misc. 236, 39 N. Y. Supp. 714, holding in an action on a judgment evidence to impeach it, is inadmissible under general denial; Duryee v. Lester, 75 N. Y. 442, holding in action by broker to recover commissions evidence of breach of contract by double agency is inadmissible under general denial; Wemple v. McManus, 27 Jones & S. 418, 15 N. Y. Supp. 86, holding that in an action for broker's commission evidence to show special agreement whereby none was due is inadmissible under general denial; Wilbur v. Collin, 4 App. Div. 417, 38 N. Y. Supp. 848, holding that in an action to recover rent, a conveyance without reserving rent by lessor can not be shown under general denial; Whitney v. Whitney, 171 N. Y. 176, 63 N. E. 834, holding that proof of will may be offered under a general denial of a claim alleging intestacy; Griffith v. Long Island R. Co. 101 N. Y. 348, 4 N. E. 740, 9 N. Y. Civ. Proc. Rep. 84, holding that, in an action to recover a chattel based on wrongful detention, defendant's general denial puts in issue plaintiff's title, which must be shown to establish a cause of action, and he may show title in stranger under such plea; Kissam v. Roberts, 6 Bosw. 154, holding that in an action for wrongful taking of goods proof of title in a third person cannot be shown by defendant under general denial; Southern R. Co. v. Ferguson, 105 Tenn. 552, 80 A. S. R. 908, 59 S. W. 343, holding in an action for wrongful maintenance of a bridge right of prescription can not be set up as a defense under general denial.

Cited in reference notes in 70 A. D. 698; 77 A. D. 583,—as to what general denial puts in issue.

Distinguished in Schaus v. Manhattan Gaslight Co. 4 Jones & S. 263, holding general denial will cover disproof of any fact involved in the material parts of the complaint; Marley v. Smith, 4 Kan. 183, holding in an action to recover an indebtedness proof of anything under general denial which would controvert

Digitized by Google

existence of the debt is admissible; Close v. Clark, 16 Daly, 91, 9 N. Y. Supp. 538, holding that in an action to enforce a mechanic's lien evidence that the defendant furnished part of the materials is admissible under general denial; Bellinger v. Craigue, 31 Barb. 534, holding that in an action for physician's services, evidence of malpractice is not excluded as "new matter" under general denial; Tompkins v. Tompkins, 78 Hun, 220, 28 N. Y. Supp. 903, holding that under general denial, any evidence which tends to contradict claimant's assertion that a certain transaction was a "loan" is admissible; Buttrick v. Gilman, 22 Wis. 356, holding in an action for value of services evidence of negligence or unskillfulness in performing them is admissible under general denial.

— Payment or discharge under general denial.

Cited in Clark v. Mullen, 16 Neb. 481, 20 N. W. 642; Bassett v. Lederer, 3 Thomp. & C. 671; Bassett v. Lederer, 1 Hun, 274; Baker v. Loring, 92 Hun, 61, 36 N. Y. Supp. 644; Arnstein v. Haulenbeek, 16 Daly, 382, 11 N. Y. Supp. 701; Rogers v. T. H. Simonson & Son Co. 45 Misc. 323, 90 N. Y. Supp. 298,—holding that payment is an affirmative defense and can not be shown under general denial; Ellison v. Rix, 85 N. C. 77, holding same as to payment of bond; Conkling v. Weatherby, 181 N. Y. 258, 73 N. E. 1028, 2 A. & E. Ann. Cas. 740, on same point; Wilkerson v. Farnham, 82 Mo. 672, holding same as to promissory note; Henderson v. Scott, 32 Hun, 412, 6 N. Y. Civ. Proc. Rep. 39, holding same as to defense of judgment in bar; Lytle v. Crawford, 69 App. Div. 273, 74 N. Y. Supp. 660, 32 N. Y. Civ. Proc. Rep. 360, holding same as to evidence of discharge of a claim by former judgment; Horton v. Horton, 83 Hun, 213 , 31 N. Y. Supp. 588, holding same as to evidence of a release of a cause of action; Grant v. Pratt, 87 App. Div. 490, 84 N. Y. Supp. 983, holding same as to evidence of waiver in an action for breach of contract; Schwartz v. Ribaudo, 52 Misc. 102, 101 N. Y. Supp. 599, holding inadmissible evidence of accord and satisfaction of contract under general denial; Chapin v. Pratt, 49 N. Y. S. R. 42, 20 N. Y. Supp. 952, holding same in action against maker of check.

Cited in reference note in 87 A. D. 523, on admissibility of evidence of payment under general denial.

Cited in notes in 61 A. D. 60, on proof of payment under general issue and under general denial; 61 A. D. 61, on proof of payment under general denial.

Distinguished in Quinn v. Lloyd, 41 N. Y. 349, holding that in an action alleging balance due for services after certain payments without stating value of such services proof of payment on account is admissible under general denial; Knapp v. Roche, 94 N. Y. 329, holding when nonpayment is alleged as necessary to a cause of action proof of payment is admissible under general denial; Boomer v. Koon, 6 Hun, 645, holding evidence of subsequent alteration of a note proper under general denial; Robertson v. Robertson, 37 Or. 339, 82 A. S. R. 756, 62 Pac. 377, holding that where an allegation, not stated as a matter of law, claims a certain amount due proof of payment is admissible as a defense under general denial; Gruenstein v. Jablonsky, 1 App. Div. 580, 37 N. Y. Supp. 538, holding that where failure to pay an installment, as a condition subsequent, rendered whole amount due, such payment may be shown under general denial; Parker v. Hays, 7 Kan. 412, holding an indebtedness is alleged generally without showing how created and answer is a general denial that a payment of cause may be shown.

Set-off as a defense.

Cited in Curran v. Curran, 40 Ind. 473, holding that a set-off is not strictly

Digitized by Google

a defense and when it assumes to answer the whole complaint, but answers only a part it is bad on demurrer.

Burden of proof under plea of payment.

Cited in Re Macomber, 2 Connoly, 279, 11 N. Y. Supp. 198; Claflin v. New York Standard Match Co. 7 Misc. 668, 28 N. Y. Supp. 42,—holding that plea of payment is an affirmative defense casting burden of proof upon defendant; Eagan v. Kergill, 1 Dem. 464, holding that on a claim against testator for services on devised property, the burden of proof of payment rests on devisee.

What must be alleged in complaint.

Cited in Watson v. Lemen, 9 Colo. 200, 11 Pac. 88, holding that a complaint merely alleging that indebtedness is due, not stating the facts, merely declares a legal conclusion and is bad; Riggs v. Chapin, 27 N. Y. S. R. 268, 7 N. Y. Supp. 765, holding that when allegations in complaint state that complainant sub-contracted with a person, he cannot show a contract with latter's employer; Hudelson v. First Nat. Bank, 51 Neb. 557, 71 N. W. 304, holding that in an action on a bond, its breach and nonpayment must be affirmatively alleged in complaint; Lent v. New York & M. R. Co. 130 N. Y. 504, 29 N. E. 988, holding that, under statute, in an action upon indebtedness an allegation of nonpayment is necessary; Sbarboro v. Health Department, 26 App. Div. 177, 49 N. Y. Supp. 1033, holding in an action against the members of a board of health, a defense merely alleging official discretion without stating the issuable parts is demurrable; Ramsey v. Erie R. Co. 38 How. Pr. 193, 7 Abb. Pr. N. S. 156, holding in an action on railway bonds the complaint must allege all the material facts upon which he intends to base his action.

— In reply.

Cited in Fetrow v. Wiseman, 40 Ind. 148, holding that where infancy is pleaded as a defense to note and there is no allegation in claimant's reply of ratification after majority such can not be proved.

What demurrer admits.

Cited in Marsh v. Elsworth, 36 How. Pr. 532, 1 Sweeny, 58, holding that a demurrer does not admit the truth of conclusions of law in the complaint of an action for slander.

69 AM. DEC. 707, TERRY v. CHANDLER, 16 N. Y. 354.

Establishment of boundaries by parol agreement or acquiescence.

Cited in Watrous v. Morrison, 33 Fla. 261, 39 A. S. R. 139, 14 So. 805; Burns v. Martin, 45 Mich. 22, 7 N. W. 219; Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. 880; Orr v. Cox, 61 W. Va. 361, 56 S. E. 522; O'Donnell v. Penny, 17 R. I. 164, 20 Atl. 305,—holding that owners of adjacent land may establish a division line by parol agreement where there is a dispute or line is uncertain; Sweet v. Warner, 14 N. Y. S. R. 312, holding that a dispute or uncertainty as to boundary line must be shown; Miner v. New York, 5 Jones & S. 171, holding a disputed boundary line necessary to invoke the rule; Smith v. Hamilton, 20 Mich. 433, 4 A. R. 398, holding that where one has aquiesced in agreement settling an honest difficulty in determining a boundary line it is binding; DeLong v. Baldwin, 111 Mich. 466, 69 N. W. 831, holding that there can be no parol agreement where there is no adjustment of differences; Wood v. Lafayette, 68 N. Y. 181; Hubbell v. McCulloch, 47 Barb. 287,—holding that where the description in a deed is definite and certain it is very doubtful whether a mere agreement for locating the line will bar a party from claiming according to his deed.

Digitized by Google

Cited in reference notes in 27 A. R. 242, on acquiescence in division line; 27 A. R. 244, on agreements as to divisional lines; 11 A. S. R. 592, on establishment of boundaries by parol agreement or acquiescence; 53 A. S. R. 491, on parol agreements and acquiescence in boundary lines.

Cited in notes in 13 A. D. 224–225, on validity and effect of establishment of boundaries by parol; 10 L.R.A.(N.S.) 610, on effect of compromise agreement locating division line at place known not to be the true boundary.

Agreement as to line by person having no title in adjoining land.

Cited in Merrill v. Hilliard, 59 N. H. 481, holding that a party having no title to either side of a line cannot show title by a parol agreement.

Admissions as to title.

Cited in People v. Holmes, 166 N. Y. 540, 60 N. E. 249; Vosburgh v. Teator, 32 N. Y. 561,—holding that coterminous land owners cannot by parol vest land which confessedly belongs to one of them in the other; Raynor v. Timerson, 51 Barb. 517, holding that a party cannot make title to land by a parol admission of his adversary; Walker v. Dunspaugh, 20 N. Y. 170, holding one school trustee cannot alone admit a claimant as lessor of the district.

Estoppel to deny division line.

Cited in reference note in 77 A. D. 772, on acts which will estop party to deny division line is true line.

69 AM. DEC. 713, BAGLEY v. PEDDIE, 16 N. Y. 469.

When stipulated damages considered penalty.

Cited in Kemp v. Knickerbocker Ice Co. 69 N. Y. 45 (reversing 51 How. Pr. 31), holding that provisions for stipulated damages must be construed in light of circumstances under which they are made; Yetter v. Hudson, 57 Tex. 604, holding the folly or wisdom of parties in making such stipulations immaterial.

Cited in reference notes in 72 A. D. 116; 81 A. D. 747,—as to whether sum is liquidated damages or penalty; 99 A. D. 631, on whether sum named in contract to be regarded as penalty or liquidated damages; 14 A. S. R. 847; 33 A. S. R. 849,—on distinction between penalties and liquidated damages; 39 A. S. R. 636, as to when damages are liquidated and when a penalty.

Cited in notes in 1 A. D. 335, as to whether provision is one for liquidating damages or one for penalty; 30 A. R. 31–36, on liquidated damages and penalties; 106 A. S. R. 51, on language employed as test for determining as between liquidated damages and penalty; 108 A. S. R. 57, on contracts containing several provisions as agreements for liquidated damages; 10 L.R.A. 829, on when provision in contract is considered as for liquidated damages; 13 L.R.A. 671, 672, on distinction between liquidated damages and penalty in contract; 6 E. R. C. 560–561, on distinction between a penalty and liquidated damages mentioned as payable in event of nonperformance of contract.

Distinguished in Manice v. Brady, 15 Abb. Pr. 173, on what constitutes liquidated damages; Staples v. Parker, 41 Barb. 648, on determination of intention of parties on question of damages; Smith v. Wedgwood, 74 Me. 457, holding where there is doubt as to whether amount was intended as a penalty or as stipulated damages it will be construed as a penalty.

— Denomination by parties as "liquidated damages" or "penalty."

Cited in Tode v. Gross, 127 N. Y. 480, 24 A. S. R. 475, 13 L.R.A. 652, 28 N. E. 469 (affirming 22 N. Y. S. R. 818), holding that use of word "penalty" in

Digitized by Google

statement of stipulated damages is not necessarily controlling where damage is uncertain; Colwell v. Lawrence, 38 N. Y. 71, 5 N. Y. Trans. App. 307, holding that though term "liquidated damages" is used a gross amount fixed may be in the nature of a penalty; Dwinel v. Brown, 54 Me. 468, holding that use of term liquidated damages will not conclude a court from construing provision of penalty; Laurea v. Bernauer, 33 Hun, 307, holding use of word forfeit implies a penalty.

Distinguished in Colwell v. Foulks, 36 How. Pr. 306, holding use of word forfeiture implies penalty; Salters v. Ralph, 15 Abb. Pr. 273, holding a provision in an agreement that for its breach the party shall "forfeit" a fixed sum implies a penalty.

— Stipulation for damages of uncertain amount or difficult to ascertain.

Cited in Riggins v. Hinchman, 3 Tex. App. Civ. Cas. (Willson) 503, holding that damage which would arise from breach of contract must be uncertain; Goldman v. Goldman, 51 La. Ann. 761, 25 So. 555, sustaining such a provision in a contract by a vendor of a business not to engage in a similar business under stipulated conditions; General Electric Co. v. Westinghouse Electric & Mfg. Co. 144 Fed. 458, holding stipulated damage of fifty per cent of price for failure to sell and deliver was not so illegal as to relegate parties to suit in equity; Shute v. Hamilton, 3 Daly, 462; Emack v. Campbell, 14 App. D. C. 186; Hahn v. Horstman, 12 Bush, 249,—sustaining a per diem stipulation for failure to complete certain work on time; Wooster v. Kisch, 26 Hun, 61, sustaining $1000 stipulated damages for failure of licensee to permit licensor to inspect and count patented appliances in use; Little v. Banks, 20 Hun, 143, holding amount of $100 is not exorbitant for failure to keep stocks of published law reports on hand for sale to dealers; Wilson v. Duls, 1 N. Y. City Ct. Rep. 132, holding stipulation in a contract for employment was not penal; L. P. & J. A. Smith Co. v. United States, 34 Ct. Cl. 472, holding same in a contract for the employment and use of a tug; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, sustaining a provision stipulating the value of a yacht in a contract for its hire; Brooks v. Wichita, 52 C. C. A. 209, 114 Fed. 297, sustaining such a provision in a contract to furnish a city with electric light; Pastor v. Solomon, 25 Misc. 322, 54 N. Y. Supp. 575, sustaining such a provision in a contract to perform at a theatre; Com. v. Ginn, 111 Ky. 110, 63 S. W. 467, sustaining such a provision in a contract to furnish a county with text-books; New Britain v. New Britain Teleph. Co. 74 Conn. 326, 50 Atl. 881, holding same as to such an agreement in a contract to furnish a city telephone service; Glock v. Howard & W. Colony Co. 123 Cal. 1, 69 A. S. R. 17, 43 L.R.A. 199, 55 Pac. 713, refusing equitable interference on ground of uncertainty of damage where there were liquidated damages by stipulation.

— When default is in payment of money.

Cited in Ward v. Jewett, 4 Robt. 714, holding that there can be no liquidated damages where only act to be performed is payment of money; Chande v. Shepard, 122 N. Y. 397, 25 N. E. 358, holding sum deposited against default in payment of rent could not be appropriated beyond what was in arrear; Barnes v. Clement, 12 S. D. 270, 81 N. W. 301, holding provision for forfeiture of all payments made on default of purchaser of land is penal.

— Disparity to apparent loss.

Cited in Giles v. Spaulding, 5 Hun, 458, holding such a covenant to be a penalty where amount named is disproportionate to actual damage; Taylor v. Times

Digitized by Google

Newspaper Co. 83 Minn. 523, 85 A. S. R. 473, 86 N. W. 760, holding where actual damage by breach of contract is doubtful and difficult of proof, that stipulated damage is not considered penalty though amount stipulated is much larger than apparent loss; Stover v. Spielman, 1 Pa. Super. Ct. 526, holding that stipulated sum which is excessive for breach of condition of contract is a penalty; Curtis v. VanBergh, 161 N. Y. 47, 55 N. E. 398, holding $50 a day for failing to complete a building for a factory at a rental of $2,100 a year, whereby idleness ensued was not unreasonable.

69 AM. DEC. 718, GRIFFIN v. COLVER, 16 N. Y. 489.

Elements of damages.

Cited in Rochester Lantern Co. v. Stiles & P. Press Co. 135 N. Y. 209, 31 N. E. 1018, 47 N. Y. S. R. 842; Brooklyn v. Brooklyn City R. Co. 8 Abb. Pr. N. S. 356, 57 Barb. 497; Mack v. Patchin, 29 How. Pr. 20; Baldwin v. United States Teleg. Co. 45 N. Y. 744, 6 A. R. 165 (affirming 1 Lans. 125); Neary v. Bostwick, 2 Hilt. 514; Devereux v. Buckley, 34 Ohio St. 16, 32 A. R. 342; Cassidy v. Le Fevre, 45 N. Y. 562,—holding that damages must flow directly and naturally and in the due course of things from breach of contract and must be such as parties at the time of entering into contract may reasonably be supposed to have contemplated as probable consequence of breach and must be capable of being established with reasonable certainty; Devlin v. New York, 63 N. Y. 8, 50 How. Pr. 1, holding measure of damages in general to be the difference between the cost of performing the contract and what would have been earned by performance; Mitchell v. Cornell, 12 Jones & S. 401, holding market value of charter for unexpired term, measure of damage for breach of contract for charter of steamer.

Cited in reference note in 71 A. D. 645, on what damages for breach of contract include.

Special and consequential damages.

Cited in Paine v. Sherwood, 19 Minn. 315, Gil. 270, holding that damages recoverable on breach of contract must be such as would be reasonably supposed to have been contemplated by the parties as the proper result of the breach; Niagara Falls Paper Co. v. Lee, 20 App. Div. 217, 47 N. Y. Supp. 1, holding that damage must naturally arise from breach of contract; Blagen v. Thompson, 23 Or. 239, 18 L.R.A. 315, 31 Pac. 647, holding that all the facts surrounding the execution of the contract known to both parties are to be considered in estimating measure of damages for its breach; Crater v. Binninger, 33 N. J. L. 513, 97 A. D. 737, holding one who enticed another by deceit into an oil speculation liable for the amount invested and lost therein; Grindle v. Eastern Exp. Co. 67 Me. 317, 24 A. R. 31, holding an express company liable for the net value of an insurance policy on day of the lapse caused by failure to deliver money which it knew was for a premium; Daniel v. Western U. Teleg. Co. 61 Tex. 452, 48 A. R. 305, holding that a special purpose of a contract will not be taken into consideration in estimating damages for breach where not known to other party; The Ceres, 19 C. C. A. 243, 38 U. S. App. 441, 72 Fed. 936 (dissenting opinion), on nonliability on breach of contract, for a loss not in contemplation of parties when contract was made; Bulkley v. United States, 7 Ct. Cl. 543, holding where a contractor contracts for an uncertain amount of work he can recover damages for breach of contract only for amount of services actually required; Briggs v. Kennett, 8 Misc. 264, 28 N. Y. Supp. 540, holding in an action for conversion of shares of stock loss of dividends may be included in computing the damages;

Digitized by Google

Cohn v. Norton, 57 Conn. 480, 5 L.R.A. 572, 18 Atl. 595, holding measure of damages recoverable by lessee or lessor is difference between rent agreed to be paid and the value of the term, together with such special damages as circumstances may show him entitled to.

Cited in note in 34 A. D. 257, on consequential damages for breach of contract.

— Collateral loss and expense.

Cited in Meyer v. Haven, 70 App. Div. 529, 75 N. Y. Supp. 261, holding where a wall is blown down in consequence of a subcontractor's breach of contract that contractor could recover loss sustained by inability to complete building in time prescribed; Gildersleeve v. Overstolz, 90 Mo. App. 518, holding an injury to a business a legitimate element to be considered in establishing a damage by an adversary's misdoing; Slaughter v. Denmead, 88 Va. 1019, 14 S. E. 833, holding expense in recovering wood washed away by a freshet not measure of damage for failure of a party to transport wood as agreed; Hecla Powder Co. v. Sigua Iron Co. 91 Hun, 429, 36 N. Y. Supp. 838, holding a vendor of gun powder who agrees to obtain permission from country into which gun powder is shipped is liable to vendee for amount of fine vendee has to pay by reason of failure to do so; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255, holding expense of preparation recoverable for breach of agreement to let hall for theatrical performance; Friedlander v. Myers, 47 N. Y. S. R. 52, 19 N. Y. Supp. 741, holding where, on breach of covenant of quiet enjoyment, lessee has to dispose of goods which he intended to place on premises that difference in their cost and amount realized is not measure of damage; Myers v. Burns, 35 N. Y. 269, holding that the lessee of a hotel is entitled to compensation for the loss of the use of rooms therein rendered untenantable by breach of lessor's covenant to repair.

Cited in note in 53 L.R.A. 44, on distinction between direct and collateral profits on question of recoverability for breach of contract.

Uncertain and speculative damages.

Cited in Beaupre v. Pacific & A. Telg. Co. 21 Minn. 155, holding that damages must be the approximate result of breach of contract and not speculative or contingent; Hamilton v. McPherson, 28 N. Y. 72, 84 A. D. 330; Flynn v. Hatton, 43 How. Pr. 333,—holding that damages must not be speculative or remote; Kelley v. La Crosse Carriage Co. 120 Wis. 84, 102 A. S. R. 971, 97 N. W. 674, holding that special damages to be ascertainable must be such as can be ascertained with practical safety; Wilcox v. Richmond & D. R. Co. 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264, denying recovery of damages for an alleged distress of mind, anxiety, mortification or suspense, resulting from nonperformance of the contract; Russell v. Giblin, 16 Daly, 258, 10 N. Y. Supp. 315, holding that under a covenant in a lease to furnish steam power for a bookbinding business, that injury to business caused by an insufficient supply cannot be had; Hoge v. Norton, 22 Kan. 374, holding that where cattle have been wrongfully detained, under void attachment, and so cared for as to cause a failure of their natural increase in weight, reasonable compensation for such prevented gain must be made; Schrandt v. Young, 2 Neb. (Unof.) 546, 89 N. W. 607, holding expected increase of flock and wool clip not too uncertain.

Cited in reference note in 78 A. D. 328, on recovery of speculative damages.

Cited in notes in 2 L.R.A. 174, on speculative losses as damages; 53 L.R.A. 39, on effect of speculativeness or contingency on right to recover profits lost by breach of contract; 53 L.R.A. 40, 41, on effect of uncertainty in amount on right to recover profits lost by breach of contract.

Digitized by Google

Proximate, remote and indirect damages.

Referred to as leading case in Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250, holding that failure to thresh grain is not the proximate cause of its loss by exposure and no recovery can be had.

Cited in Bussard v. Hibler, 42 Or. 500, 71 Pac. 642; Billmeyer v. Wagner, 91 Pa. 92; Hackersmith v. Hanley, 29 Or. 27, 44 Pac. 497,—holding that damages must be proximate consequence of breach of contract; Smith v. Pettee, 7 Hun, 334; Milton v. Hudson River S. B. Co. 37 N. Y. 210,—holding that damages must not have proceeded from the injured party's own neglect, inattention or mismanagement; The May Flower, Brown, Adm. 376 Fed. Cas. No. 9,345, holding that the source of a damage must be direct and immediate; Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. Supp. 436, holding where defendant failed to complete two gowns ordered by plaintiff for his betrothed at time specified that damage because of breach of promise of betrothed because of this could not be recovered.

Cited in reference notes in 72 A. D. 554, on damages for breach of contract being natural and proximate consequences; 78 A. D. 387, on recovery of damages not natural and proximate consequence of act; 84 A. D. 333, on damages for breach of contract, including proximate and remote damages; 10 A. S. R. 778, on necessity that damages be such as parties contemplated when making contract.

Cited in notes in 36 A. S. R. 808, on proximate and remote cause in cases involving wrongful acts; 53 L.R.A. 37, 38, on effect of remoteness on recoverability of profits lost by breach of contract.

Lost profits as damages.

Cited in Jones v. National Printing Co. 13 Daly, 92; Bryant v. American Teleg. Co. 1 Daly, 575; Choctaw, O. & G. R. Co. v. Jacobs, 15 Okla. 493, 82 Pac. 502; Hutchinson v. Snider, 137 Pa. 1, 20 Atl. 510, 26 W. N. C. 531, 47 Phila. Leg. Int. 494, 21 Pittsb. L. J. N. S. 187; Wilson v. Wernwag, 217 Pa. 82, 66 Atl. 242, 10 A. & E. Ann. Cas. 649; Alamo Mills Co. v. Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. 1097; Fraser v. Echo Min. & Smelting Co. 9 Tex. Civ. App. 210, 28 S. W. 714; Chisholm & M. Mfg. Co. v. United States Canopy Co. 111 Tenn. 202, 77 S. W. 1062,—holding that profits are recoverable when proximate, natural and certain and such as could reasonably have been contemplated by parties; Schile v. Brokhahus, 80 N. Y. 614; Lowenstein v. Chappell, 30 Barb. 241,—holding that gains prevented may be recovered provided they are certain and such as might naturally be expected to follow the breach; White v. Miller, 71 N. Y. 118, 27 A. R. 13; Allen v. McConihe, 124 N. Y. 342, 26 N. E. 812; Landsberger v. Magnetic Teleg. Co. 32 Barb. 530; Starbird v. Barrons, 38 N. Y. 230; Albert v. Bleecker Street, etc. R. Co. 2 Daly, 389,—holding that as a broad, general rule, a party is entitled to recover all his damages including gains prevented as well as losses sustained; New York Academy of Music v. Hackett, 2 Hilt. 217, holding that to recover loss of profits for breach of contract it must be reasonably certain that they would have been realized by performance and must have been such as would have been contemplated by the parties; Pollitt v. Long, 58 Barb. 20; Heineman v. Heard, 50 N. Y. 27 (affirming 2 Hun, 324, 4 Thomp. & Co. 666); Van Ness v. Fisher, 2 Lans. 236; Taylor v. Bradley, 4 Abb. App. Dec. 363; Scott v. Rogers, 4 Abb. App. Dec. 157; Burruss v. Hines, 94 Va. 413, 26 S. E. 875; Duke v. Norfolk & W. R. Co. 106 Va. 152, 55 S. E. 548; Benjamin v. Puget Sound Commercial Co. 12 Wash. 476, 41 Pac. 166; Winston Cigarette Mach. Co. v. Wells Whitehead Tobacco Co. 141 N. C. 284, 8

Digitized by Google

L.R.A.(N.S.) 255, 53 S. E. 885,—holding one who violates contract, is liable for gains profited or losses sustained, which may fairly have been supposed to have entered into the contemplation of the parties at the time of making of the contract; Cushing v. Seymour & S. Co. 30 Minn. 301, 15 N. W. 249, holding that to enable loss of profits to be shown as damages they should be reasonably certain; James v. Adams, 8 W. Va. 568, holding that gains prevented by breach of contract to be recoverable must be certain and such as might naturally be expected to follow the breach; Gove v. Island City Mercantile & Mill. Co. 16 Or. 93, 17 Pac. 740, on loss of earnings as a measure of damages; Western U. Teleg. Co. v. Bertram, 1 Tex. App. Civ. Cas. (White & W.) 652, to point that profits are element of damages; Collins v. Lavelle, 19 R. I. 45, 31 Atl. 434, holding evidence of profits admissible in an action for breach of contract to sell a store where plaintiff was ejected; Langan v. Potter, 8 Misc. 541, 28 N. Y. Supp. 752, holding in an action for wrongfully seizing under execution the stock of goods in plaintiff's store, plaintiff may recover loss of profits resulting from the seizure; Brown v. Hadley, 43 Kan. 267, 23 Pac. 492, holding that in an action for breach of the special provisions of real estate contract measure of damages is the fair and reasonably certain profit prevented thereby; Carolina Portland Cement Co. v. Columbia Improv. Co. 3 Ga. App. 483, 60 S. E. 279, holding that the measure of damages for breach of contract of sale is the loss of expected profit if the same can be ascertained to a reasonable certainty; Wilson v. Russler, 91 Mo. App. 275, holding loss of profits not measure of damage for failure to deliver saw logs; Fairfield v. Jeffreys, 68 Ind. 578, holding that measure of damages for breach of executory contract to permit building of a house is the difference between amount agreed to be paid, and the cost of performing the contract; Curran v. Smith, 81 C. C. A. 537, 149 Fed. 945 (affirming 138 Fed. 150), holding that measure of damages for breach of contract, to construct a pipe line by contracting engineers, was the money actually expended by promoters and not anticipated profits prevented; Krom v. Levy, 48 N. Y. 679, holding loss of profit from use not recoverable for failure to deliver appliance according to contract; Rhodes v. Baird, 16 Ohio St. 573, holding probable future profits not measure of damage in an action by an evicted lessee; Wolff v. Hoass, 11 Misc. 561, 32 N. Y. Supp. 798, holding loss of profits of business not recoverable in action by lessee for breach of covenant of quiet enjoyment; Kelly v. Miles, 26 Jones & S. 495, 12 N. Y. Supp. 915, holding that loss of profits cannot be recovered by tenant out of possession; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, holding one electing to rescind contract on breach, cannot recover loss of profits but is limited to quantum meruit; Clements v. Beatty, 87 Ala. 238, 6 So. 151, holding that measure of damages for breach of contract to sell standing timber, is the value of the trees cut and removed, minus the selling price also citing annotation on this point; French v. Ramge, 2 Neb. 254, holding that estimated profits on goods to be sold cannot be made the measure of damages for failure to ship goods according to contract; Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577, holding a telegraph company, liable only in nominal damages for failure to deliver a message directing a purchase of property in absence of evidence that a profit could have been made or was intended; Price v. Keyes, 1 Hun, 177, 3 Thomp. & C. 720, holding that loss of profits if not speculative or contingent, where owner is wrongfully deprived of use of property may be considered in estimating damages in tort as well as

Digitized by Google

for breach of contract; Wehle v. Haviland, 69 N. Y. 448, holding that speculative profits are not part of damages in an action for conversion of goods; Simmer v. St. Paul, 23 Minn. 408, denying recovery of profits which might have been made in a grocery business had sewer been properly constructed; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96, holding that in an action to recover losses for violation of anti trust law, uncertain future profits prevented are not recoverable.

Cited in reference notes in 73 A. D. 73; 78 A. D. 387; 16 A. S. R. 781; 81 A. D. 96,—on loss of profits as damages; 72 A. D. 562, on recovery for loss of profits in action for breach of contract; 96 A. D. 378, as to when future profits are recoverable as damages; 30 A. S. R. 471, on profits as element of damages for breach of contract; 35 A. S. R. 330, on loss of profits as damages for breach of contract; 41 A. S. R. 163, on loss of prospective profits from breach of contract as element of damages; 45 A. S. R. 894, on loss of profits as element of damages; 53 A. S. R. 143, on loss of prospective profits as an element of damages; 53 A. S. R. 916, on prospective profits as damages.

Cited in notes in 42 A. D. 49, on damages for breach of executory contract, loss of profits, etc.; 60 A. R. 494, on loss of profits as damages; 12 A. S. R. 303, on loss of profits as element of damages; 42 A. R. 463–464, on prospective profits as damages; 53 L.R.A. 35, on loss of profits as element of damages for breach of contract; 53 L.R.A. 54, on loss of profits as element of damages for breach of contract for general service or labor; 53 L.R.A. 82, on loss of profits as element of damages for breach of partnership contracts.

Distinguished in Nash v. Thousand Island S. B. Co. 123 App. Div. 148, 108 N. Y. Supp. 336, holding profits lost because of defendant's breach of contract to let plaintiff have exclusive checking, news, confectionery and view privileges could be recovered.

— Profits lost by enforced idleness.

Cited in Jolly v. Single, 16 Wis. 281; Hinckley v. Beckwith, 13 Wis. 31,—where a lessee of a mill is deprived of its use by a breach of the lessor's contract to repair or by direct act of lessor the loss of profits while the mill is idle are recoverable; State ex rel. Mundy v. Andrews, 39 W. Va. 35, 45 A. S. R. 884, 19 S. E. 385, holding that one excavating under contract, whose team and implements are wrongfully seized may recover profits he is prevented from making under contract; Brock v. Gale, 14 Fla. 523, 14 A. R. 356, holding that in an action against a carrier for loss of baggage containing dentists' tools no recovery can be had for loss of profits deprived; Watson v. Kirby, 112 Ala. 436, 20 So. 624, holding measure of damages for failure to deliver logs causing a mill to be idle is not the estimated profits prevented, but interest on money invested therein; Reed Lumber Co. v. Lewis, 94 Ala. 626, 10 So. 333, holding measure of damages for failure to deliver machinery to a saw mill can not be made on loss of profits estimated; Ripley v. Mosely, 57 Me. 76, holding an obligor on a bond against loss by infringement suits on a patent, liable for all expenses incident to defending such a suit but not for loss of anticipated profits during pendency; Manhattan Stamping Works v. Koehler, 45 Hun, 150, holding profits of a business not recoverable as damage because of breach of contract to furnish power for business; Callahan v. Chickasha Cotton Oil Co. 17 Okla. 544, 87 Pac. 331, holding profits not measure of damages for failure to deliver a machine.

— Resales prevented and subcontracts broken.

Cited in Thorne v. McVeagh, 75 Ill. 8, holding profit on resale of goods re-

Digitized by Google

coverable both knowing of resale; Messmore v. New York Shot & Lead Co. 40 N. Y. 422, holding where vendor knows of a contract for a resale at time, he is liable for such profits prevented on breach of his contract; Lapp v. Illinois Watch Co. 104 Ill. App. 255, holding that when vendor is informed that vendee has already disposed of the goods at a profit, the former's breach of contract to deliver, renders him liable for such profits; Lynch v. Wright, 94 Fed. 703, holding that the measure of damages for breach of contract to convey realty, is the loss of profit to vendee by prevention of resale, when vendor had knowledge of special circumstances; Ye Seng Co. v. Corbitt, 7 Sawy. 368, 9 Fed. 423, holding that the measure of damages for failure to furnish a vessel to charters is the profits which would have been made on passengers already engaged at certain rates; Booth v. Spuyten Duyvil Rolling Mill Co. 3 Thomp. & C. 368, holding profits recoverable which plaintiff would have made had defendant performed his contract to deliver articles where articles to be furnished had no market value; Atchison, T. & S. F. R. Co. v. Thomas, 70 Kan. 409, 78 Pac. 861, holding a railroad company not liable for loss of anticipated profits arising from future sale of watches to its employes caused by company's revocation of arrangement to secure payment from its employes; Connersville Wagon Co. v. McFarlan Carriage Co. 166 Ind. 123, 3 L.R.A.(N.S.) 709, 76 N. E. 294, holding loss of profits on sales of completed product not recoverable for breach of a contract to deliver wheels for the manufacture of wagons; Booth v. Spuyten Duyvil Rolling Mill Co. 60 N. Y. 487, holding where a party was prevented by a breach of contract of sale from performing a subcontract with another in contemplation of parties at time that measure of damage is difference between contract price and subcontract price.

Value of use of idle property as damages.

Cited with special approval in Livermore Foundry & Mach. Co. v. Union Compress & Storage Co. 105 Tenn. 187, 53 L.R.A. 482, 58 S. W. 270, holding value of use of cotton compress recoverable for supplying an imperfect appliance which failed and disabled the entire plant.

Cited in The Margaret J. Sanford, 37 Fed. 148, holding that the measure of damages for injury to a vessel by collision was market value for its use during detention for repairs; Wagner v. Corkhill, 40 Barb. 175, holding in case of breach of contract for erection of a building within a certain time where there is a delay in its completion, the value of the use while the owner is deprived of the use of the building is the measure of damages; Rogers v. Beard, 36 Barb. 31, 20 How. Pr. 98, holding rent of vessel under charter for time of idleness measure of damage for failure to repair chartered vessel; Alexander v. Bishop, 59 Iowa, 572, 13 N. W. 714 (dissenting opinion), on right of tenant, for breach of contract by landlord to furnish a new building, to recover damages measured by value of use of new building for business; Benton v. Fay, 64 Ill. 417, holding that measure of damages for failure to deliver a certain machine is the rental value of the shop made idle thereby; Sanitary Dist. v. McMahon & M. Co. 110 Ill. App. 510, holding that measure of damages, for failure to furnish a canal right of way to one under contract, to excavate it, is the rental value of the dredges and scows during the delay; Martin v. Seaboard Air Line R. Co. 70 S. C. 8, 48 S. E. 616, holding rental value measure of damages where plaintiff was warranted in abandoning mill because of breach of contract; Paola Gas Co. v. Paola Glass Co. 56 Kan. 614, 54 A. S. R. 598, 44 Pac. 621, holding measure of damages for breach of contract to supply

Digitized by Google

gas for factory causing it to be idle is rental value of same plus interest on other idle capital invested; Ansonia Brass & C. Co. v. Gerlach, 8 Misc. 256, 28 N. Y. Supp. 546, holding that loss of rents by failure to complete a building at time specified in a contract may be recovered from contractor; Delafield v. J. K. Ormsby Co. 62 App. Div. 262, 71 N. Y. Supp. 14, 32 N. Y. Civ. Proc. Rep. 132, holding measure of damage for failure to deliver an article is rental value of article; Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. 58, holding that damage for failure to supply power for a mill is reduced rental value.

Damages on breach of sale or warranty of chattel.

Referred to as leading case in Howe Mach. Co. v. Bryson, 44 Iowa, 159, 24 A. R. 735, holding that the damages for breach of contract giving right to sell sewing machines is measured by loss of time and expenses and not speculative profits deprived.

Cited in Goodkind v. Rogan, 8 Ill. App. 413, holding that the vendor of goods having no knowledge of special use to which the same are intended to be put, is not liable for such special damage for breach of warranty; Thomas v. Dingley, 70 Me. 100, holding the vendor of warranted carriage springs liable for consequential damages naturally incident to, and reasonably anticipated by failure of warranty; Union Bank v. Blanchard, 65 N. H. 21, 18 Atl. 90, on measure of damages of breach of warranty of goods sold; Stewart v. Power, 12 Kan. 596, holding when sale of chattels for special purpose is made, of which vendor has knowledge, he is liable for the special consequential loss resulting from breach; Sternfels v. Clark, 2 Hun, 122, 4 Thomp. & C. 396, holding in an action for breach of contract to deliver an article the use of which is known to deliverer that hazards and chances of business are to be considered in estimating damages; Shadbolt & B. Iron Co. v. Topliff, 85 Wis. 513, 55 N. W. 854, holding that a manufacturer who refuses to fill an order under contract is liable only for failure to fill orders rightfully made under contract; Coal Run Coal Co. v. Jones, 12 Ill. App. 365, holding that for failure to deliver trees at a certain time the vendor is not liable for special damages not necessarily resulting from it; Shouse v. Neiswaager, 18 Mo. App. 236, holding failure to deliver building materials of the special use of which vendor had knowledge, renders him liable for the consequential damages; South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165, 53 Atl. 1110, holding that special damages for failure to deliver an order of lumber are not allowable where vendor was ignorant of the special circumstances; Crocker-Wheeler Co. v. Bullock, 134 Fed. 241, holding that measure of damages for breach of contract to sell stock is not anticipated profits prevented which are not susceptible of proof to reasonable certainty; Norfolk & W. R. Co. v. Wilkinson, 106 Va. 775, 56 S. E. 808, holding that damage for failure to deliver lumber is difference between contract price and market price at which it sold after delay, together with expense incident to keeping lumber during delay; Hurd v. Dunsmore, 63 N. H. 171, holding that for breach of contract to buy land, the measure of damages is the difference between value of land and its agreed price plus other losses reasonably to be anticipated by parties; Goodman v. Wolf, 95 App. Div. 522, 88 N. Y. Supp. 934, holding that vendee's damages for the vendor's breach of a contract to convey real property is the difference, between the contract price and value at time of breach; Pumpelly v. Phelps, 40 N. Y. 58, 100 A. D. 463, holding where vendor refuses to convey that vendee is entitled to recover the difference between contract price and value at time of breach; Southern Cotton Oil Co. v. Heflin, 39 C. C. A. 546, 99 Fed. 339, holding that measure of damages for breach of contract to buy products of a cotton seed mill is difference between contract

Digitized by Google

price and market price; Barker v. Mann, 5 Bush, 672, 96 A. D. 373, holding that measure of damages for breach of contract to sell goods is the difference between market price and contract price plus expenses, incident to procuring in the market; Kemp v. Knickerbocker Ice Co. 51 How. Pr. 31, holding in an action by a retail merchant for breach of contract by a wholesale merchant to deliver ice that measure of damage difference between wholesale market price and contract price; Rice v. Manley, 66 N. Y. 82, 23 A. R. 30, holding in an action for a breach of a contract to sell and deliver goods to be resold in another market evidence of market value at place of resale and of cost of transportation is competent; Reynolds v. Bell, 84 Ala. 496, 4 So. 703 (affirming on rehearing 78 Ala. 513, 56 A. R. 52), holding that measure of damages for failure to deliver all of a quantity of guano, when vendor knew the special circumstances, is the loss in value of the crop for which it was to be used; Wolcott v. Mount, 38 N. J. L. 496, 20 A. R. 425; Passinger v. Thorburn, 34 N. Y. 634, 90 A. D. 753 (affirming 35 Barb. 17),—holding damage for selling spurious seed was difference in value of resultant crop from that of crop intended; Schutt v. Baker, 9 Hun, 556, holding same where hop roots were sold for cultivation and turned out to be largely of an unproductive variety; Delafield v. J. K. Armsby Co. 58 App. Div. 432, 68 N. Y. Supp. 998 (dissenting opinion), on measure of damages where vendor refuses to deliver.

Cited in reference notes in 89 A. D. 593, on measure of damages for breach of contract to deliver goods; 93 A. D. 162, on damages for breach of contract; 7 A. S. R. 659, on damages for failure to execute or for delay in executing contract at time stipulated.

Cited in notes in 12 A. S. R. 303, on measure of damages for breach of contract; 69 L.R.A. 127, on measure of damages on termination of running contract because of its insolvency or dissolution; 2 L.R.A. 766; 3 L.R.A. 588; 6 E. R. C. 624,—on measure of damages recoverable on breach of a contract; 19 L.R.A. (N.S.) 157, on measure of damages for breach of contract preventing operation of industrial business in contemplation, but not established or in actual operation.

— On breach of sale of machinery.

Cited in E. W. Bliss Co. v. Buffalo Tin Can Co. 65 C. C. A. 289, 131 Fed. 51, holding measure of damages for breach of contract to sell machinery is the difference between contract price and market price, not anticipated profits prevented; Shouse v. Neiswaanger, 18 Mo. App. 236, holding that measure of damages for failure to deliver an engine for grinding corn is all the incidental losses necessarily contemplated by the parties; Booher v. Goldsborough, 44 Ind. 490, holding that damages for breach of warranty of machinery sold, is measured by the difference in value between the article sold and the one as warranted; Sinker, D. & Co. v. Kidder, 123 Ind. 528, 24 N. E. 341, holding that the measure of damages for breach of warranty of a boiler by its explosion is the rental value of the idle plant operated by same; Brownell v. Chapman, 84 Iowa, 504, 35 A. S. R. 326, 51 N. W. 249, holding that for breach of contract to furnish boilers for a boat, the measure of damage is the rental value of the boat for that time, plus owner's time and cost of keeping men ready to work; United States Electric Lighting Co. v. Metropolitan Club, 5 App. D. C. 536, holding the measure of damage for failure to manufacture and deliver street cars at time fixed by a contract is rental value of cars less interest on contract price; Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 561, holding speculative and uncertain profits can not be made the basis for damages for failure to deliver a machine.

Digitized by Google

— On breach of agreement for transportation and the like.

Cited in Deming v. Grand Trunk R. Co. 48 N. H. 455, 2 A. R. 267, holding a railroad company liable for delaying shipment, for difference between contract price and value of goods when actually delivered; Ward v. New York C. R. Co. 47 N. Y. 29, 7 A. R. 405, holding in an action against a carrier for non-delivery of goods within a reasonable time is difference between value at the time and place of delivery and value at time and place where they should have been delivered; The Georg Dumois, 52 C. C. A. 659, 115 Fed. 65 (reversing 88 Fed. 537), holding that the measure of damages for furnishing an unseaworthy ship to a charterer for carrying perishable fruit which were ruined by the delay, is the value of cargo plus other incidental losses; Boutin v. Rudd, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685, holding that a tug owner was liable, for breach of contract to tow a leaky schooner, by reason of which it was destroyed in a storm, for the value of the vessel, when he knew of its dangerous condition; Badgley v. Wabash, 62 Wis. 642, holding a carrier who has damaged a machine so that it could not be used is not liable for loss of use of machine while another is being procured where it was not informed of such use by consignee; Western U. Teleg. Co. v. Reynolds Bros. 77 Va. 173, 46 A. R. 715, holding a telegraph company liable for such damages as befell party injured by reason of wrongful act of company; Texas & W. Teleg. & Teleph. Co. v. Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581, holding a telegraph company liable for direct damage by reason of its negligence where it has notice of purpose of message; Hays v. Western U. Teleg. Co. 70 S. C. 16, 106 A. S. R. 731, 67 L.R.A. 481, 48 S. E. 608, 3 A. & E. Ann. Cas. 424, holding where because of an error in a message a vendor paid more than given price the measure of damages is difference between price sent and price paid; Western U. Teleg. Co. v. Longwill, 5 N. M. 308, 21 Pac. 339, holding a telegraph company liable to a physician for delaying a message, relative to a professional call for difference between value of call and what he earned during that time; Fleischner v. Pacific Postal Teleg. Cable Co. 55 Fed. 738, holding company liable for debt lost by failure to transmit message to levy attachment; Raynolds v. Hanna, 55 Fed. 783, holding a telegraph company liable to amount of sender's debt, for delaying a message directing an attachment whereby debtor's goods were exhausted by priority of other attachments; Western U. Teleg. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393, holding a telegraph company not liable for loss of stolen goods, because of delaying a message relative to the capture of the thief, the company's agent having no knowledge of the situation; Postal Teleg. Cable Co. v. Barwise, 11 Colo. App. 328, 53 Pac. 252, holding that a telegraph company, not liable to a broker for loss of commission on sale of fruit, not consummated owing to failure to deliver a message; Reynolds v. Western U. Teleg. Co. 81 Mo. App. 223, holding conjectural profits not allowable for failure to deliver message not to sell; Western U. Teleg. Co. v. Graham, 1 Colo. 230, 9 A. R. 136, holding that for failure of telegraph company to deliver a message directing purchase of oil only nominal damages are recoverable; Western U. Teleg. Co. v. Martin, 9 Ill. App. 587, holding that telegraph company is liable only in nominal damages for failure to deliver a cipher message of whose purport they were ignorant; True v. International Teleg. Co. 60 Me. 9, 11 A. R. 156, holding a telegraph company liable to sender for delaying a message causing a loss by advance in price of goods and freight, notwithstanding exemption in printed blank; United States Teleg. Co. v. Gildersleeve, 29 Md. 232, 96 A. D. 519, holding that a telegraph company not liable for a loss by decline in gold

Digitized by Google

caused by failure to deliver message directing a sale of gold so worded as not to apprise them of the special circumstances; Chalice v. Witte, 81 Mo. App. 84, holding that in an action against a telegraph company for failure to deliver a message regarding a sale of cattle estimated losses based on market fluctuations can not be made measure of damages; Western U. Teleg. Co. v. Wilhelm, 48 Neb. 910, 67 N. W. 870, holding a telegraph company liable for the profits that would have been made on a sale where consummation was prevented by failure to deliver a message; Cahn v. Western U. Teleg. Co. 46 Fed. 40, holding a telegraph company liable only for value of message delayed directing a sale of stock which declined during the delay, there being no actual evidence of intention to repurchase for profit; Leonard v. New York, A. & B. Electric Magnetic Teleg. Co. 41 N. Y. 544, 1 A. R. 446, holding where through a mistake of a telegraph company a quantity of salt in New York was sent to Chicago and sold at a loss, that measure of damages was difference between the market value in New York and price at which sold together with cost of transportation; Connell v. Western U. Teleg. Co. 116 Mo. 34, 38 A. S. R. 575, 20 L.R.A. 172, 22 S. W. 345, denying recovery for mental distress because of failure to deliver telegram.

Cited in reference notes in 72 A. D. 562, on measure of damages against carrier for nondelivery of goods; 91 A. D. 450, on measure of damages for carrier's delay in delivery of freight; 41 A. S. R. 784, on damages for error in transmitting telegram.

Cited in note in 53 L.R.A. 85, on measure of damages for breach of contract by carrier.

Distinguished in Bowas v. Pioneer Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713, holding that rule for measure of damages for contemplated losses by breach of contract does not apply to torts, all the results of which are presumed to have been contemplated.

Losses counterclaimable in action for contract price.

Referred to as leading case in Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co. 70 Neb. 688, 97 N. W. 1040, holding that a recovery may be had for profits on resales actually completed on counterclaim for breach of warranty in an action for purchase price.

Cited in Western Gravel Road Co. v. Cox, 39 Ind. 260, holding that in suit for labor on toll road, defendant can not counterclaim for "loss of tolls which might have been received" had the work been completed as per contract; Halstead Lumber Co. v. Sutton, 46 Kan. 192, 26 Pac. 444, holding that defendant in suit for purchase price of lumber may counterclaim consequential damages, arising out of special conditions, of which plaintiff had knowledge, and latter's breach of contract; Mihills Mfg. Co. v. Day Bros. 50 Iowa, 250, holding that in an action to recover purchase price of lumber the vendee can not counterclaim for special consequential damages not in contemplation of parties when contract was made; Howard v. Stilwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500, holding that in an action for contract price of machinery, probable profits from mill can not be recouped by defendant as damages for delay in installing such machinery; John Hutchinson Mfg. Co. v. Pinch, 91 Mich. 156, 30 A. S. R. 463, 51 N. W. 930, holding that in an action for machinery sold, the defendant can not show by way of recoupment speculative damages from loss of sales caused by failure to deliver such machinery as per contract but can only show rental value of mill during the delay; Culver v. Hill, 68 Ala. 66, 44 A. R. 134, holding in action by landlord against tenant for rent, the latter

Digitized by Google

may recoup for damages by landlord's failure to build fences as agreed; Hunt v. Oregon P. R. Co. 36 Fed. 481, holding failure to complete railroad not recoupable with loss of contracted freight or cost of completion over contract price.

Cited in reference note in 5 A. S. R. 194, on recoupment for failure to execute or delay in executing contract in action for contract price.

Distinguished in Bridges v. Lanham, 14 Neb. 369, 45 A. R. 121, 15 N. W. 704, holding that in an action to recover the contract price of flume, the defendant can not recoup the speculative damages for loss of the mill, never built, by reason of delay in making flume.

Mode of estimating damages.

Cited in Reisert v. New York, 69 App. Div. 302, 74 N. Y. Supp. 673, holding where damages may be estimated in more than one way that mode should be adopted which is most definite and certain.

— In absence of market or ruling values.

Cited in Trigg v. Clay, 88 Va. 330, 29 A. S. R. 723, 13 S. E. 434, holding where there is no market at the place of delivery the price of the goods in the nearest market with the cost of transportation added determines their value.

— Proof of amount of lost profits.

Cited in Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018, holding that evidence of past profits are admissible to show reasonably certain future profits by which to measure damages for breach of partnership contract; Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686, holding that where an established mill is interrupted by an overflow evidence of past profits are admissible to show reasonably certain profits in future, as during interruption, as basis for damages; Hitchcock v. Anthony, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779, holding that in an action on breach of contract, not to use certain premises to compete with plaintiff's business, evidence of profits before and after such breach are admissible to measure the damages; Illinois C. R. Co. v. Davidson, 22 C. C. A. 306, 46 U. S. App. 300, 76 Fed. 517, holding that in personal injury action evidence of past earnings is admissible to show damages; Taylor Mfg. Co. v. Hatcher Mfg. Co. 3 L.R.A. 587, 39 Fed. 440, holding where there is no method of ascertaining damages, that injured party is entitled to submit to the jury all facts which are the foundation of the expected profit, in so far as they tend to support claim; Hichhorn v. Bradley, 117 Iowa, 130, 90 N. W. 592, holding that in an action for revoking exclusive right to sell certain brand of cigars, evidence of past sales is admissible to show loss of reasonably certain future profits thereby deprived.

— Expense and idleness consequent on breach.

Cited in Frenzel v. Miller, 37 Ind. 1, 10 A. R. 62, holding that evidence of loss of time caused by repairing machinery in a mill is admissible to show damages for breach of warranty of such machinery.

— Rental value of idle or unused property.

Distinguished in Wood v. Carlton, 3 Silv. Sup. Ct. 509, 6 N. Y. Supp. 865, 25 N. Y. S. R. 172, holding it error in estimating damages resulting from a breach of warranty as to the power of a water wheel to consider the rental value of the mill with wheel as it was and what rental value would be if wheel was as warranted.

Burden of proving damages.

Cited in Merrill v. Western U. Teleg. Co. 78 Me. 97, 2 Atl. 847, holding that

Digitized by Google

the plaintiff must prove his damages before they can be assessed; Toohey v. Patterson, 52 Misc. 285, 102 N. Y. Supp. 1122, holding that amount of damage must be shown by plaintiff; Rohwer v. Chadwick, 7 Utah, 384, 26 Pac. 1116, holding that jury can not estimate damages not proven.

69 AM. DEC. 728, GAUSE v. PERKINS, 56 N. C. (3 JONES, EQ.) 177.

Grounds for granting extraordinary equitable relief.

Cited in Lancaster v. Asheville Street R. Co. 90 Fed. 129, holding imminent danger demanding immediate relief essential to appointment of a receiver pendente lite; Nesbitt v. Turrentine, 83 N. C. 535, holding allegations of title and wrongful withholding by tenants and their insolvency will sustain appointment of a receiver.

Cited in reference notes in 86 A. D. 258, on showing necessary to entitle one to injunction; 91 A. D. 757, on where insolvency must be alleged in action for injunction; 5 A. S. R. 501, on equity jurisdiction of offenses against public.

Cited in notes in 11 A. D. 500, on irreparable injury in injunctions for trespass; 99 A. S. R. 735, on irreparable, destructive, and permanent injuries as ground for injunction; 1 L.R.A. 745, on inadequacy of legal remedy as essential to issuance of injunction.

Injunction against trespass.

Referred to as a leading case in Sharpe v. Loane, 124 N. C. 1, 32 S. E. 318, holding irreparable injury incapable of compensation in money value essential.

Cited in Davenport v. Harvey, 4 Kulp, 499, holding averment of pecuniary irresponsibility essential; Smith v. Gardner, 12 Or. 221, 53 A. R. 342, 6 Pac. 771; Carney v. Hadley, 32 Fla. 344, 37 A. S. R. 101, 22 L.R.A. 233, 14 So. 4,— holding irreparable injury and establishment of title by admission or legal adjudication essential; Wiggins v. Williams, 36 Fla. 637, 30 L.R.A. 754, 18 So. 859, holding mere trespass susceptible of adequate remuneration will not be enjoined; Frink v. Stewart, 94 N. C. 484, holding same as to a trespass not working an irreparable injury; Freer v. Davis, 52 W. Va. 1, 94 A. S. R. 895, 59 L.R.A. 556, 43 S. E. 164, holding trespass will be enjoined where injury was irreparable and claim of title was about to be put in suit; Haines v. Hall, 17 Or. 165, 3 L.R.A. 609, 20 Pac. 831 (dissenting opinion), on inapplicability of injunction to ordinary trespasses.

Cited in reference notes in 73 A. D. 583, on injunction to prevent threatened trespass where defendant is insolvent; 78 A. D. 737, on prevention by injunction of unlawful taking of property for public use; 83 A. D. 772, on injunction against trespass; 89 A. D. 639, as to when trespass may be enjoined.

Cited in notes in 11 A. D. 505, on injunction for trespass where defendant insolvent; 99 A. S. R. 732, on jurisdiction to enjoin trespass on realty; 99 A. S. R. 748, on injunction against cutting and removing trees and timber; 22 L.R.A. 236, on injunction against trespass to cut timber where remedy at law is inadequate; 22 L.R.A. 237, on injunction against trespass to cut timber in order to prevent waste pending litigation.

What constitutes an irreparable injury.

Cited in Deegan v. Neville, 127 Ala. 471, 85 A. S. R. 137, 29 So. 173; Indian River S. B. Co. v. East Coast Transp. Co. 28 Fla. 387, 29 A. S. R. 258, 10 So. 480; Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 28 L.R.A. 581, 60 N. W. 717; Morganton Land & Improv. Co. v. Webb, 117 N. C. 478, 23 S. E. 458; Lemmon

Digitized by Google

v. Guthrie Center, 113 Iowa, 36, 86 A. S. R. 361, 84 N. W. 986,—holding question determined by adequacy of compensation actually recoverable at law.

Cited in reference note in 4 A. S. R. 247, on irreparable injuries against which injunction may issue.

Cited in note in 1 A. S. R. 375, on irreparable injury within meaning of law of injunctions.

Criticized in Heine v. Roth, 2 Alaska, 416, holding question determined by readiness, adequateness and completeness of money compensation recoverable.

Cutting and removing timber as irreparable injury.

Cited in Dunkart v. Rinehart, 87 N. C. 224; Johnson v. Grand Fountain, U. O. T. R. 135 N. C. 385, 47 S. E. 463; McCormick v. Nixon, 83 N. C. 113,—holding it is not an irreparable injury there being no proof as to insolvency; Woodford v. Alexander, 35 Fla. 333, 17 So. 658, holding it is not an irreparable injury there being no averment of peculiar value affecting use of owner; East Lake Lumber Co. v. East Coast Cedar Co. 142 N. C. 411, 55 S. E. 304, holding it is irreparable by statute where injury was continuous though there was no averment of insolvency; Butman v. James, 34 Minn. 547, 27 N. W. 66, holding it is an irreparable injury where timber constituted principal value of the land.

Cited in note in 11 A. D. 502–504, on trespass destructive of estate.

Criticized in Camp v. Dixon, 112 Ga. 872, 52 L.R.A. 755, 38 S. E. 71, holding it is an irreparable injury, the land being covered with a forest.

Receivership of going industries.

Cited in John L. Roper Lumber Co. v. Wallace, 93 N. C. 22, holding cutting of timber on land in suit creates right to receiver the parties being solvent; Parker v. Parker, 82 N. C. 165, holding receiver should be appointed in case party in possession is sued and proved to be insolvent.

69 AM. DEC. 734, VASS v. FREEMAN, 56 N. C. (3 JONES EQ.) 221.

Construction as to vesting of absolute estate.

Cited in Galloway v. Carter, 100 N. C. 111, 5 S. E. 4, holding will construed to make estate absolute as early as possible unless contrary appears to be the intention; Price v. Johnson, 90 N. C. 592, holding intermediate period between death of devisor and devisee must be adopted provided contingency could refer thereto; Burton v. Conigland, 82 N. C. 99, holding same though death of testator will be adopted unless there be words to forbid it.

Cited in reference note in 77 A. D. 679, on construction of will when death of legatee is spoken of as uncertain event.

— Words of survivorship or failure of issue.

Cited in Sharp v. Sharp, 35 Ala. 574, on whether words "my surviving children" in clause after life estate to wife refer to death of testator or his wife; Buchanan v. Buchanan, 99 N. C. 308, 5 S. E. 430, holding limitation to one son on death of other without issue does not require death to occur before that of testator; Garrison v. Eborn, 56 N. C. (3 Jones, Eq.) 228, holding death of daughter spoken of as a contingent event is referable to death of testator, no other event being mentioned.

Validity of devise to children with survivorship on death of any one before or after death of testator.

Cited in Galloway v. Carter, 100 N. C. 111, 5 S. E. 4, upholding validity.

Effect on cotenancies of statute abolishing survivorship.

Digitized by Google

Cited in Rowland v. Rowland, 93 N. C. 214, holding it only took away right of survivorship from joint tenancies in fee.

69 AM. DEC. 740, McLEAN v. HARDIN, 56 N. C. (3 JONES, EQ.) 294.

Conflict of laws — As to validity of contracts.

Cited in reference notes in 76 A. D. 616, as to what law governs validity of contract; 86 A. D. 340, on enforceability of contracts made in another state; 97 A. D. 478, on contracts which comity does not require foreign courts to enforce; 13 A. S. R. 757, on validity in one state of assignment for benefit of creditors executed in another; 55 A. S. R. 774, on enforcement of contract outside of jurisdiction where made.

— As to movable property.

Cited in reference notes in 77 A. D. 181, as to what law governs movable property; 73 A. D. 286, on law of matrimonial domicil governing right of husband and wife to movable property; 77 A. D. 182, as to what law governs rights of married persons to movable property; 90 A. D. 394; 97 A. D. 478,—on movable property being subject to law of domicil.

Cited in note in 57 L.R.A. 355, on conflict of laws as to matrimonial property when lex domicilii is opposed to lex rei sitae or lex fori.

— As to succession and distribution of personalty.

Cited in notes in 85 A. S. R. 563, on law governing succession and distribution of personal property to married women; 5 E. R. C. 782, on law of domicil of testator as governing testamentary capacity and right of succession to personalty.

Territorial operation of laws.

Cited in G. A. Holshouser Co. v. Gold Hill Copper Co. 138 N. C. 248, 70 L.R.A. 183, 50 S. E. 650, holding statute preferring claim for annual franchise tax not enforcible in insolvency proceedings in another state.

Cited in reference notes in 73 A. D. 677, on extraterritorial effect of statutes; 92 A. D. 598, on whether comity requires state to enforce foreign laws derogatory to its own; 1 A. S. R. 161, on necessity of courts of one state enforcing law of another contrary to its public policy.

69 AM. DEC. 744, MIZELL v. BURNETT, 49 N. C. (4 JONES, L.) 249.

Real estate contracts within statute of frauds.

Cited in Hall v. Fisher, 126 N. C. 205, 35 S. E. 425, holding verbal agreement as to opening of streets by one party to land trade unenforcible.

Cited in reference notes in 72 A. D. 157, on contract for sale of growing crops as within statute of frauds; 77 A. D. 683, as to what agreements are contracts respecting land within meaning of statute of frauds.

— Contracts to sell standing timber.

Cited in Drake v. Howell, 133 N. C. 162, 45 S. E. 539, holding parol conveyance invalid; Green v. North Carolina R. Co. 73 N. C. 524, holding execution renders parol contract valid; Dunkart v. Rineheart, 89 N. C. 354, on whether foregoing conclusion is sound; Tremaine v. Williams, 144 N. C. 114, 56 S. E. 694; Hawkins v. Goldsboro Lumber Co. 139 N. C. 160, 51 S. E. 852,—holding deeds and contracts governed by laws applicable to realty.

Cited in reference note in 83 A. D. 483, on effect of statute of frauds on contract for sale of standing trees.

Cited in notes in 86 A. D. 182, as to whether sale of growing trees is sale

Digitized by Google

of interest in land within statute of frauds; 19 L.R.A. 721, on validity of oral sale of standing timber.

Distinguished in Ives v. Atlantic & N. C. R. Co. 142 N. C. 131, 115 A. S. R. 732, 55 S. E. 74, 9 A. & E. Ann. Cas. 188, upholding parol contract to cut and deliver cord-wood from land of both parties; Carpenter v. Medford, 99 N. C. 495, 6 A. S. R. 535, 6 S. E. 785, holding description in contract for sale with view to severance governed by laws applicable to chattels; York v. Westall, 143 N. C. 276, 55 S. E. 724, where agreement for adjustment of differences was involved.

Sufficiency of memorandum to satisfy statute of frauds.

Cited in reference notes in 25 A. S. R. 462, on sufficiency of memorandum to comply with statute of frauds; 38 A. S. R. 866, on sufficiency of memorandum under statute of frauds; 51 A. S. R. 870, on letters as memorandum within statute of frauds.

As to real estate.

Cited in Neaves v. North State Min. Co. 90 N. C. 412, 47 A. R. 529, holding writing need only express the contract of party against whom it is sought to be enforced; Hall v. Misenheimer, 137 N. C. 183, 107 A. S. R. 474, 49 S. E. 104, refusing to sustain memorandum failing to show price to be paid; Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16, holding existence of a consideration may be shown by extrinsic evidence; Magee v. Blankenship, 95 N. C. 563, holding subsequent putting of contract in writing removes statutory impediment.

— Memoranda of sale signed only by party to be charged.

Cited in Love v. Welch, 97 N. C. 200, 2 S. E. 242; Dennis Simmons Lumber Co. v. Corey, 140 N. C. 462, 6 L.R.A.(N.S.) 468, 53 S. E. 300,—holding vendor liable on contract signed by him though obligation of purchaser rested in parol; Green v. North Carolina R. Co. 77 N. C. 95, holding contract for an exchange need only be signed by party sought to be charged; Wade v. Newbern, 77 N. C. 460, holding same as to a contract of lease; Hall v. Misenheimer, 137 N. C. 183, 107 A. S. R. 474, 49 S. E. 104, holding name of purchaser in receipt given by vendor sufficient signing to bind former; Love v. Atkinson, 131 N. C. 544, 42 S. E. 966, holding contract for sale of land, signed by vendor alone unenforceable by vendor though vendee in possession and part purchase price paid; Edwards v. Kelly, 53 N. C. (8 Jones, L.) 69, to point that no part of contract falling within statute is binding upon party not signing writing while others who do sign may be bound.

— Effect of placing purchaser's contract in form of writing obligatory.

Cited in Neaves v. North State Min. Co. 90 N. C. 412, 47 A. R. 529, holding contract may be placed in a draft.

Parties to whom defense under statute of frauds is available.

Cited in Davis v. Inscoe, 84 N. C. 396, holding oral agreement to rescind an unregistered deed not attackable by a third person.

Time allowed for acceptance of offer.

Cited in Lapsley v. Howard, 119 Mo. 489, 24 S. W. 1020, holding offer to permit redemption, not fixing a definite date, must be accepted within a reasonable time; Crook v. Cowan, 64 N. C. 743 (dissenting opinion), on allowance of a reasonable time for acceptance of a proposition.

What constitutes a reasonable time.

Cited in Francis v. Love, 56 N. C. (3 Jones, Eq.) 321, holding six years of inaction after recognition of invalid contract unreasonable.

Digitized by Google

Necessity of prompt performance of contract by purchaser of realty.

Cited in Beattie v. Carolina C. R. Co. 108 N. C. 425, 12 S. E. 913, holding delay accompanied by acts inconsistent with intent to perform bars specific performance.

Absoluteness of conditions precedent.

Cited in Corinthian Lodge v. Smith, 147 N. C. 244, 61 S. E. 49, holding conditions precedent in contract for lease must be strictly performed; Memphis, K. & C. R. Co. v. Thompson, 24 Kan. 170, holding same as to like conditions in contract to subscribe for stock.

Cited in reference note in 63 A. S. R. 202, on conditions precedent to recovery on contract.

Inevitable accident as affecting rights under contract.

Cited in Buffkin v. Baird, 73 N. C. 283, on nonavoidance of liability by inevitable accident.

Cited in reference note in 95 A. D. 118, as to what performance act of God will excuse.

Cited in note in 70 A. S. R. 832, on impossibility of performance of condition in contract.

Time as essence of contract.

Cited in reference note in 84 A. D. 155, on when time is of essence of contract to convey land.

69 AM. DEC. 750, MANN v. TAYLOR, 49 N. C. (4 JONES, L.) 272.

Sufficiency of description of land.

Cited in Hinchey v. Nichols, 72 N. C. 66; Archibald v. Davis, 50 N. C. (5 Jones, L.) 322,—holding description calling for unidentified stake and course and distance thereafter insufficient; Goodsell v. Rutland Canadian R. Co. 75 Vt. 375, 56 Atl. 7, holding same as to like description beginning at southwest part of my farm; Southern Pants Co. v. Smith, 125 N. C. 588, 34 S. E. 552, holding description without a single corner fixed by anything more definite than a stake insufficient; Welder v. Carroll, 29 Tex. 317, on nullity of description rendering identity wholly uncertain.

Cited in reference notes in 69 A. D. 763, as to when description is too indefinite to locate land; 92 A. D. 375, on when deed or grant is void for uncertainty of description; 74 A. S. R. 662, on defective description in deed.

Distinguished in Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340, holding description "beginning at a pine on east side of Gun Swamp," etc., explainable by parol.

— Applicability of rule "Id certum est quod certum reddi potest."

Cited in Brown v. House, 118 N. C. 870, 24 S. E. 786 (dissenting opinion), on its availability as a test of sufficiency.

69 AM. DEC. 751, STATE v. ROSS, 49 N. C. (4 JONES, L.) 315.

What constitutes an indictable trespass.

Cited in State v. Covington, 70 N. C. 71; State v. Mills, 104 N. C. 905, 17 A. S. R. 706, 10 S. E. 676,—holding actual violence or demonstration of force tending to a breach of peace essential; Temple v. State, 7 Baxt. 109; Temple v. State, 6 Baxt. 496,—holding error to charge that unlawful entry without consent of owner was indictable.

Digitized by Google

Right of owner of land to enter thereon.

Cited in reference notes in 83 A. D. 618, on right of landlord to enter after termination of lease; 69 A. S. R. 580 d, on right of landlord to re-enter.

Cited in notes in 77 A. D. 552, on right of owner to enter upon his land; 19 A. S. R. 546, on right of owner of land to effect entry thereon.

What amounts to forcible entry.

Cited in reference notes in 44 A. S. R. 331; 17 A. S. R. 708,—on what constitutes forcible entry; 74 A. S. R. 671, on what constitutes forcible trespass.

Lawfulness of forcible entry as dependent on right of entry.

Cited in State v. Smith, 100 N. C. 466, 6 S. E. 84, holding landlord ousting tenant by threats tending to breach of peace guilty of an indictable trespass; Caldwell v. Bush, 6 Wyo. 342, 46 Pac. 1092, on right to use force not amounting to breach of peace, provided there was a right of entry, and citing annotation also on this point; State v. Shepard, 82 N. C. 614, on whether entry with force by one claiming, though not possessing, right of entry, involves criminal culpability.

Cited in reference note in 33 A. S. R. 907, on forcible ejectment of tenant by landlord at expiration of term.

Cited in note in 82 A. D. 676, on force which owner of property may use to regain possession of same.

69 AM. DEC. 756, GILES v. PALMER, 49 N. C. (4 JONES, L.) 386. Bill to restrain enforcement of writ of possession dismissed, 58 N. C. (5 Jones, Eq.) 75.

Rights acquirable at sale under execution against a trustee.

Cited in Tally v. Reed, 74 N. C. 463; Blackmer v. Phillips, 67 N. C. 340,—holding purchase of legal title held as security for purchase money does not include right to latter; Moore v. Byers, 65 N. C. 240, holding neither land held by a deceased vendor or notes secured thereby can be sold, a part of the money having been paid; Palmer v. Giles, 58 N. C. (5 Jones, Eq.) 75, on non-avoidance of purchaser's title because defendant in execution was a trustee.

Equities available against purchaser at execution sale.

Cited in Threadgill v. Redwine, 97 N. C. 241, 2 S. E. 526, holding estate passes in same condition as when held by debtor.

69 AM. DEC. 757, DUPREE v. DUPREE, 49 N. C. (4 JONES, L.) 387.

Presumption as to inclusion of all accountable differences in transaction between parties.

Cited in Kennedy v. Williamson, 50 N. C. (5 Jones, L.) 284, holding settlement of accounts between parties is presumed to take in all matters of charge on both sides.

Relative nature of action of waste and of case in nature of waste.

Cited in Southerland v. Jones, 51 N. C. (6 Jones, L.) 321, on superiority of latter as regards convenience and adaptability to circumstances.

Liability of life tenant for waste.

Cited in reference note in 72 A. D. 723, on liability of life tenant to remainderman or reversioner for waste.

Cited in note in 14 A. S. R. 632, on mode of determining rights and remedies of reversioners and remaindermen.

Digitized by Google

69 AM. DEC. 760, CHASTEEN v. PHILLIPS, 49 N. C. (4 JONES, L.) 459.

Presumption as to want of personalty when land is sold on execution.

Cited in Barnes v. Hyatt, 87 N. C. 315, holding purchaser not required to prove this fact on a trial involving title.

Parol proof of property sold at judicial sale.

Cited in reference note in 90 A. D. 519, as to parol proof to show what property was sold at judicial sale.

Validity of execution purchaser's title.

Cited in reference note in 84 A. D. 78, on execution purchaser's title as affected by irregularities of officer.

69 AM. DEC. 763, GAITHER v. BALLEW, 49 N. C. (4 JONES, L.) 488.

Attachability of money or property in custody of law.

Cited in Williamson v. Nealy, 119 N. C. 339, 25 S. E. 953, holding property in hands of sheriff under a mandate in claim and delivery not attachable; Weaver v. Cressman, 21 Neb. 675, 33 N. W. 245, on general rule that money in hands of clerk of court is not attachable.

— Moneys ready for distribution.

Cited in Dunsmoor v. Furstenfeldt, 88 Cal. 522, 22 A. S. R. 331, 12 L.R.A. 508, 26 Pac. 518, holding money in hands of clerk of court garnishable after decree in insolvency proceedings; Pace v. Smith, 57 Tex. 555, holding same as to money ordered to be paid to defendant on quashing of attachment; Le Roy v. Jacobosky, 136 N. C. 443, 67 L.R.A. 977, 48 S. E. 796, holding same as to proceeds of guardian's sale already confirmed.

Cited in note in 13 L.R.A.(N.S.) 758, on right to attach or garnish fund in the hands of officer of the court after he has been ordered to pay same to party.

69 AM. DEC. 768, STATE v. PERRY, 50 N. C. (5 JONES, L.) 9.

What constitutes an affray.

Cited in State v. Davis, 80 N. C. 351, 30 A. R. 86, holding language intended to and actually causing a fight sufficient; State v. Fanning, 94 N. C. 940, holding same though defendant did not return the blow; Pollack v. State, 32 Tex. Crim. Rep. 29, 22 S. W. 19, holding reluctant return of first blow from other side sufficient; State v. King, 86 N. C. 603, holding defendant cannot be heard to say that he did not intend a breach of the peace.

Liability of one instigating an assault by words.

Cited in State v. Jones, 118 N. C. 1237, 24 S. E. 493, holding guilt is same as one actually committing the assault.

Similarity of affray and assault and battery by several persons.

Cited in State v. Griffin, 125 N. C. 692, 34 S. E. 513, holding same law equally applicable to both offenses.

69 AM. DEC. 770, BRANCH v. MORRISON, 50 N. C. (5 JONES, L.) 16, Later action between same parties in 51 N. C. (6 Jones, L.) 16.

Turpentine in boxes cut into trees as personal property.

Cited in Richbourg v. Rose, 53 Fla. 173, 125 A. S. R. 1061, 44 So. 69, 12 A. & E. Ann. Cas. 274, holding it is a proper subject for action of replevin.

Digitized by Google

Rights of disseized owner as to articles severed from land.

Cited in Branch v. Morrison, 51 N. C. (6 Jones, L.) 16, upholding liability in trover to adverse possessor for conversion of turpentine severed by him; Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. 55 N. J. L. 350, 26 Atl. 920, denying right to maintain trover for severed ores against adverse possessor; Cooper v. Watson, 73 Ala. 252, denying right to maintain detinue for severed trees against adverse possessor; Richbourg v. Rose, 53 Fla. 173, 125 A. S. R. 1061, 44 So. 69, 12 A. & E. Ann. Cas. 274, denying right to maintain replevin for severed turpentine against adverse possessor; Faulcon v. Johnston, 102 N. C. 264, 11 A. S. R. 737, 9 S. E. 394, denying right to maintain action for severed crops or their value as against purchaser.

Criticized in Alliance Trust Co. v. Nettleton Hardware Co. 74 Miss. 584, 60 A. S. R. 531, 36 L.R.A. 155, 21 So. 396, holding reentry gives right to maintain trover or trespass de bonis asportatis for severed trees as against a purchaser.

When mere possession will sustain recovery in trover.

Cited in reference note in 100 A. D. 742, as to trover founded on possession.

Cited in note in 1 A. D. 586, on right of property necessary to maintain trover.

Distinguished in Russell v. Hill, 125 N. C. 470, 34 S. E. 640, holding purchaser of growing timber from adverse possessor may maintain trover against wrongdoer taking it after cutting.

Right of owner out of possession to maintain trespass for injury to freehold.

Cited in Johnson v. C. & N. W. Sand & Gravel Co. 30 C. C. A. 35, 58 U. S. App. 552, 86 Fed. 269, denying right to maintain trespass or case against party in adverse possession.

69 AM. DEC. 773, PURVIS v. WILSON, 50 N. C. (5 JONES, L.) 22.

Who may maintain partition.

Cited in reference note in 35 A. S. R. 620, on who may maintain partition.

Right to try title on plea of sole seizin in partition proceeding.

Cited in Parker v. Taylor, 133 N. C. 103, 45 S. E. 473, on effect of plea to change character of action to ejectment; Woody v. Fountain, 143 N. C. 66, 55 S. E. 425, holding by analogy that like plea in proceeding to determine boundary changes character to action to quiet title.

Distinguished in Simpson v. Wallace, 83 N. C. 477, denying right to try conflicting claim on bill for partition showing adverse claim in others than alleged co-tenants.

Right to try title on plea denying seizin in proceeding for dower.

Distinguished in Lowery v. Lowery, 64 N. C. 110, where case was totally dissimilar.

Character of plea "nontenent in simul" in proceeding for partition.

Cited in Hunnecutt v. Brooks, 116 N. C. 788, 21 S. E. 558, on its effect as a "general issue" plea.

Digitized by Google

69 AM. DEC. 775, BODENHAMMER v. NEWSOM, 50 N. C. (5 JONES, L.) 107.

Loss of lien on pawn by qualified surrender of possession.

Cited in reference notes in 74 A. D. 605, on effect of redelivery of pledge to pledgeor; 57 A. S. R. 464, on dependence of pledgee's lien on possession; 68 A. S. R. 35, on necessity of retention of possession of article pledged.

Cited in note in 49 A. D. 733, on effect of redelivery to pledgeor.

Distinguished in Bruley v. Rose, 57 Iowa, 651, 11 N. W. 629, holding lien subsists between parties where giving up was procured by fraud; Way v. Davidson, 12 Gray, 465, 74 A. D. 604, holding refusal to return pledge creates liability in conversion though it was obtained without fraud.

69 AM. DEC. 777, STATE v. JOHN, 50 N. C. (5 JONES, L.) 163.

Force or fear as essential in robbery.

Cited in note in 70 A. D. 183, on force and violence as element in crime of robbery.

Distinguished in State v. Miller, 83 Iowa, 291, 49 N. W. 90, holding taking of jug of whisky from bottom of hack while owner was looking the other way not robbery.

— Necessity that force precede or accompany the stealing.

Cited in Colbey v. State, 46 Fla. 112, 110 A. S. R. 87, 35 So. 189, holding robbery not proved where only force was used in attempt to escape and not in obtaining the property; Thomas v. State, 91 Ala. 34, 9 So. 81, holding same where there was threat to shoot after voluntary giving over of the property.

Cited in notes in 70 A. D. 184, on snatching not being robbery; 57 L.R.A. 434, on necessity of actual force in snatching to constitute robbery where there is no resistance; 57 L.R.A. 444, on what force employed as a means of escape or to prevent a recaption of property taken without force is sufficient to constitute robbery.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

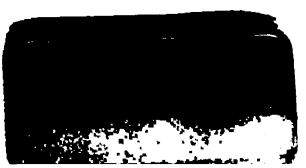
Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google





Digitized by Google

Digitized by Google